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UNITED STATES

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*

CASES REPORTED

	Page
Ada, The (D. C.)	325
Alden, In re (D. C.)	160
American Bonding Co. of Baltimore v. United States (C. C. A.)	364
American Druggists' Syndicate, Singer v. (D. C.)	266
American Lumber & Mfg. Co. v. Berthold & Jennings Lumber Co. (C. C. A.)	971
American Potato Corp. v. Boca Grande S. S. Co. (D. C.)	542
American Temperance Life Ins. Ass'n of City of New York v. Solomon (C. C. A.)	213
Anton, Hauser Awning Arm Co. v. (C. C. A.)	262
Archer, Paine v. (C. C. A.)	259
Arkansas Grand Prairie Oil & Gas Co. v. Davidson (C. C. A.)	641
A. R. Mosler & Co., Champion Spark Plug Co. v. (D. C.)	112
Aronson, In re (D. C.)	1022
Atchison, T. & S. F. R. Co., Christy v. (C. C. A.)	255
Atlas Portland Cement Co. v. Hagen (C. C. A.)	24
Babylon R. Co., Spencer v. (D. C.)	803
Baldwin Co. v. R. S. Howard Co. (D. C.)	439
Baldwin Co-op. Creamery Ass'n v. Williams (D. C.)	607
Barber, In re (D. C.)	712
Barker Piano Co., In re (C. C. A.)	522
Barnard, Wright v. (D. C.)	329
Benford Mfg. Co., Champion Spark Plug Co. v. (D. C.)	112
Bergdoll, Harrigan v. (C. C. A.)	410
Bergdoll Motor Co., In re (C. C. A.)	410
Berthold & Jennings Lumber Co., American Lumber & Mfg. Co. v. (C. C. A.)	971
Bethlehem Steel Co., Churchward International Steel Co. v. (D. C.)	322
Boca Grande S. S. Co., American Potato Corp v. (D. C.)	542
Bowron, Georgia Casualty Co. v. (C. C. A.)	89
Bradley, Glover v. (C. C. A.)	721
Brady, In re (D. C.)	778
Brady v. South Shore Traction Co. (D. C.)	778
Brainard, San Francisco Breweries v. (C. C. A.)	45
Braus, In re (D. C.)	835
Bridgeton, The (C. C. A.)	750
Brincat, In re (D. C.)	811
Brown, Brown Perfection Tube Co. v. (C. C. A.)	676
Brown v. United States (C. C. A.)	353
Brown Bros. & Co., Ex parte (C. C. A.)	906
Brown Perfection Tube Co. v. Brown (C. C. A.)	676
Buchanan v. United States, seven cases (C. C. A.)	257
Buckeye Wheel Co., Haines v. (C. C. A.)	665
Bun Chew v. Connell (C. C. A.)	220
Bunch v. Maloney (C. C. A.)	967
Bunch Commission Co., In re (C. C. A.)	967
Bush, United States v. (D. C.)	808
Butte & Superior Copper Co., Clark-Montana Realty Co. v. (D. C.)	547
Cadierno, Gandia & Stubbe v. (C. C. A.)	739
Caledonian Ins. Co. v. Levy (C. C. A.)	92
Cameragraph Co., Rectigraph Co. v. (C. C. A.)	668
Carland v. Heckler (C. C. A.)	504
Carter, Puget Sound Nav. Co. v., two cases (D. C.)	832
Central Trust Co. of New York v. United States Light & Heating Co. (C. C. A.)	420
Champion Spark Plug Co. v. A. R. Mosler & Co. (D. C.)	112
Champion Spark Plug Co. v. Benford Mfg. Co. (D. C.)	112
Chautauqua Institution v. Zimmerman (C. C. A.)	371
Chicago Great Western R. Co. v. Le Valley (C. C. A.)	384
Chicago, M. & St. P. R. Co., Raymond v. (C. C. A.)	239
Chicago & N. W. R. Co. v. William S. Stein Co. (D. C.)	716
Christy v. Atchison, T. & S. F. R. Co. (C. C. A.)	255
Church v. Swetland (C. C. A.)	891
Churchward International Steel Co. v. Bethlehem Steel Co. (D. C.)	322
Citizens' Trust Co., Wilson v. (D. C.)	697
Citizens' Trust & Savings Bank, Miller Rubber Co. v. (C. C. A.)	488
City Council of Augusta, Ga., v. Timmerman (C. C. A.)	216
City of Port Huron, Cuyahoga Contracting Co. v. (C. C. A.)	346
Clapp, In re (D. C.)	458
Clark, McKey v. (C. C. A.)	928
Clark, Southern R. Co. v. (C. C. A.)	900
Clarke County, Wash., Pacific Timber Cruising Co. v. (D. C.)	540
Clark-Montana Realty Co. v. Butte & Superior Copper Co. (D. C.)	547
Coastwise, The (C. C. A.)	1
Cobb's Consol. Cos., In re (D. C.)	458
Columbia-Knickerbocker Trust Co., Gates v. (C. C. A.)	359
Combined Heat & Sprinkler Co., Pierce v. (D. C.)	531
Conine, The Eli B. (C. C. A.)	987
Connell, Bun Chew v. (C. C. A.)	220

	Page
Connell, Wong Back Sue v. (C. C. A.)	659
Continental Passenger R. Co. of Philadelphia, McCoach v. (C. C. A.)	976
Cook v. Flagg (C. C. A.)	426
Cook v. Flagg (D. C.)	713
Cooper v. Jewett (C. C. A.)	618
Crandol, United States v. (D. C.)	331
Crane v. Johnson (D. C.)	334
Crawford v. Washington Northern R. Co. (C. C. A.)	961
Crescent Mfg. Co. v. Wilson (D. C.)	282
Curtin, McFarland v. (C. C. A.)	728
Cuyahoga Contracting Co. v. Port Huron (C. C. A.)	346
Davidson, In re (D. C.)	462
Davidson, Arkansas Grand Prarie Oil & Gas Co. v. (C. C. A.)	641
Delaware, L. & W. R. Co., Hughes v. (D. C.)	118
Delaware & Hudson Co. v. Ketz (C. C. A.)	31
Denver & R. G. R. Co. v. United States (C. C. A.)	62
Detroit Rock Salt Co., Swift & Co. v. (C. C. A.)	231
Devoe & C. T. Reynolds Co., Rubber & Celluloid Harness Trimming Co. v. (D. C.)	150
Dispatch Printing Co., L. A. Westermann Co. v. (C. C. A.)	609
Dodge Co., First Nat. Bank of Portland, Or., v. (C. C. A.)	74
Doherty v. Smith (D. C.)	132
Dolan, Kelly v. (C. C. A.)	635
Doull Miller Co., Palmer v. (D. C.)	309
Drill Boat No. 4, The (D. C.)	589
Dunston Lithograph Co., Stecher Lithographic Co. v. (D. C.)	601
Eaton, Middlesex Banking Co. v. (C. C. A.)	87
E. F. Houghton Co., Rodman Chemical Co. v. (D. C.)	470
Eichel, United States Fidelity & Guaranty Co. v. (C. C. A.)	991
E. J. Dodge Co., First Nat. Bank of Portland, Or., v. (C. C. A.)	74
Eleven Gross Packages, More or Less, of Dr. Williams' Pink Pills v. United States (C. C. A.)	71
Eli B. Conine, The (C. C. A.)	987
Equitable Trust Co. of New York v. Western Pac. R. Co. (D. C.)	335
Federal Mail & Express Co., In re (D. C.)	691
Feilbach v. Russell (C. C. A.)	412
Fenner, In re (D. C.)	712
First Nat. Bank of Portland, Or., v. E. J. Dodge Co. (C. C. A.)	74
Fisher Hydraulic Stone & Machinery Co. v. Warner (C. C. A.)	527
Flagg, Cook v. (C. C. A.)	426
Flagg, Cook v. (D. C.)	713
Flagg v. United States (C. C. A.)	481
Folk v. United States (C. C. A.)	177
Fong Hong, United States v. (D. C.)	168
Ford Motor Co., Stahlbrodt v. (D. C.)	678
Forty Fort Coal Co. v. Kirkendall (D. C.)	704
Franklin S. S. Co., Frontier S. S. Co. v. (D. C.)	127
Freeman v. Kinston Mfg. Co. (C. C. A.)	58
Frick, Greenwood v. (C. C. A.)	629
Frick, Lam Fung Yen v. (C. C. A.)	393
Friedberg, United States v. (D. C.)	313
Friedlaender, Petition of (C. C. A.)	250
Friedman v. United States (C. C. A.)	429
Frontier S. S. Co. v. Franklin S. S. Co. (D. C.)	127
F. W. Devoe & C. T. Reynolds Co., Rubber & Celluloid Harness Trimming Co. v. (D. C.)	150
Gale, In re (D. C.)	171
Galle v. Hamburg Amerikanische Packetfahrt Actien Gesellschaft (C. C. A.)	424
Gandia & Stubbe v. Cadierno (C. C. A.)	739
Garner, Johnson v. (D. C.)	756
Gates v. Columbia-Knickerbocker Trust Co. (C. C. A.)	359
Gay & Sturgis, In re (D. C.)	604
General Electric Co. v. Laco-Philips Co. (C. C. A.)	96
General Electric Co. v. Richardson (C. C. A.)	84
George S. Kelley Co., Marshall Field & Co. v. (C. C. A.)	265
Georgia Casualty Co. v. Bowron (C. C. A.)	89
Georgia Coast & P. R. Co., Lowenthal v. (D. C.)	1010
Georgia Coast & P. R. Co., Lowenthal v. (D. C.)	1016
Gerrow, In re (D. C.)	845
Gibson Co., In re (C. C. A.)	751
Glover v. Bradley (C. C. A.)	721
Glover v. Glover (C. C. A.)	733
Gold Hunter Mining & Smelting Co. v. Johnson (C. C. A.)	849
Gordon v. Turco-Halvah Co. (D. C.)	430
Graboyes, In re (D. C.)	133
Grand Trunk R. Co. of Canada v. Knapp (C. C. A.)	950
Greenwood v. Frick (C. C. A.)	629
Griggs, In re (C. C. A.)	243
Groveland Mining Co., Hamilton Iron & Steel Co. v. (C. C. A.)	388
Hagen, Atlas Portland Cement Co. v. (C. C. A.)	24
Haines v. Buckeye Wheel Co. (C. C. A.)	665
Hamburg Amerikanische Packetfahrt Actien Gesellschaft, Galle v. (C. C. A.)	424
Hamilton Iron & Steel Co. v. Groveland Mining Co. (C. C. A.)	388
Hamilton, Miller v. (C. C. A.)	402
Hamilton, United States v. (D. C.)	685
Hanlon, National Automobile Chamber of Commerce v. (C. C. A.)	673
Hanlon, Rauch & Lang Carriage Co. v. (C. C. A.)	673
Harrigan v. Bergdoll (C. C. A.)	410
Hauser Awning Arm Co. v. Anton (C. C. A.)	262
Hawley Down-Draft Furnace Co., In re (D. C.)	451
Heckler, Carland v. (C. C. A.)	504
Hendrey v. United States (C. C. A.)	5
Hills, Kennedy v. (C. C. A.)	666
Hodges, In re (C. C. A.)	79
Hogg v. Maxwell (D. C.)	290

Page

Hollingsworth & Whitney Co., In re (D. C.) 446
Hoopes & Sons, Illinois Cent. R. Co. v. (D. C.) 135
Hosmer, In re (D. C.) 318
Houghton Co., Rodman Chemical Co. v. (D. C.) 470
Howard Co., Baldwin Co. v. (D. C.) 439
Hudson Nav. Co. v. Murray (D. C.) 466
Hughes v. Delaware, L. & W. R. Co. (D. C.) 118
Hunter Arms Co., In re (C. C. A.) 79

Illinois Cent. R. Co. v. W. L. Hoopes & Sons (D. C.) 135
Inman-Poulsen Lumber Co., United States v. (C. C. A.) 941
International Silver Co. v. New York Jewelry Co. (C. C. A.) 945

Jackson v. Parkersburg & O. V. Electric R. Co. (D. C.) 784
Jackson v. William Kenefick Co. (D. C.) 130
Jacobsen, Tri-Bullion Smelting & Development Co. v. (C. C. A.) 646
Jeffrey Mfg. Co., Mound Coal Co. v. (C. C. A.) 913
Jewett, Cooper v. (C. C. A.) 618
John J. Gibson Co., In re (C. C. A.) 751
John J. Trimmins, The (C. C. A.) 748
Johnson, In re (D. C.) 841
Johnson, Crane v. (D. C.) 334
Johnson v. Garner (D. C.) 756
Johnson, Gold Hunter Mining & Smelting Co. v. (C. C. A.) 849
Johnson, McNaughton v. (D. C.) 334
Jones v. Missouri-Edison Electric Co. (C. C. A.) 49
Jones v. Western Union Tel. Co. (D. C.) ... 301
Joseph, Palmer v. (C. C. A.) 1003

Kansas City Terminal R. Co., Skaggs v. (D. C.) 827
Kasle v. United States (C. C. A.) 878
Katzoff, Scheuer v., two cases (D. C.) 473
Kehoe, In re (C. C. A.) 415
Kelley Co., Marshall Field & Co. v. (C. C. A.) 265
Kelly v. Dolan (C. C. A.) 635
Kenefick Co., Jackson v. (D. C.) 130
Kennedy, In re (C. C. A.) 666
Kennedy v. Hills (C. C. A.) 666
Ketz, Delaware & Hudson Co. v. (C. C. A.) 31
Keystone Vulcanizing Co., In re (D. C.) ... 171
Kilby, New York, N. H. & H. R. Co. v. (C. C. A.) 252
Kinston Mfg. Co., Freeman v. (C. C. A.) ... 58
Kirkendall, Forty Fort Coal Co. v. (D. C.) 704
Knapp, Grand Trunk R. Co. of Canada v. (C. C. A.) 950

Laco-Philips Co., General Electric Co. v. (C. C. A.) 96
Lam Fung Yen v. Frick (C. C. A.) 393
Larkin Co., National Binding Mach. Co. v. (C. C. A.) 998
Larsen, Ex parte (D. C.) 708

Page

L. A. Westermann Co. v. Dispatch Printing Co. (C. C. A.) 609
Lehigh Valley Coal Co., Sewchulis v. (C. C. A.) 422
Lepper v. United States (C. C. A.) 227
Leroy Plow Co., Syracuse Chilled Plow Co. v. (D. C.) 682
Le Valley, Chicago Great Western R. Co. v. (C. C. A.) 384
Levy, Caledonian Ins. Co. v. (C. C. A.) 92
Link Belt Co., Robins Conveying Belt Co. v. (C. C. A.) 1005
Long, Richmond Guano Co. v. (C. C. A.) .. 650
Louis J. Bergdoll Motor Co., In re (C. C. A.) 410
Louis Neuburger, Inc., In re (D. C.) 701
Louisville Bridge Co., United States v. (D. C.) 270
Louisville & N. R. Co. v. Western Union Tel. Co. (C. C. A.) 82
Lowe, Appeal of (C. C. A.) 906
Lowenthal v. Georgia Coast & P. R. Co. (D. C.) 1010
Lowenthal v. Georgia Coast & P. R. Co. (D. C.) 1016
Lowery, In re (C. C. A.) 53
Lucas v. Vulcan Iron Works (D. C.) 823
Lucchetti v. Philadelphia & R. R. Co. (D. C.) 137
Lyons v. Lyons (C. C. A.) 744

McCoach v. Continental Passenger R. Co. of Philadelphia (C. C. A.) 976
McCook County, Riederich v. (C. C. A.) .. 42
McDougal v. Mudge (C. C. A.) 235
McFarland v. Curtin (C. C. A.) 728
McKey v. Clark (C. C. A.) 928
McLafferty, Wintermote v. (C. C. A.) 95
McNaughton v. Johnson (D. C.) 334
Macwilliam, President Suspender Co. v. (D. C.) 433
Maloney, Bunch v. (C. C. A.) 967
Markowitz, In re (D. C.) 715
Marshall Field & Co. v. George S. Kelly Co. (C. C. A.) 265
Mary, The (D. C.) 121
Maxwell, Hogg v. (D. C.) 290
Menzin, In re (D. C.) 333
Mettacomet, The (C. C. A.) 261
Merko v. Sturm & Dillard Co. (C. C. A.) .. 68
Meyer Bros. Drug Co., Pollack v. (C. C. A.) 861
Michigan Engine Valve Co. v. Monarch Mfg. Co. (C. C. A.) 107
Middlesex Banking Co. v. Eaton (C. C. A.) 87
Miller v. Hamilton (C. C. A.) 402
Miller Rubber Co. v. Citizens' Trust & Savings Bank (C. C. A.) 488
Milwee v. Waddleton (C. C. A.) 989
Miners' & Merchants' Bank v. United States Fidelity & Guaranty Co. (C. C. A.) 654
Missouri-Edison Electric Co., Jones v. (C. C. A.) 49
Monarch Mfg. Co., Michigan Engine Valve Co. v. (C. C. A.) 107
Mosler & Co., Champion Spark Plug Co. v. (D. C.) 112
Mound Coal Co. v. Jeffrey Mfg. Co. (C. C. A.) 913

	Page
Mudge, McDougal v. (C. C. A.)	235
Murray, Hudson Nav. Co. v. (D. C.)	466
Murray, Puget Sound Nav. Co. v. (D. C.)	832
Napier v. Westerhoff (C. C. A.)	398
Nashville, C. & St. L. R. Co., Western Union Tel. Co. v. (D. C.)	605
National Automobile Chamber of Commerce v. Hanlon (C. C. A.)	673
National Binding Mach. Co. v. Larkin Co. (C. C. A.)	998
National City Bank of Seattle v. Titlow (D. C.)	838
Neuburger, Inc., In re (D. C.)	701
Newerf's Estate, In re (C. C. A.)	488
New York Commercial Co., In re (C. C. A.)	906
New York, N. H. & H. R. Co. v. Kilby (C. C. A.)	252
New York Jewelry Co., In re (C. C. A.)	945
New York Jewelry Co., International Silver Co. v. (C. C. A.)	945
Ng Jung v. United States (C. C. A.)	992
Ng Kwack Kang, Ex parte (D. C.)	478
Oates v. United States, four cases (C. C. A.)	201
Oceana, The (D. C.)	139
Oceania Vance, The (C. C. A.)	77
Ohmer, Ryan v. (D. C.)	165
Orr, United States v. (D. C.)	717
Orr, United States v. (D. C.)	718
Pacific Timber Cruising Co. v. Clarke County, Wash. (D. C.)	540
Paine v. Archer (C. C. A.)	259
Paisley, Rail & River Coal Co. v. (C. C. A.)	337
Palmer v. Doull Miller Co. (D. C.)	309
Palmer v. Joseph (C. C. A.)	1003
Parkersburg & O. V. Electric R. Co., Jackson v. (D. C.)	784
Pennsylvania Steel Co. of New Jersey, Venner v. (C. C. A.)	407
Philadelphia & R. R. Co., Lucchetti v. (D. C.)	137
Pierce v. Combined Heat & Sprinkler Co. (D. C.)	531
Pierson, In re (C. C. A.)	519
Pollack v. Meyer Bros. Drug Co. (C. C. A.)	861
President Suspender Co. v. Macwilliam (D. C.)	433
Puget Sound Nav. Co. v. Carter, two cases (D. C.)	832
Puget Sound Nav. Co. v. Murray (D. C.)	832
Pullman Co., Quinette v. (C. C. A.)	980
Quinette v. Pullman Co. (C. C. A.)	980
Rail & River Coal Co. v. Paisley (C. C. A.)	337
Ramirez-Quiñones, In re (C. C. A.)	733
Rauch & Lang Carriage Co. v. Hanlon (C. C. A.)	673
Raymond v. Chicago, M. & St. P. R. Co. (C. C. A.)	239
Rectigraph Co. v. Cameragraph Co. (C. C. A.)	668
Reddington & Co., In re (D. C.)	160
Reinheimer, United States v. (D. C.)	545
Richards, Tillinghast v. (D. C.)	710
Richardson, General Electric Co. v. (C. C. A.)	84
Richmond Guano Co. v. Long (C. C. A.)	650
Riederich v. McCook County (C. C. A.)	42
Rintelen, United States v. (D. C.)	793
Robb v. United States (C. C. A.)	525
Robins Conveying Belt Co. v. Link Belt Co. (C. C. A.)	1005
Robinson v. Roe (C. C. A.)	936
Rodman Chemical Co. v. E. F. Houghton Co. (D. C.)	470
Roe, Robinson v. (C. C. A.)	936
Royal, The (D. C.)	296
R. S. Howard Co., Baldwin Co. v. (D. C.)	439
Rubber & Celluloid Harness Trimming Co. v. F. W. Devoe & C. T. Reynolds Co. (D. C.)	150
Rubin, United States v. (D. C.)	125
Russell, Feilbach v. (C. C. A.)	412
Ryan v. Ohmer (D. C.)	165
Safford v. United States (C. C. A.)	495
Safety Car Heating & Lighting Co. v. United States Light & Heat Corp. (D. C.)	1007
San Francisco Breweries v. Brainard (C. C. A.)	45
Scheuer v. Katzoff, two cases (D. C.)	473
Schmick Handle & Lumber Co., In re (D. C.)	446
Security Trust & Savings Bank v. Wm. R. Staats Co. (C. C. A.)	514
Seufert Bros. Co., United States v. (D. C.)	579
Sewchulis v. Lehigh Valley Coal Co. (C. C. A.)	422
Shute, In re (D. C.)	544
Sierra v. United States (C. C. A.)	37
Singer v. American Druggists' Syndicate (D. C.)	266
Skaats, In re (D. C.)	817
Skaggs v. Kansas City Terminal R. Co. (D. C.)	827
Smith, Doherty v. (D. C.)	132
Solá É Hijo, S. En C., In re (C. C. A.)	739
Solomon, American Temperance Life Ins. Ass'n of City of New York v. (C. C. A.)	213
South Coast, The (D. C.)	327
South Shore Traction Co., Brady v. (D. C.)	778
Southern Pac. Co. v. Stewart (C. C. A.)	956
Southern R. Co. v. Clark (C. C. A.)	900
Spencer v. Babylon R. Co. (D. C.)	803
Spring Garden Ins. Co. of Philadelphia, Pa., v. Wood (C. C. A.)	223
Staab, Winslow v. (D. C.)	305
Staats Co., Security Trust & Savings Bank v. (C. C. A.)	514
Stager v. United States (C. C. A.)	510
Stahlbrodt Co. v. Ford Motor Co. (D. C.)	678
Stallo v. Wagner (C. C. A.)	379
Stecher Lithographic Co. v. Dunston Lithograph Co. (D. C.)	601
Stein Co., Chicago & N. W. R. Co. v. (D. C.)	716
Stewart, Southern Pac. Co. v. (C. C. A.)	956
Stringer, In re (D. C.)	799
Stump, Wong Yee Toon v. (C. C. A.)	194
Sturm & Dillard Co., Merko v. (C. C. A.)	68
Succession of Rodriguez, Trujillo & Mercado v. (C. C. A.)	208
Swetland, Church v. (C. C. A.)	891
Swift & Co. v. Detroit Rock Salt Co. (C. C. A.)	231

Page

Syracuse Chilled Plow Co. v. Leroy Plow Co. (D. C.) 682

Tauscher, United States v. (D. C.) 597
T. H. Bunch Commission Co., In re (C. C. A.) 967
Thurston, Ex parte (D. C.) 847
Tillinghast, In re (D. C.) 712
Tillinghast v. Richards (D. C.) 710
Timmerman, City Council of Augusta, Ga., v. (C. C. A.) 216
Timmins, The John J. (C. C. A.) 748
Titlow, National City Bank of Seattle v. (D. C.) 838
Titone, In re (D. C.) 175
Toch v. Zibell Damp Resisting Paint Co. (C. C. A.) 993
Tomlinson-Humes, In re (C. C. A.) 928
Tri-Bullion Smelting & Development Co. v. Jacobsen (C. C. A.) 646
Trujillo & Mercado v. Succession of Rodriguez (C. C. A.) 208
Turco-Halvah Co., Gordon v. (D. C.) 430

United States, American Bonding Co. of Baltimore v. (C. C. A.) 364
United States, Brown v. (C. C. A.) 353
United States, Buchanan v., seven cases (C. C. A.) 257
United States v. Bush (D. C.) 808
United States v. Crandol (D. C.) 331
United States v. Denver & R. G. R. Co. (C. C. A.) 62
United States, Eleven Gross Packages, More or Less, of Dr. Williams' Pink Pills v. (C. C. A.) 71
United States, Flagg v. (C. C. A.) 481
United States, Folk v. (C. C. A.) 177
United States v. Fong Hong (D. C.) 168
United States v. Friedberg (D. C.) 313
United States, Friedman v. (C. C. A.) 429
United States v. Hamilton (D. C.) 685
United States, Hendrey v. (C. C. A.) 5
United States v. Inman-Poulsen Lumber Co. (C. C. A.) 941
United States, Kasle v. (C. C. A.) 878
United States, Lepper v. (C. C. A.) 227
United States v. Louisville Bridge Co. (D. C.) 270
United States, Ng Jung v. (C. C. A.) 932
United States, Oates v., four cases (C. C. A.) 201
United States v. Orr (D. C.) 717
United States v. Orr (D. C.) 718
United States v. Reinheimer (D. C.) 545
United States v. Rintelen (D. C.) 793
United States, Robb v. (C. C. A.) 525
United States v. Rubin (D. C.) 125
United States, Safford v. (C. C. A.) 495
United States v. Seufert Bros. Co. (D. C.) 579
United States, Sierra v. (C. C. A.) 37
United States, Stager v. (C. C. A.) 510
United States v. Tauscher (D. C.) 597
United States, Watlington v. (C. C. A.) 247
United States, Wetzel v. (C. C. A.) 984
United States Fidelity & Guaranty Co. v. Eichel (C. C. A.) 991

Page

United States Fidelity & Guaranty Co., Miners' & Merchants' Bank v. (C. C. A.) 654
United States Light & Heat Corp., Safety Car Heating & Lighting Co. v. (D. C.) ..1007
United States Light & Heating Co., Central Trust Co. of New York v. (C. C. A.) 420

Valecia Condensed Milk Co., In re (D. C.) 173
Vance, The Oceania (C. C. A.) 77
Vanoscope Co., In re (C. C. A.) 53
Van Thyn, In re (C. C. A.) 519
Venner v. Pennsylvania Steel Co. of New Jersey (C. C. A.) 407
Vidal, In re (C. C. A.) 733
Vulcan Iron Works, Lucas v. (D. C.) 823

Waddleton, Milwee v. (C. C. A.) 989
Wagner, Stallo v. (C. C. A.) 379
Wagner Electric Mfg. Co. v. Westinghouse Electric & Mfg. Co. (C. C. A.) 752
Warner, Fisher Hydraulic Stone & Machinery Co. v. (C. C. A.) 527
Washington Northern R. Co., Crawford v. (C. C. A.) 961
Watlington v. United States (C. C. A.) 247
Wellmade Gas Mantle Co., In re (C. C. A.) 250
Westerhoff, Napier v. (C. C. A.) 398
Westermann Co. v. Dispatch Printing Co. (C. C. A.) 609
Western Pac. R. Co., Equitable Trust Co. of New York v. (D. C.) 335
Western Union Tel. Co., Jones v. (D. C.) .. 301
Western Union Tel. Co., Louisville & N. R. Co. v. (C. C. A.) 82
Western Union Tel. Co. v. Nashville, C. & St. L. R. Co. (D. C.) 605
Westinghouse Electric & Mfg. Co. v. Wagner Electric Mfg. Co. (C. C. A.) 752
Wetzel v. United States (C. C. A.) 984
William Kenefick Co., Jackson v. (D. C.) 130
Wm. R. Staats Co., Security Trust & Savings Bank v. (C. C. A.) 514
William S. Stein Co., Chicago & N. W. R. Co. v. (D. C.) 716
Williams, Baldwin Co-op. Creamery Ass'n v. (D. C.) 607
Wilson v. Citizens' Trust Co. (D. C.) 697
Wilson, Crescent Mfg. Co. v. (D. C.) 282
Winslow v. Staab (D. C.) 305
Wintermote v. MacLafferty (C. C. A.) ... 95
Wishkah Logging Co., In re (C. C. A.) 259
W. L. Hoopes & Sons, Illinois Cent. R. Co. v. (D. C.) 135
Wong Back Sue v. Connell (C. C. A.) 659
Wong Yee Toon v. Stump (C. C. A.) 194
Wood, Spring Garden Ins. Co. of Philadelphia, Pa., v. (C. C. A.) 223
Wray, In re (C. C. A.) 418
Wright v. Barnard (D. C.) 329

Yankee, The (C. C. A.) 919
Ylia, In re (D. C.) 476

Zibell Damp Resisting Paint Co., Toch v. (C. C. A.) 993
Zimmerman, Chautauqua Institution v. (C. C. A.) 371

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CASES

ARGUED AND DETERMINED

IN THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE DISTRICT COURTS

THE COASTWISE.

(Circuit Court of Appeals, First Circuit. June 8, 1916.)

No. 1187.

1. TOWAGE ⊂=11(1)—LOSS OF CARGO OF TOW—LIABILITY OF TUG—HARTER ACT—"SINGLE VESSEL."

A tug and a laden barge in tow, although both the property of the same owner, do not constitute a "single vessel," within the meaning of Harter Act Feb. 13, 1893, c. 105, § 3, 27 Stat. 445 (Comp. St. 1913, § 8031); nor can the tug be considered as transporting the cargo of the barge, so as to be exempted by said section from liability to the cargo owner for loss resulting from faults or errors in navigation, if due diligence has been used to make her seaworthy and properly manned, equipped, and supplied; and especially is this true where the two vessels are operating under separate contracts, the bill of lading for the cargo having been made by the barge.

[Ed. Note.—For other cases, see Towage, Cent. Dig. §§ 11, 14, 16, 21; Dec. Dig. ⊂=11(1).]

2. TOWAGE ⊂=11(5)—STRANDING OF TOW—LIABILITY OF TUG—DEVIATION FROM PROPER COURSE.

A barge, being towed up the New Jersey coast at night, was stranded on Brigantine Shoal. The wind was fresh, and tended to set the tow toward the shore; there were no unusual weather conditions, and nothing to prevent the tug from keeping at a safe distance offshore; but the place of stranding was two or three miles inshore from her proper course. *Held*, that the tug was negligent, and liable for the loss of the cargo of the tow.

[Ed. Note.—For other cases, see Towage, Cent. Dig. § 17; Dec. Dig. ⊂=11(5).]

Appeal from the District Court of the United States for the District of Massachusetts; Jas. M. Morton, Judge.

Suit in admiralty by Melville L. Cobb against the steam tug Coastwise; Thomas J. Scully, claimant. Decree for libelant, and claimant appeals. Affirmed.

For opinion below, see 230 Fed. 505.

Frank V. Barns, of New York City (James J. Macklin, of New York City, on the brief), for appellant.

Edward E. Blodgett, of Boston, Mass. (Blodgett, Jones, Burnham & Bingham, of Boston, Mass., on the brief), for appellee.

Before PUTNAM and DODGE, Circuit Judges, and HALE, District Judge.

HALE, District Judge. This case comes before the court on appeal from the decision of the District Court for the District of Massachusetts, holding the steam tug Coastwise liable for loss of the coal barge Enos Soule, and her cargo of coal, by stranding on the Brigantine Shoal, east of Atlantic City, N. J., on May 12, 1914.

[1] 1. The claimant, the owner of the barge, contends that he is exonerated from liability for the loss of the cargo by the act of Congress of February 13, 1893 (27 U. S. Statutes at Large, 445, c. 105), known as the Harter Act. He bases his contention upon the first clause of section 3 of that act:

"If the owner of any vessel transporting merchandise or property to and from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers, shall become or be held responsible for damages or loss resulting from faults or errors in navigation or in the management of said vessel."

The claimant relies upon the fact shown in evidence that the tug and barge, and the hawser between them, were owned by the claimant, while the cargo of the barge was owned by the libelant; and the claimant contends that the voyage was undertaken by the tug and the barge, both vessels being owned by the same party, that the object of the voyage was to transport certain coal, that the claimant was performing his part of the contract, and that for the purpose of the voyage the two vessels became as one. He urges that, where a tug and tow are of a common ownership, and are engaged upon a voyage, the sole purpose of which is to transport the cargo laden on a tow, section 3 of the Harter Act applies; and, by force of that section, the tug and the owner are exempted from liability for the loss of the cargo on the tow, occurring through the fault, or errors in navigation, of the tug.

A question of fact arises in this case whether there was any special contract by which the tug and the barge were together chartered. The proofs tend to show that, in the course of the claimant's towage business, no particular tug went with any particular barge; that a barge was towed, sometimes by the claimant's tug, and sometimes by others. This cargo was put upon the claimant's barge, under a bill of lading signed by the captain of the barge; that bill of lading reads: "In and upon the barge called the Enos Soule." No mention of the tug is made in the bill of lading. The learned judge who heard the case in the District Court found, upon all the evidence, that the agreement under which the barge was chartered did not include the tug; and that the claimant was free to tow the barge by any tug at his disposal.

In The Murrell (Boston & Baltimore Barge Co. v. Eastern Coal Co.), 195 Fed. 483, 115 C. C. A. 393, this court held that section 3 of the Harter Act was intended to govern only the relations between a vessel and her cargo. In speaking for the court, Judge Putnam said:

"Clearly on its face the Harter Act had in mind, not so much a broad principle, as only the relations which exist between a vessel and the cargo with which she is herself laden."

In the case then before the court, the tug and the barge were not owned by the same person.

In The Delaware, 161 U. S. 459, 471, 16 Sup. Ct. 516, 522, 40 L. Ed. 771, in referring to the Harter Act, the Supreme Court said:

"It is entirely clear, however, that the whole object of the act is to modify the relations previously existing between the vessel and her cargo. This is apparent not only from the title of the act, but from its general tenor and provisions, which are generally designed to fix the relations between the cargo and the vessel, and to prohibit contracts restricting the liability of the vessel and owners in certain particulars connected with the construction, repair and outfit of the vessel, and the care and delivery of the cargo."

It will be seen that, in The Murrell, this court had before it the case of an agreement by the owner of a tug to tow another owner's vessel; and this court held that there is nothing in such agreement to make the latter vessel, or her cargo, the cargo of the tug. In view of the reasoning of the Supreme Court in The Delaware, it seems clear also that there is nothing in the agreement by the owner of a tug to tow another vessel which can be regarded as making the latter vessel, or her cargo, the cargo of the tug, even when such other vessel belongs to the same owner as the tug. And, in our opinion, this is the law. A careful examination of the language and history of the Harter Act leads us to the conclusion that section 3 is dealing with the specific vessel on which the merchandise is being transported. The Irrawaddy, 171 U. S. 187, 195, 196, 18 Sup. Ct. 831, 43 L. Ed. 130; Ralli v. New York & T. S. S. Co., 154 Fed. 286, 287, 83 C. C. A. 290. A similar case was considered by this court, but not decided, in The Cygnet, 126 Fed. 742, 745, 61 C. C. A. 348.

The proofs in the case at bar, however, present a still stronger case for the libelant. Here the contract of towage was made by the tug; the bill of lading for the cargo was made by the barge. It is clear, then, that, up to the time when the hawser was passed from the tug to the barge, the coal was the cargo of the barge alone. If, then, we follow the claimant's contention, we are compelled to hold that the cargo was at one time the cargo of the barge alone, and at a later time the cargo of the tug as well. We must conclude, as Judge Dodge did in deciding The Murrell, in the District Court, 200 Fed. 826, 831, that it is difficult to believe that Congress intended a construction of the Harter Act leading to such a result. It is true that, for some purposes, the tug may be said to take part in the transportation of the cargo of the barge; and that, where questions of limited liability have arisen, the tug and tow have been regarded as one vessel. It is urged by the claimant that this doctrine has been carried even further. In The Nettie Quill (D. C.) 124 Fed. 667, the District Court for the Southern District of Alabama had before it the fact that the owner of a steamer making regular trips had agreed to transport a locomotive, under a bill of lading in the usual form; he undertook to carry the locomotive on a barge, towed alongside, and belonging to the locomotive's owner. This barge was also covered by the bill of lading. The court held the contract to be one of affreightment, not of towage, and subject to the Harter Act. No such question arises in the case at bar. Here the contract with the tug was clearly a contract of towage. The bill of lading was made with the barge only, not with the tug. There

is nothing to indicate an attempt to combine the tug and barge into a single maritime adventure.

The general rule is stated by the Circuit Court of Appeals in the Second Circuit in The W. G. Mason, 142 Fed. 913, 918, 74 C. C. A. 83, 88, where, in speaking for the court, Judge Wallace said:

"A tug and her tow are deemed a single vessel under steam, within the meaning of the rules of navigation for preventing collisions; but it has never been asserted elsewhere that they could be regarded as one vessel for the purpose of ascertaining their relations as between themselves, or their several liabilities to respond for the consequences of a fault of one of them. Even when two vessels are lashed together, the question of the liability of each always depends upon ascertaining whether that vessel was in fault."

Judge Wallace cited The James Gray v. John Frazer, 21 How. 184, 16 L. Ed. 106; Sturgis v. Boyer, 24 How. 110, 16 L. Ed. 591; The Carrie L. Tyler, 106 Fed. 422, 45 C. C. A. 374, 54 L. R. A. 236.

Upon the proofs in the case at bar, and upon the facts found correctly by the District Court, it is clear, and we must hold, that, within the meaning of the Harter Act, the tug and the barge were not one entity, and the tug Coastwise was not "transporting merchandise or property."

The claimant is not exonerated by the Harter Act from liability for loss of the cargo.

[2] 2. Was the tug at fault for the stranding of the barge?

Upon this point the facts are sufficiently stated by the District Court. The tug was proceeding up the Jersey coast with her tow, in the nighttime, against a wind nearly ahead and tending to set her toward the shore, in weather so misty as to render the shore lights invisible at the ordinary distance. It was clearly the part of good seamanship, under such conditions, to keep well offshore. The warnings of the coast pilot and the experience of navigators clearly pointed out this duty.

We are not unmindful that the contract to tow does not impose the obligation to insure, or the liability of a common carrier; that it requires no more than that he who engages to tow shall exercise the care and skill of a reasonably prudent navigator; and a disaster does not always raise the presumption of fault. The Webb, 14 Wall. 406, 414, 20 L. Ed. 774; The Margaret, 94 U. S. 494, 24 L. Ed. 146; The L. P. Dayton, 120 U. S. 337, 351, 7 Sup. Ct. 568, 30 L. Ed. 669; The Burlington, 137 U. S. 386, 391, 11 Sup. Ct. 138, 34 L. Ed. 731; The J. P. Donaldson, 167 U. S. 599, 603, 17 Sup. Ct. 951, 42 L. Ed. 292. But in the case before us, as in the case of The Webb, supra, the departure of the tug from her true course was enough to devolve upon her the duty of explanation. Under no stress of storm, she ran upon a well-known, well-charted shoal. She shows no operating cause, or accident, sufficient to produce the disaster; she has made no satisfactory explanation. The proofs show that there was nothing to prevent a mariner in the exercise of careful seamanship from keeping out to sea far enough to escape danger. The master of the tug testifies that he did not suppose he was so far inshore as to create a situation which could be called an emergency. In answer to a question by the court, he

said that, if it had occurred to him that the situation was really perilous, he would have changed his course and "gone right to sea." But he says he was "trying to get up the coast in shoal water." In his attempt to make headway, and to "gain on his voyage," we think he did not exercise the care of a prudent mariner. We are satisfied with the conclusion of the District Court in finding the tug at fault.

The decree of the District Court is affirmed; the appellee recovers his costs of appeal.

HENDREY et al. v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. April 4, 1916.)

No. 2546.

1. POST OFFICE ⟸35—USE OF MAILS TO DEFRAUD—CONSTRUCTION OF STATUTE.
The use of the mails in carrying out a scheme to defraud may constitute an offense under Criminal Code (Act March 4, 1909, c. 321) § 215, 35 Stat. 1130 (Comp. St. 1913, § 10385), although the scheme in its inception had no relation to any law of the United States, but related to state laws only, and the use of the mails may have been unpremeditated, and merely incidental.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. § 55; Dec. Dig. ⟸35.]

2. POST OFFICE ⟸48(4)—USE OF MAILS TO DEFRAUD—INDICTMENT.
An indictment against nine defendants for having devised a scheme to defraud by the organization of six connected banks in four different states, which were without substantial capital and were kept in operation by transferring money or securities from one to another, and for using the mails in furtherance of such scheme, construed.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. § 72; Dec. Dig. ⟸48(4).]

3. CONSPIRACY ⟸47—INDICTMENT—SUFFICIENCY OF EVIDENCE.
A further count charging a conspiracy to use the mails in aid of a scheme to defraud construed, and on the only construction upon which it was sustainable *held* not supported by the evidence.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 105–107; Dec. Dig. ⟸47.]

4. POST OFFICE ⟸49—PROSECUTION FOR USING MAILS TO DEFRAUD—EVIDENCE.
On the trial of defendants, charged with using the mails in the execution of a scheme to defraud, the evidence to establish the existence of the scheme charged may be extensive in its scope, and must rest largely in the discretion of the trial judge.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 84–86; Dec. Dig. ⟸49.]

5. POST OFFICE ⟸49—PROSECUTION FOR USING MAILS TO DEFRAUD—EVIDENCE.
Various rulings as to admissibility of evidence considered, in a criminal prosecution for using the mails to defraud against a number of defendants, who bore different relations to the matters in issue to which

the evidence was directed, and *held* erroneous as to some of the defendants.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 84-86; Dec. Dig. ⊂⊃49.]

6. CRIMINAL LAW ⊂⊃449(1)—OPINION EVIDENCE—SOLVENCY.
Where the question of the insolvency of a corporation at a given time is collaterally involved in a criminal prosecution, the opinion of a witness otherwise qualified, and who was in a position to know the facts, may be admissible on that issue.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1034, 1035; Dec. Dig. ⊂⊃449(1).]

7. COURTS ⊂⊃349—FEDERAL COURTS—FOLLOWING STATE PRACTICE.
The practice of the federal courts as to the scope allowed in cross-examination in criminal cases is not affected by the practice or rules of the courts of the state.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 925; Dec. Dig. ⊂⊃349.]

8. CRIMINAL LAW ⊂⊃881(2)—TRIAL—VERDICT—CONFORMITY TO INDICTMENT.
A defendant cannot be charged with one crime and convicted of another merely because the latter is developable out of the proof, which fails to establish the crime charged in the indictment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2093; Dec. Dig. ⊂⊃881(2).]

9. CRIMINAL LAW ⊂⊃673(4)—TRIAL—INSTRUCTIONS.
Where, in a criminal prosecution against a number of defendants, evidence is received which is properly admissible against some of the defendants, but not against others, it is essential that the jury be expressly and carefully instructed in respect thereto.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1597, 1873; Dec. Dig. ⊂⊃673(4).]

10. CRIMINAL LAW ⊂⊃770(2)—INSTRUCTIONS.
While it is not error to refuse requested instructions in a criminal case which are clearly covered by the charge given, a defendant is entitled of right to have clearly stated to the jury each distinct and important theory of defense.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1806; Dec. Dig. ⊂⊃770(2).]

In Error to the District Court of the United States for the Western District of Tennessee; John E. McCall, Judge.

E. L. Hendrey and others were convicted of offenses, and they bring error. Reversed, and new trial awarded.

Caruthers Ewing, of Memphis, Tenn. (E. G. McAdams, of Oklahoma City, Okl., and Ralph Davis, of Memphis, Tenn., of counsel), for plaintiffs in error.

Hubert F. Fisher, U. S. Atty., and W. D. Kyser, Asst. U. S. Atty., both of Memphis, Tenn.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

DENISON, Circuit Judge. The four plaintiffs in error, Hendrey, Davis, Brooks and Wynne, were, jointly with five others, Cooke,

Toenges, Chick, Bonds and White, indicted in the court below, for violating section 215 (using mails to defraud, R. S. § 5480) and section 37 (conspiracy, R. S. § 5440), of the Criminal Code (Comp. St. 1913, § 10,201).[1] The first four counts alleged defendants' participation in a fraudulent banking scheme, and, in each count, a different letter or paper sent through the mails in furtherance of the scheme. The fifth count charged a conspiracy to violate the law by the same mailing which was the basis of the third count. The jury acquitted White on all counts. Toenges and Chick were generally acquitted by direction of the court, and Cooke escaped by a nolle pros. The jury found no one guilty under count 1, but convicted Hendrey under counts 2, 3, 4 and 5, and the other four respondents on counts 3, 4 and 5. The court arrested the verdicts of guilty on the second and third counts; Bonds absconded; and the four plaintiffs in error were sentenced each to three years' imprisonment on the fourth count, and to two years' additional imprisonment on the fifth count, and to pay fines of $1,000 each under each of these two counts.

This situation leaves for consideration only the fourth and fifth. The substantive offense now involved, and denounced by section 215, in its present form, is the depositing or causing to be deposited in the mails a letter or advertisement in execution or attempted execution of an existing scheme or artifice to defraud. The specific act, upon which the fourth count rests, is the mailing, at Memphis, of a copy of the Memphis Commercial Appeal, of July 1, 1911, addressed to J. E. Patterson, of Columbus, Miss., and containing the semiannual statement of the All Night and Day Bank of Memphis, as required by the banking laws of Tennessee (Shan. Code, pt. 1, tit. 14, c. 7).

For present purposes, we assume, and without intending to decide, that whoever publishes a bank statement in a newspaper may be thought to "cause to be placed" in the post office an "advertisement," if copies of that newspaper regularly go to subscribers through the mails. The course of the trial below indicates that defendants' counsel raised no such question, even if it does not show their practical concession that the crime could be so made out; we see no occasion to look into a question which has been given that aspect.

[1] We observe that most of the respondents' acts involved in the testimony and relied upon to prove a scheme to defraud were apparently violations of the banking laws of Tennessee and of the other states where the different banks were located, and that since the bank statement of the fourth count and the letters of the other counts were incidental to the ordinary or the required conduct of the banks, the practical effect of this situation is to call upon the laws or the courts of the United States to punish citizens of a state for violating laws of that state. The peculiarities of the present case make it a very extreme

[1] This case was tried in October, 1912, and, by consent of the then counsel for the United States the case was not perfected for hearing in this court by the printing of a brief for the United States until September, 1915. Examination of the 2,000 pages of typewritten record, accepted because of the poverty of plaintiffs in error, has been exceedingly tedious. These things both account for the long delay since the trial and make us less certain than usual that some minor error of fact may not appear in the opinion.

instance of such resort to the federal law; and yet, since the amendment to section 215, it is entirely clear that the scheme to defraud need have no original relation whatever to the laws of the United States, and that the mere incidental or unpremeditated use of the mails may give to the federal courts the trial of any state law offense which involves defrauding another person—this result being accomplished by the broad definitions of "defraud" and "scheme or artifice" which are now accepted. Bettman v. U. S., 224 Fed. 819, 140 C. C. A. 265; Tucker v. U. S., 224 Fed. 833, 140 C. C. A. 279. If it be true, as is sometimes thought, that there was no deliberate intent to extend so far the federal criminal jurisdiction, restriction can come only from Congress.

[2] Taking up the fourth count: This newspaper deposit in the mails is said to have been "for executing and effecting said scheme and artifice to defraud"; and so it must first be determined what is the "said" scheme or artifice to which this clause refers. This question is exceedingly difficult to answer. This count is reproduced in the margin [2] (including in brackets the matter also comprised in the fifth count).

A careful reading of the nearly 2,000 typewritten pages of the trial record discloses no clear and consistent theory as to the identity of the fraudulent scheme in connection with which the respondents were on trial; the proceedings during the two weeks of trial indicate fluctuating views as to what the real issue was; and so it becomes additionally necessary to find and identify this scheme in the indictment. This document covers three subjects: Recitals of the scheme, statements of what was done pursuant thereto and denials of the truth of the things assumed in the scheme. The first or main scheme recited seems to be: (1) To organize or otherwise gain control of six banks in four states, which banks (a) should not be financially responsible or able to do a legitimate banking business, (b) should be allied together under control of one or another respondent, and operated in the interest of each other by colorable, mutual transfer of securities, and (c) three of which should issue false and fraudulent certificates of deposit; and (2) to hold out all the banks as responsible and to solicit and receive deposits therein. The statement of acts done pursuant to the scheme recites the organization of seven banks (including the six first named), one or more of the defendants being connected with and in control of each bank, but there being no statement that all the defendants had to do with any one bank. By way of denial, the indictment then alleges that at the different times involved it was a fact, known to respondents, that these banks were not "bona fide, reliable, legitimate and financially responsible banks." It then returns to what is, in effect, though not in form, a further recital of the scheme, and says that, at the time of soliciting for the Memphis bank, the deposits of Patterson and the public, by the statement of July 7, 1911, it was intended by defendants fraudulently to convert such deposits to their own use. Obviously, there can be no complete scheme to defraud, unless some person or class is to be defrauded,

[2] See end of opinion.

and the only persons who could be defrauded by the organization and maintenance of a bank which was "not responsible and legitimate" would be those who bought its stock at a price which was too high, or became its creditors when it was (or became) insolvent. The relation between the depositors or other creditors of the Memphis bank and those of another bank—for example, the one at Kansas City—is not apparent. In what manner the maintenance of the Memphis bank as a going concern, when it should have been closed, and the receipt therein of deposits which it was a fraud upon depositors to accept, would defraud depositors in the Kansas City bank, is not revealed. So, only in the most indirect way, if at all, can it be said that mailing this statement to Patterson was "in the execution or attempted execution" of any fraudulent plan regarding the Kansas City bank, or the Oklahoma City bank, or the Little Rock bank, or the Trust Company of Hot Springs, or of Siloam Springs, or of Memphis; and since the fraudulent scheme described in the indictment must be that identical scheme in the execution of which the advertisement was mailed, we are persuaded toward the conclusion—even if not surely led thereto—that this prosecution must rest on such parts of the recited general scheme as were directed against the solvency and the good faith existence of the Memphis bank. Reference to other varying and fraudulent schemes, having to do with all the banks or having to do with the Memphis bank only, can be extracted from this indictment, but none of these schemes could be carried into execution or attempted to be—save in the most remote and consequential way—by mailing to Patterson the copy of the Memphis newspaper. The scheme or artifice in furtherance of which this semiannual statement was sent to him must have been something which could be furthered or which defendants thought could be furthered by such sending.

However, if it be assumed that a construction is possible which would make the broad, general, four-state scheme the one upon which the indictment depends, the prosecution is no better off. Upon that theory, it would not be supported by any evidence justifying conviction. Davis had no connection with the organization or management of any bank, excepting that at Oklahoma City; nor did Bonds with any excepting the one at Kansas City (and one of the small trust companies); while Hendrey, Brooks and several other respondents had to do only with the Memphis bank (and its subsidiary trust company). There is nothing distinctly and fairly tending to show that any two respondents participated in any scheme to organize or acquire or to control, in a fraudulent way, the seven banks named, or any two of the chief banks in the list. Association merely between one of the main banks and one of the trust companies falls so far short of the general, seven-member plan as to be an essentially different thing. The evidence is convincing that each man, Davis, Bonds and Hendrey, was primarily and substantially engaged in operating his own bank; that each was willing to get from the others favors for himself or for his bank; and that these favors were reciprocal; but this is its extent as to mutual relations, and it falls far short of showing the general scheme in question. That Davis persuaded, or even bribed (if he did), Bonds and Hendrey to take from him, for their banks, large amounts of paper

which turned out to be worthless, so wrecking their banks, tends to dispute rather than to support this theory of the indictment.

It does not follow that the prosecution must fail. The indictment does describe, in some of its portions, a subordinate or separable fraudulent scheme which the evidence did tend to support as to some respondents. Construing the indictment with liberality and with reluctance to hold that it furnishes no support for the judgment rendered, unless the record compels that conclusion, we are forced to conclude that the fraudulent scheme which, under the proofs, alone could coact with the act of mailing to create in the Western district of Tennessee, an offense against the federal law, and for which alone the respondents could lawfully be convicted on the trial and which alone we can rightfully consider the indictment as charging and the proofs as supporting, is a scheme by respondents to organize and maintain the Memphis bank and hold it out as entitled to public confidence and deposits, when, in fact, it had no substantial capital and was an empty shell, intending thereby to convert to their own use the money deposited. We can find no other scheme than this, the formation of which is fairly charged and supported by proof and to which the substantive act—the mailing of the statement—can possibly be pertinent.[3] Hence, in examining the errors alleged, we must regard this as the scheme involved, and we must consider that the respondents were not on trial for a scheme to encourage deposits in this bank by false representations in the semiannual statement[4] or a scheme to wreck the bank by unloading worthless paper upon it, or a scheme to injure the stockholders or the depositors of some other bank or any one of the other schemes at which the indictment hints. This same view was, at times, expressly taken on the trial, for we find the United States district attorney, in response to the court's question, "You are not trying these defendants for wrecking a bank?" answering, "No, your honor."

The fourth count is seriously defective in that it gave no information as to the proposed method or plan by which respondents were to convert the assets to their own use. They would have been entitled to a further statement of particulars; but only one of the convicted defendants, Davis, raised this point. The record shows that this was stated as one of the grounds of his demurrer to the indictment. What became of the demurrer does not appear. He seems, later, to have pleaded not guilty and he assigns no error on the overruling of this demurrer, if it was overruled. In view of the general conclusions we reach, the subject is not now important.

[3] The fifth count, that for conspiracy, and the conviction thereon, may well be considered before reviewing generally the trial pro-

[3] We lay to one side some casual references to respondents' plan to sell stock in these banks and convert the proceeds to their own use. It is clear that there is no intention to allege the stock-selling plan as the substantial fraudulent scheme, and that it is mentioned only collaterally; nor is it charged that the published and mailed advertisement could have been a step in the execution of such a plan; the proof does not indicate that any stock-selling plan remained in existence in July, 1911.

[4] The indictment alleged no particular in which the statement was untrue; yet the statement had evidential force as later pointed out.

ceedings. This count, also, we quote in the margin, omitting formal parts and matter repeated from count 4.[5] If this conspiracy count intelligibly charges any offense against federal law, it must be one based upon a scheme to defraud the St. Louis bank by means of the letter of April 28th. All the recited setting of the scheme, telling of the chain of banks and their inter-relation and their methods, gets nowhere as the statement of a scheme possibly effective to defraud the St. Louis bank or others like it. The St. Louis bank (unlike Patterson) was no part of the public which might deposit in the Memphis bank just because the latter was held out as real; the St. Louis bank could not be hurt, unless it was solicited to become a creditor of the Memphis bank. Hence the plan for such soliciting must have been an integral part of any scheme to defraud that (the St. Louis) bank. No plan for or advance intention of such soliciting, or any soliciting which this would typify, is alleged; but if we pass by that deficiency and take the allegation that the letter was sent as being a sufficient charge of the previous intent to send it, we find that the substance of the offense against the law which the parties conspired to commit was to send to the St. Louis bank this letter and get its money into the Memphis bank on the pretense of a good-faith loan to a responsible bank, when, in truth, the loan would be uncollectible, and when, in fact, the purpose of the respondents was to convert to their own use the money so secured. Viewing the count in this way—the only way in which it can be sustained as good—it is unsupported by any evidence. If the letter was what it purported to be—a request for a loan upon ample collateral tendered and enclosed therein—it would not seem to have been mailed "in the execution of" a scheme to defraud the lender. There is no proof even tending to show that ample collateral was not enclosed as stated. The entire record contains no reference to this subject, except the letter itself and the statement of the manager of the St. Louis bank that he declined the loan because he was not satisfied with the collateral. It is clear that a conviction of felony cannot rest on such a record, and on the record which is before us, a verdict for respondents, on this count, should have been instructed.[6]

We observe that this count seems to have been drawn according to a form in use before section 5480 of the Revised Statutes was changed to read as it now does in section 215 of the Criminal Code. The pleader evidently thought, as was not uncommonly thought of the old law, that the substantive crime was the formation of the scheme to defraud by use of the mails, and it seems clear that, considering this as the crime, he charged a conspiracy to commit that crime, and then set out the mailing of the letter merely as the necessary overt act to make the conspiracy punishable under R. S. § 5440 (Criminal Code,

[5] See end of opinion.

[6] We do not overlook the claim of the present counsel for the United States (not the district attorney who prepared the indictment and tried the case) that a part of this collateral consisted of the Williford notes, which were bad; but the record shows the inaccuracy of this claim, since the Williford paper had been given to the St. Louis bank as collateral to another loan which that bank had made a month before this letter of April 28th.

§ 37). Now, that it has become more commonly recognized under Criminal Code, § 215, that the crime consists of mailing the letter, and that, unless the letter is mailed, there is no offense, the query at once arises, how the actual commission of the crime can be the overt act which completes the conspiracy, unless the same act is made two crimes by different names, and so is to be twice punished? So, too, it is not clear, as above stated, that the indictment charges a conspiracy *to mail this letter,* or any other letter of this type; and there is no evidence tending to show the existence of any plan which would or might defraud the St. Louis bank in any other way than by this letter. The proofs indicate that Hendrey, seemingly in practice the sole manager of the Memphis bank, solicited this loan in the course of his conduct of the bank's daily affairs, and how the other respondents are thought to be sufficiently connected with this act, so that all can be charged with conspiring to do it, has not been pointed out. This is, obviously, a different question from the mere responsibility of conspiracy members for an overt act committed by one of them; this question pertains to the existence of the conspiracy. Indeed, the practice of joining a count for conspiracy with a count or counts against two or more persons for violating section 215, though common in some districts and though it has been judicially approved, does not seem to have been considered in the aspects that here arise, and will merit careful attention.[7] All these matters, it would be premature to determine at this time, without the benefit of consideration in the court below and of arguments by counsel.

We also observe, with reference to count five, that whatever conspiracy there was, to be accomplished by the letter of April 28, 1911, was finished or dropped on that day, while a large part of the proofs in the case is concerning acts committed and statements made after that date; and all this proof was not admissible under the fifth count, any more than under the fourth, as against respondents other than the one who acted or spoke.

[4] Errors were assigned on rulings upon evidence and on refusals of requests for a directed verdict and on refusals of requests to give special instructions. So far as these matters need consideration, they can be examined by groups. It is evident that with the con-

[7] The writer of this opinion notes that, ordinarily, there is no difficulty in conceiving the crime itself and the conspiracy to commit it, followed by some overt act, as two distinct offenses; but when we come to apply section 215 to the case of two or more respondents, and remember that a "scheme" planned by two or more people is a "conspiracy," we find, from one aspect, a conspiracy which is to be followed by a particular overt act, else the conspiracy is not wrongful; and we find, from the other aspect, the identical act pursuant to the identical conspiracy. Could joint respondents be acquitted for this act pursuant to this conspiracy, and then be subject to conviction for the same conspiracy materialized by the same act? The District Court met this difficulty by arresting judgment on the third count; but a doubt must arise whether Congress ever intended R. S. § 5440 (Criminal Code, § 37) to apply to a conspiracy to conspire, or to a conspiracy which was already specifically punished, if followed by a certain event, and which, unless to be followed by that very event, did not contemplate any offense against federal law. When and how far the crime of conspiracy survives the commission of the substantive crime is also suggested.

struction which we have put upon the indictment for fixing the identity of that scheme the existence of which was the preliminary issue to be tried, the scope of the evidence might be extensive. The existence of this chain of banks and their relations to each other in their mutual dealings, all of which formed merely the framework or setting of the effective scheme to be accomplished at Memphis, might, in some degree, be admissible, because these matters or many of them might tend to show the motives or characterize the general conduct of the respondents who were managing the Memphis bank. The limit to which such evidence may go must rest largely in the discretion of the trial judge, and the exercise of this discretion must be affected by the view taken, in a case like this, of the scheme or plan to defraud which is in issue. Certainly, less latitude will be permitted with reference to controversies which pertain to a matter which itself is only evidence tending to support the main issue than will be permitted as to controversies directly affecting the main issue. In this case, during a large part of the trial, it seems to have been thought that the scheme directly in issue involved the mismanagement or wrecking of the banks in Kansas City, Oklahoma City, Little Rock, and elsewhere, with which only Bonds only Davis or only Wynne had primary connection; although as we have pointed out, these things were no part of the scheme to defraud depositors in the Memphis bank, and the latter was the only scheme directly involved in the fourth count. Having this broader view of the indictment, it seems likely that the District Judge admitted evidence much more remote than he would otherwise have done; but in view of the necessity for a new trial otherwise developing, there is no occasion now to pass upon the assignments of error which rest only on this ground.

[5] The Memphis bank went into the hands of a receiver, August 9, 1911. Among its assets, and constituting more than half of its ostensible loans and discounts, were notes of, or indorsed by, I. N. Putnam, of Oklahoma City, amounting to about $50,000. $31,000 of these notes had been discounted at the Memphis bank, about March, 1911, and $16,000 in December, 1910, by respondent Davis, acting either for himself or for the Oklahoma Night and Day Bank of which he was, until January, 1911, president and manager. This Putnam paper, at the time of the trial of this case, was regarded as nearly, or quite, worthless, and the proofs were devoted largely to its history and character. There were two aspects, and two only, in which the value of this paper became material to the charge on trial under the fourth count, and the different respondents stand in more or less distinct relations thereto. If Hendrey received, personally, part of the Memphis bank's assets, exchanged for this Putnam paper at the time of its discount, and if he then was chargeable with knowledge that the paper was not good, this would tend to show his fraudulent conduct of the bank, leading up to and supporting the inference that he was, in June, 1911, fraudulently holding out the bank as entitled to confidence. As to respondents Wynne and Brooks, there is nothing to indicate that either of them profited personally by this discount. They were directors of the bank and they could turn the bank to their own profit only

as they were stockholders or became debtors, and from both of these points of view the discount of the Putnam paper, if it was bad, could not profit Wynne or Brooks, but could only injure them; so, it cannot be assumed that the discount was a step in any scheme by them to convert the bank's assets to their own use, nor can it be lightly assumed, without proof, that they would acquiesce in the injury which Hendrey would thereby do to them. The other aspect is that, if, at any time before June 30, 1911, Wynne or Brooks, or Hendrey was chargeable with knowledge that the Putnam paper was bad, this would tend to support the theory that each one having such knowledge would be guilty of fraud in continuing to participate in holding out the bank as responsible. The issue, as to the Putnam paper therefore, was, as to Hendrey, whether, and how far, he personally profited when he caused the Memphis bank to take the paper; as to Hendrey, Wynne and Brooks, whether the loss on this paper would make the bank insolvent, and, if so, whether each was, before June 30, 1911, chargeable with knowledge of this loss. Of course as to each defendant, the issue was, "Did he know, or, under familiar rules—stricter in criminal than in civil cases—must he be charged with knowing at the critical time?" and a good-faith belief by any defendant that the Putnam paper was good would fully justify any action which he took and which would have been rightful if the belief had been well founded, even although in fact the paper might have been wholly bad. A great deal of proof about Putnam and the Putnam paper seems to us to have been inadmissible as against any respondent, except Davis. No express notice of Putnam's condition or of the vast amount of his paper outstanding, is brought home to Hendrey, Wynne or Brooks. Putnam's credit seems to have begun to go down hill, some time in 1910, and to have then become a subject of controversy in Oklahoma, although, in 1909, he had been rated at $2,000,000. The paper was also criticized by state bank examiners, during 1910, in Oklahoma and in Missouri. The attacks on the paper were of such notoriety in these localities, and Hendrey's relations were such with the banks which had this paper in Oklahoma City, Kansas City and St. Louis, that the jury would be authorized to infer, if it saw fit, that Hendrey was put on notice as to the real value of the paper, and so was bound to satisfy the jury of his own good faith. We do not see any compelling reason for charging Wynne or Brooks with the same knowledge, or why they might not have been justified in believing what Hendrey may have told them. Wynne was, by occupation, a banker, at Little Rock, Ark.; Brooks, a lumberman, in Memphis. The mere fact, if it was a fact, that the Putnam paper was notoriously doubtful in the neighborhood of Oklahoma City or Kansas City would not charge Wynne or Brooks with any unusual degree of notice; and the whole matter of the reputation of the Putnam paper in Oklahoma would be admissible against Wynne and Brooks only contingently upon a finding that by actual or implied notice, they would be bound to know it. The government was undertaking to prove two things: First, that the Putnam paper was bad in fact; and, second, the notoriety of that fact. As to the second, the evidence must be essentially hearsay, but as to the first, the ordinary rule applies requiring primary evidence. This distinction

seems to have been sometimes overlooked, as applied to the contents of books and documents.

[6, 7] The financial condition of the Memphis bank, at the time of its failure, was in issue. If it was solvent in the sense that it was able to pay its depositors and creditors, evidently, the scheme to defraud charged in the indictment was improbable. Mr. Taylor was a stockholder and had been one of the directors in the bank. He became its receiver and held that position for a short time only, until displaced by another receiver more acceptable to creditors. He was a witness in the case, and on cross-examination was asked to state his opinion as to whether it was insolvent. An objection by the district attorney to this question was sustained, and counsel avowed that the witness would have replied that it was solvent. We think respondents were entitled to this evidence, for whatever it might be worth, and that its exclusion was error. The ruling was based on the ground that the question called only for an opinion, and that the true way to show solvency or insolvency was to show all the liabilities and all the assets. This is theoretically true; where solvency is the main issue, as in bankruptcy, the theory can be approximately observed, although even there, opinion as to the value of the assets, must be continually involved and may be controlling; but where an issue of insolvency is collaterally involved along with a great many other things, it may be quite impracticable to do anything more than to take the conclusions of those who know the most about it, tested by such criteria as may be available. This case is full of statements made by witnesses who could have no absolute knowledge as to the solvency or insolvency of Putnam and several other makers of paper in the Memphis bank and of several other banks. The competency of witness Taylor to give a conclusion of any real value did not very satisfactorily appear; but no objection was made on this ground; the objection was put solely on the ground that no inference or conclusion could be received, and if the objection had been made that the witness was not qualified, it might perhaps, have been cured. So, also, it appears that the question was asked on cross-examination and was not germane to the examination in chief. It would have been proper to sustain the objection for that reason. We are told that, according to the Tennessee practice, a witness may be cross-examined on any matter material in the case; but state rules on this subject are not accepted by the federal courts, which are controlled by their own practice in this respect, and which do not permit cross-examination to go beyond the scope of the direct examination. McKnight v. U. S. (C. C. A. 6) 122 Fed. 926, 928, 61 C. C. A. 112. In this respect, also, if the objection has been made, it might have been cured by calling the witness for the respondents. Under these conditions, we probably would not reverse the case because of the exclusion of Taylor's testimony; but if the same question arises upon further trial, the court will have the benefit of the views which we have expressed.

Much of the testimony related to the issue of the so-called certificates of deposit by the Memphis bank. It issued interest-bearing certificates in the regular way and in rather small amounts to depositors, and these certificates were regularly entered on the bank

books. Hendrey also followed the practice of executing for the bank what appeared to be certificates of deposit and entrusting them to the nominal payee under an arrangement that the payee was to sell them and then deposit the proceeds in the bank as against the outstanding certificates. In other words, he used them like promissory notes. When the purposed use of them in this way fell through, they were returned to him or otherwise canceled, and, in these cases, no entry appeared on the bank books. The proof shows the execution and this incomplete delivery of $127,000 of such certificates, never entered on the bank books; but it shows that the great part, if not all, of such certificates were never completely delivered or ever presented as a claim against the bank. One of these transactions involved the use of such certificates by Davis for the alleged purpose of paying for stock he was buying in an insurance company, but no harm came of it to the Memphis bank, and if Davis' and Hendrey's theory of what was planned is true, none was intended. This course of business as to certificates was admissible as against Hendrey, and was sufficiently reckless and unusual, to say the least, so that it furnished some support to the charge that he was maintaining the bank as an instrument of fraud. We cannot see that the record brings any notice of any of these certificate transactions to Wynne, and they were not of such a character that notice could be presumed. Wynne's only connection with them was that, acting for his Little Rock bank, he bought $2,200 of certificates now said to be of this character. This action does not tend to show knowledge by him that the Memphis bank was hopelessly insolvent. Brooks seems to have participated in handling certificates of this class.

[8] We are compelled to think that, however many laws Davis may have broken in Oklahoma City with reference to the All Night and Day Bank of Oklahoma City, which closed June 9, 1911, and of which he was not president after January, 1911, there was nothing connecting him with the only scheme to defraud which was both charged in the fourth count of this indictment and supported by proofs. This was, as we have seen, a plan existing in June, 1911, to hold this Memphis bank out as solvent and responsible and thereby defraud the public which should deposit or loan. Davis was neither stockholder nor director in the Memphis bank; he had nothing to do with its management; and he touched its affairs from its birth to its death at only two or three points. The chief one is in relation to the Putnam paper. He and Hendrey shifted $50,000 of this paper from his shoulders or those of his bank to the Memphis bank. There was, doubtless, a personal profit in this paper for Davis, and, perhaps, as to a part or all of it, for Hendrey; and if, in truth, they took to themselves a large amount of the Memphis bank's good assets in exchange for paper which was worthless or partly so to their knowledge, this would be a scheme to defraud the bank and certainly its stockholders, and perhaps its depositors; but Davis was not on trial for anything like that; no such scheme is hinted at in the indictment; and it cannot be permitted that any respondent shall be charged with one crime and convicted of another merely because the latter is developable out of the proof which fails to show the crime charged. Nor can we possibly bring

Davis within the scheme which we have found to be the essence of the conviction, in the same way as those who were managing the bank may fall within it. Even if he had known that the Putnam paper was to be an absolute loss, and that its presence among the assets made the bank insolvent, it cannot be said that Davis mailed or caused to be mailed to Patterson the bank statement of June 30th; his connection with the Oklahoma bank had ceased six months before; he cannot be considered a participant in the making or publishing of the statement. We are satisfied that a verdict of acquittal should have been directed in favor of Davis on the fourth count as well as on the fifth.

[9] Errors are assigned because evidence was admitted concerning the statements or the acts of one respondent without instructing or cautioning the jury that such evidence would be of force only against that one respondent. The trial court evidently considered this whole matter as governed by that rule of evidence in conspiracy cases, which permits the acts or statements of one conspirator, made or done after the conspiracy has been formed and in the course of its execution and before it has been accomplished or abandoned, to be received as evidence against all. This rule seems to have been regarded as applicable to the trial of the counts under section 215 as well as of the conspiracy count. Some of the reasons which support this rule in a conspiracy case apply in a case where the offense on trial necessarily involves a precedent plan by two or more persons; others of the supporting reasons do not apply; it is not clear that respondents insisted on this distinction in the court below, and we need not determine the matter here. Assuming, for the purposes of this review, that the rule of evidence was the same under the other counts as under the conspiracy count, we find that a material part of the evidence so received referred to things said or done by some one respondent after the conspiracy of the fifth count had been completed or dropped on April 28, 1911, and after the offenses charged in the other four counts had been finished by the use of the mails in each count specified, viz., May 27, 1911, December 7, 1910, April 28, 1911, and July 1, 1911. Clearly, such evidence must be considered only as against the one respondent directly affected. Due protection of the rights of other respondents requires that the jury should be expressly cautioned to this effect, and warned that they must not consider the evidence as affecting other respondents, and that, if it is not practicable to give such caution every time that such evidence is received, it must, at least, be repeated frequently enough to be sure that the jury keep the rule in mind; and, in such a case as this, where most of the evidence pertained to respondents' acts that prima facie were individual rather than joint, it is almost if not quite essential that the final charge to the jury should carefully point out the conditions under which evidence of what one did or said may rightfully affect another's guilt. An analogous situation exists with reference to some evidence of acts while the conspiracy was in force. This must be received in a sense contingently, for it can ultimately be considered by the jury against other respondents only in case they conclude from all the evidence that the conspiracy did then exist; and the rights of other respondents can be preserved only by

the same careful, and, if necessary, repeated warnings and instruction to the jury.

The present counsel for the United States urge that, if there was any error upon this subject, it was cured; and say that, for example, while the post office inspectors were permitted to repeat, as witnesses, many statements which respondent Toenges made while in jail after the indictment was found, yet, that later in the trial, Toenges himself, as a witness, testified to these same facts, as to which his admissions had previously been received. With reference to Toenges, this claim is true as to some of the admissions, but not as to all; but with reference to several other witnesses, there can be no claim that whatever error there was in this respect was cured. For example, W. C. White was one of the respondents. On August 26, 1911, at a time later than the completion of either offense charged, and apparently after the collapse of at least part of the plans (for the letter refers to Hendrey's "second indictment"), White wrote a letter to Brooks. This letter referred to others of the respondents in very derogatory terms. When this letter was offered, and objection was made by other respondents that it was only a narrative made after the events mentioned in the indictment and must be limited alone to the writer, it was received, not only without caution to the jury, but with a ruling that it could be considered "as a circumstance throwing what light it may on the question whether there was a conspiracy to defraud and a scheme." The error involved in this view of the matter is emphasized by the fact that the jury acquitted White on all five counts, thereby establishing that he was not a co-conspirator.

[10] At the conclusion of the trial, respondents presented a considerable number of specific requests to charge, asking, among other things, that the jury be told that the respondents could not be convicted if all the testimony was as fairly consistent with their innocence as their guilt, and that they could not be convicted in the absence of an actual fraudulent intent, no matter how unsuccessful their banking schemes proved to be or how inconsistent with any sound judgment. These requests were refused, not because they were thought to be incorrect statements of the law (see Harrison v. U. S. [C. C. A. 6] 200 Fed. 662, 664, 119 C. C. A. 78), but because the subjects seemed to be sufficiently covered by the general charge. A reference to the latter shows that neither one of these subjects is covered, except by the instruction that guilt must be proved beyond a reasonable doubt, and by the repeated use of the word "fraudulent" in defining the conduct of respondents which would make it criminal. We have often approved the practice of declining to give instructions which, though proper in themselves, would constitute mere repetitions, usually in less intelligible form, of subject-matter consecutively and logically treated in the general charge but the respondents in a criminal case, no less than the parties in a civil case, are entitled of right to have clearly stated to the jury each distinct and important theory of defense, so that the jury may understand that theory and the essential rules applicable to it. We cannot avoid the conviction that the respondents' rights in these respects in this case were not sufficiently saved by the general charge.

Several of defendants' requests, including, especially, Nos. 1, 2, 7 and 19, should have been given, except that the rule of reconciling with innocence should be stated as above.

We have given serious consideration to the question whether the conviction of Hendrey should not be affirmed, and because his guilt under the fourth count is clear enough upon the undisputed testimony to make these errors nonprejudicial. It seems to appear that it was the fact, fully known to him, that out of the stated $40,000 capital and surplus paid in, shown in the statement of June 30th, less than one-fourth had ever been paid in in cash, in the ordinary way, so as to have been actually available for the bank's needs. The remainder was paid in, either by discounting in the bank notes signed or indorsed by subscribers or else through money borrowed by subscribers from other banks upon agreements that the money loaned should remain in those other banks to the credit of the Memphis bank and should not be drawn against. These agreements were doubtless invalid, as against the Memphis bank, but they indicated that the money was not in good faith available for the needs of that bank. So, as we go through the entire evidence, rejecting all parts which can rightly be criticized, there is no escape from the strong impression that Hendrey, on June 30th, must have known that the bank could not survive much longer, unless by a miracle, and that, in all probability, it could not pay existing depositors in full; yet, in spite of all these things, it cannot be said, as matter of law, that Hendrey's conduct is not fairly reconcilable with a good-faith belief on his part, on June 30th, that the Putnam paper would turn out to be good or that there would not be loss enough on that and other doubtful assets to make the bank insolvent. His good-faith belief on the one hand or his intent to defraud on the other hand constituted the controlling question as to him, and upon that he was and is entitled to the verdict of a jury, under instructions carefully preserving his rights and after a trial confined to evidence which fixed rules permit. We cannot be sure that, with those instructions and with only that evidence, the jury would have found his guilt to exist beyond a reasonable doubt.

As to respondents Wynne and Brooks, we are not prepared to say that they were entitled to an instructed verdict. There is little—perhaps nothing beyond suspicion from the company he kept—tending to connect Wynne with any scheme to convert the assets of the Memphis bank to his own use, or to permit other respondents to do so. Neither he nor his institution, the Little Rock bank, was a borrower from the Memphis bank. His main interest was, seemingly, the other way, as a stockholder in the Memphis bank, and as a creditor of Hendrey on the security of Hendrey's stock. As to Brooks, it seems that he or his company, the Continental Lumber Company, was a borrower in comparatively large sums from the bank, although the final state of the account is not clear; and his relations to Hendrey's plans seem to have been close. Both Wynne and Brooks were directors, and, as such, carried certain obligations. Whether each was bound to know and did know the condition of the bank and its assets so as to make him, on that ground, guilty of fraud in continuing to hold it out as a responsible institution, was an issue, which, while we

think it was the vital one in the case under the indictment, was not distinctly or fully tried out or submitted to the jury, and we prefer not to discuss it further.

Other errors are assigned which we think unnecessary to consider. Some of them, already discussed, were not properly saved; but others were, and we have desired to avoid leaving undecided questions likely to arise upon a new trial.

For the reasons stated, the judgment must be reversed and a new trial awarded. We cannot assume that the evidence upon the second trial may not be so materially different as to require the question of Davis' guilt to be submitted to the jury, and as to put a different light upon the fifth count.

Certain Counts of the Indictment.

Fourth Count (Cr. Code, § 215).

And the grand jurors aforesaid upon their oaths aforesaid, do further present that, E. L. Hendrey, A. C. Cooke, George E. Toenges, H. C. Wynne, J. S. Chick, J. H. Brooks, C. A. Bonds, W. C. White and Abner Davis, whose Christian names are to the grand jurors unknown, yeoman, (sic) late of the circuit and district aforesaid, heretofore, before the finding of this indictment, on, to wit, the 21st day of April, A. D. 1910, at Memphis, in the county of Shelby, in the state of Tennessee in the circuit and Western division of the district aforesaid, and within the jurisdiction of this court, did unlawfully, willfully, fraudulently, and feloniously devise an intent to devise a scheme and artifice to defraud J. B. Patterson, of Columbus, Mississippi, and divers other persons to the grand jurors unknown, out of their moneys; which said scheme and artifice to defraud, the said Hendrey * * * did intend to execute and effect and attempt to execute and effect by use of the mails and the post office establishment of the United States, and in furtherance of said scheme and artifice to defraud, and in and for executing and effecting, and attempting to execute the same, the said defendants did deposit and cause to be deposited in the mails of the United States for mailing and delivery by the mails and the post office establishment of the United States, divers letters, packets, printed and published statements and representations; the said scheme and artifice to defraud was in substance as follows, to wit: [That the said Hendrey * * * would organize, incorporate and gain control of several banks in the states of Tennessee, Arkansas, Missouri and Oklahoma, to wit: All Night and Day Bank of Memphis, Tennessee; All Night and Day Bank of Kansas City, Missouri; the Night and Day Bank of Little Rock, Arkansas; the Night and Day Bank of Oklahoma; Ozark Trust Company, Siloam Springs, Arkansas: and the American Trust Company, of Memphis, Tennessee—none of which said banks would be reliable, responsible and financially able to do a legitimate banking business and that each of said banks would be in practical control of one or more of said defendants, all of whom were friends and allied together and intended to and did operate said banks and the funds and credits of each, for and in the interest of each other, and intended to and did switch and "kite" the funds and securities belonging to and in one of said banks to another thereof, and from that other of said banks to still another, or others, and so on through and among the entire chain of banks controlled and operated by said defendants, and that the All Night and Day Bank of Memphis, Tennessee would issue and use false and fraudulent centificates of deposit for the purpose of securing funds and stock in others of said string of banks, and for fraudulently procuring money for said All Night and Day Bank, and the officers thereof, and that the All Night and Day Bank of Little Rock Arkansas, and the American Trust Company of Memphis, Tennessee, would also issue and use false and fraudulent certificates of deposit for a like purpose; that in pursuance of said scheme and plan Hendrey * * * organized and incorporated the All Night and Day Bank of Memphis, Tennessee, on April 21st, 1910, with an authorized capital stock of fifty thousand ($50,000) dollars, with

E. L. Hendrey as president, A. C. Cooke, cashier, until June 30th, A. D. 1911, when he was succeeded by George F. Toenges, and each of whom was a director in said bank, and H. C. Wynne and J. S. Chick and J. H. Brooks, were also directors in same. Said bank proposed to do a general banking business and to be a reliable and financially responsible banking institution and to solicit, accept and receive deposits from individuals, firms and corporations; that the stock of said bank had a par value of one hundred ($100) dollars per share and was sold at one hundred and twenty-five ($125) dollars per share, and that defendants would collect of and from outside stockholders one hundred and twenty-five ($125) dollars per share for stock sold to them and that the defendants would make no bona fide payment whatever for stock issued to themselves.

That there was also established the Night and Day Bank of Kansas City, Missouri, with C. A. Bonds as president, and in charge and control thereof, and the said bank was allied with the All Night and Day Bank of Memphis, Tennessee. There was also organized the Night and Day Bank of Little Rock, Arkansas, with H. C. Wynne as president, and in charge and control thereof; there was also organized the Night and Day Bank of Oklahoma City, Oklahoma, with Abner Davis, as president, in charge and control thereof; there was also organized the Union Trust Company, of Hot Springs, Arkansas, with J. M. McDonald, as president, and also a director in charge and control of same, and with O. E. Helton, E. L. Hendrey, W. C. White and J. H. Brooks as directors; there was also organized the Ozark Trust Company, of Siloam Springs, Arkansas, with C. A. Bonds as president, and in charge and control thereof; there was also organized the American Trust Company, of Memphis, Tennessee, with J. M. McDonald, as president, O. E. Helton, as secretary and E. L. Hendrey, as director—all of which said above-named banks were closely allied and associated and their controlling officers and directors therein were all friends and associated in said plan and scheme; and each and all of said banks, and the said above-named defendants as officers and directors therein, would hold said banks out to be, and represent themselves to be liable, responsible banking institutions, and would solicit and accept and receive deposits from individuals, firms, and corporations, which said deposits were to be held in said banks subject to the check of the depositors thereof.

Whereas, in truth and in fact, at the time said scheme and artifice to defraud the said J. B. Patterson, of Columbus, Mississippi, and the divers other persons to the grand jurors unknown, was so devised by the defendants as aforesaid, and at the time the said All Night and Day Bank of Memphis, Tennessee, was organized and incorporated as aforesaid, and at the time said false representations and pretenses were made by defendants as aforesaid, and at the time deposits were solicited, accepted and received by said bank as aforesaid, as defendants then and there well knew, the said All Night and Day Bank of Memphis, Tennessee, was not a bona fide, legitimate, reliable and responsible bank and banking company, and at the time the said false representations and pretenses were so made to said J. B. Patterson of Columbus, Mississippi, and the divers other persons to the grand jurors unknown as aforesaid, the said defendants also well knew that the All Night and Day Bank of Kansas City, Missouri, the Night and Day Bank of Oklahoma City, Oklahoma, the Night and Day Bank of Little Rock, Arkansas, the Union Trust Company of Hot Springs, Arkansas, the Ozark Trust Company of Siloam Springs, Arkansas, and the American Trust Company of Memphis, Tennessee, were not bona fide, reliable, legitimate and financially responsible banks and banking institutions. But that said Hendrey, * * * at the time said scheme and artifice to defraud was so devised by them as aforesaid, and at the time said representations and false pretenses were made to said J. B. Patterson of Columbus, Mississippi, and to the divers other persons to the grand jurors unknown, did intend to solicit, receive and accept from the said J. B. Patterson of Columbus, Mississippi, and the divers other persons to the grand jurors unknown, their deposits into the said All Night and Day Bank of Memphis, Tennessee, and into the other banks hereinbefore mentioned, and to unlawfully, knowingly and fraudulently convert the money so received by them to their own use and benefit, and did, at the time said scheme and artifice to defraud

was so devised by them, intend to sell the shares of capital stock of said All Night and Day Bank of Memphis, Tennessee, and each of said other banks hereinbefore mentioned, to divers persons to the grand jurors unknown, and to the public generally, and to unlawfully, fraudulently and knowingly convert the money so received by them for said stock to their own use and benefit.]

And in pursuance of and in and for executing and effecting said scheme and artifice to defraud the said J. B. Patterson of Columbus, Mississippi, and divers other persons to the grand jurors unknown, the said Hendrey, * * * heretofore, before the finding of this indictment, on, to wit, the first day of July, 1911, in the circuit and Western division of the district aforesaid, to wit, in Memphis, in the county of Shelby, in the state of Tennessee, and within the jurisdiction of this court, did knowingly, unlawfully, fraudulently and feloniously deposit and cause to be deposited in the mails and the post office of the United States, at Memphis, Tennessee, aforesaid, for mailing and delivery by and through the mails and the post office establishment of the United States, a certain false, fraudulent and misleading statement, which said statement was published in the Commercial Appeal, a newspaper published in Memphis, Tennessee, which said statement appearing upon the twelfth page of the issue of Saturday morning, July 1, A. D. 1911, was as follows, to wit:

"Statement of the All Night and Day Bank.

"At the Close of Business June 30, 1911.

"Resources.

Loans and discounts	$ 99,134 92
Overdrafts	293 70
Furniture and fixtures	12,877 85
Expenses	14,128 58
Cash and due from banks	27,411 85
Total	$153,846 90

"Liabilities.

Capital stock	$ 32,250 00
Surplus and profits	15,566 49
Deposits	96,030 41
Bills payable	10,000 00
Total	$153,846 90

"I, A. C. Cooke, cashier of the above named All Night and Day Bank, do solemnly swear that the above statement is true, to the best of my knowledge and belief. J. Messick Hall, Notary Public.

"Officers.

"E. L. Hendrey, President; Wm. V. Taylor, Vice President;
"A. C. Cooke, Cashier.

"Directors.

"I. F. Peters, J. S. Chick, H. C. Wynne, A. C. Cooke, J. H. Brooks, J. A. Johnson, A. D. Gibson, E. L. Brooks, E. L. Hendrey, Wm. V. Taylor."

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

Fifth Count:

And the grand jurors aforesaid, upon their oaths aforesaid, do further present that the said * * * on, to wit, the 21st day of April, A. D. 1910, at Memphis, in the county of Shelby, in the state of Tennessee, in the circuit and Western division of the district aforesaid, and within the jurisdiction of this court, did unlawfully, willfully, knowingly and fraudulently and feloniously agree and conspire together to commit an offense against the United States, to wit, the offense of knowingly, unlawfully, fraudulently and feloniously devising and intending to devise a scheme and artifice to defraud the Night and Day Bank of St. Louis, Missouri, and divers other persons to the grand jurors unknown, out of their moneys, which said scheme and artifice to defraud was to be effected and executed by the use of the mails and the post office establish-

ment of the United States, and the said defendants did agree and conspire together that in furtherance of said scheme and artifice to defraud and in and for attempting to execute and effect the same, that they would deposit and cause to be deposited in the mails of the United States, for mailing and delivery by and through the mails and the post office establishment of the United States, divers and sundry letters, packets, written and printed statements and representations; the said scheme and artifice which the said defendants agreed and conspired to devise and which they were to execute and effect by and through the mails of the United States, was in substance as follows, to wit: * * * (Here follows all which is in brackets in count 4, save that "Night and Day Bank of St. Louis" is substituted for "J. B. Patterson" whereever the latter name occurs.)

And in pursuance of said agreement and conspiracy and in and for executing and attempting to execute said scheme and artifice to defraud, and in execution of said conspiracy and in furtherance of, and in and for executing and effecting and attempting to execute and effect, said scheme and artifice to defraud the Night and Day Bank of St. Louis, Missouri, and divers other persons to the grand jurors unknown, the said E. L. Hendrey, one of the conspirators and who was acting for his associates in said agreement and conspiracy and for and in execution of the said conspiracy, did heretofore, before the finding of this indictment, on to wit, the 28th day of April, A. D. 1911, in the circuit and Western division of the district aforesaid, to wit, at Memphis, in the county of Shelby, in the state of Tennessee, and within the jurisdiction of this court, knowingly, unlawfully, fraudulently and feloniously deposit and cause to be deposited in the mails and the post office establishment of the United States, at Memphis, Tennessee, aforesaid, for mailing and delivery by and through the mails and the post office establishment of the United States a certain envelope duly stamped with a United States postage stamp and addressed to "Night and Day Bank, St. Louis, Mo.," which said envelope so stamped and addressed then and there contained the following letter, to wit:

"E. L. Hendrey, Pres. Wm. V. Taylor, Vice Pres. A. C. Cooke, Cashier.

"All Night and Day Bank. Capital Stock, $50,000. Surplus, $12,500.

"Directors: J. H. Brooks, J. A. Johnson, A. C. Cooke, A. D. Gibson, J. S. Chick, Wm. V. Taylor, E. L. Hendrey, I. F. Peters, H. C. Wynne.

"Memphis, Tenn., April 28, 1911.

"Night and Day Bank, St. Louis, Mo.—Gentlemen: Confirming conversation with your Mr. White of even date, we herewith hand you our sixty-day note for $4,000.00, together with collateral amounting to $5,840.80. All of these notes are made by thoroughly responsible parties and will be paid promptly. We may possibly need to draw on you to-morrow for a part of this, but will in all probability carry the greater portion, or even more, with you from now on, as we have within the neighborhood of $10,000.00 coming in within this time.

"Assuring you we will highly appreciate your placing the amount of this note to our credit, and that we will be only too glad to return the favor at any time we may, we are,

"Yours very truly, The All Night and Day Bank,
"E. L. Hendrey."

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

ATLAS PORTLAND CEMENT CO. v. HAGEN. *

(Circuit Court of Appeals, Eighth Circuit. May 12, 1916.)

No. 4544.

1. COURTS ⟸366(1)—RULES OF DECISION—FEDERAL COURTS.
The decisions of the state courts, construing state statutes, are binding on the federal courts.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 956, 957, 967; Dec. Dig. ⟸366(1).]

2. MASTER AND SERVANT ⟸204(2), 228(2)—INJURIES TO SERVANT—ASSUMPTION OF RISK.
Under Rev. St. Mo. 1909, § 7828, declaring that the belting, shafting, machines, machinery, etc., in all manufacturing establishments, when placed so as to be dangerous to employés, shall be safely and securely guarded, when possible, and, if not, notice of the danger shall be conspicuously posted, an employé does not assume the risk of injury resulting from the employer's failure to comply with the statute, and advantage of such defense cannot be taken on the ground that assumption of risk becomes contributory negligence, for one defense is based on contract and the other on tort, and as an employé does not assume the risk of a master's negligence, there can be no assumption of risk, as a violation of the statute is negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 545, 671; Dec. Dig. ⟸204(2), 228(2).]

3. APPEAL AND ERROR ⟸1067—REVIEW—HARMLESS ERROR.
Where the pleadings and evidence were such that the court might have instructed the jury as to the existence of a particular fact, the failure to submit to them the question of that fact's existence was not error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4229; Dec. Dig. ⟸1067; Trial, Cent. Dig. § 475.]

4. MASTER AND SERVANT ⟸297(3)—INJURIES TO SERVANT—ESSENTIALS TO RECOVERY.
Where an injured employé based his action on the master's violation of Rev. St. Mo. 1909, § 7828, requiring the guarding of machinery or the posting of warnings, it is essential to recovery that the jury find failure to guard or to post warnings was the cause of the injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1197; Dec. Dig. ⟸297(3).]

5. MASTER AND SERVANT ⟸293(6)—INJURIES TO SERVANT—INSTRUCTIONS—SUFFICIENCY.
In such case an instruction that if the statutory directions were obeyed the master was not liable, but if they were not obeyed then the master was guilty of negligence, rendering him responsible for all injuries directly caused by such failure, saving the defense of contributory negligence, was sufficient, in the absence of a request for a more detailed instruction.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1149; Dec. Dig. ⟸293(6).]

6. TRIAL ⟸256(9)—INSTRUCTIONS—REQUESTS.
Where an ample general instruction on contributory negligence was given, defendant, who requested no additional instructions, cannot complain that the one given was not sufficiently inclusive.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 637; Dec. Dig. ⟸256(9).]

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

*Rehearing denied September 4, 1916.

7. MASTER AND SERVANT ⊂92(1)—INJURIES TO SERVANT—LIABILITY OF MASTER.

Where a master supplied a physician, who set an injured servant's broken leg in such a manner that it did not properly heal, and the servant thereafter engaged other physicians, who rebroke the leg, the master, though the new operation was not a success, was liable for the whole injury; the servant not being negligent in refusing to permit the first physician to rebreak the leg as he desired.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 143; Dec. Dig. ⊂92(1).]

8. APPEAL AND ERROR ⊂231(9)—PRESENTATION OF GROUNDS OF REVIEW IN COURT BELOW—NECESSITY.

Where the petition generally alleged the damages submitted in the charge, defendant's objection to the charge on damages, on the ground that it specified items not included in the petition, presents nothing for review, where defendant was requested by the court to make its objection specific.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. ⊂231(9); Pleading, Cent. Dig. § 1439; Trial, Cent. Dig. §§ 194, 195, 689, 690, 696.]

9. MASTER AND SERVANT ⊂228(2)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE.

Where a master violated Rev. St. Mo. 1909, § 7828, requiring the guarding of machinery and if impossible the posting of notices of danger, the fact that an employé, hurt while screwing oil cups on a wheel which was revolved by a shaft, had done the work for some months without injury, does not show him guilty of contributory negligence; the master having failed to comply with the statute.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 671; Dec. Dig. ⊂228(2).]

In Error to the District Court of the United States for the Eastern District of Missouri; David P. Dyer, Judge.

Action by Fred W. Hagen against the Atlas Portland Cement Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

George A. Mahan, of Hannibal, Mo. (Albert R. Smith and Dulany Mahan, both of Hannibal, Mo., on the brief), for plaintiff in error.

Ben E. Hulse, of Hannibal, Mo. (A. Clay Williams, of Pittsfield, Ill., and D. H. Eby, of Hannibal, Mo., on the brief), for defendant in error.

Before HOOK and SMITH, Circuit Judges, and REED, District Judge.

SMITH, Circuit Judge. The plaintiff in error, the Atlas Portland Cement Company, is a corporation organized under the laws of Pennsylvania. It was the defendant below, and is hereafter so styled here. It has for years been engaged in conducting a cement manufacturing plant at Ilasco, Ralls county, Mo. The defendant in error, the plaintiff below, and so hereafter styled here, was employed by the defendant in what was known as clinker mill No. 1, a part of plant 5, under a foreman. This mill had in it a line shaft extending from east to west about 100 to 125 feet long. This was 9 inches in diameter and was about 6 feet from the floor. Upon it were 16 wheels or pulleys, which by belts operated 16 Huntington mills, 8 on each side. The plaintiff

had charge of the 8 south mills. The shaft revolved 150 times a minute. The wheels or pulleys referred to were about 32 inches across the face and the one here in question was 4 feet in diameter.

This wheel, like the others, was so arranged that it could be detached from the power, so as to stop the Huntington mill to which it was attached. This was done by placing a collar in two pieces bolted around the shaft to the right of the wheel and placing a spider or clutch to the left of the wheel. This spider or clutch always revolved with the shaft, even when the pulleys or wheels were standing still. When it was desired to have the mill put in motion the spider or clutch was by a small wheel thrown against the large wheel or pulley on which the belt ran and seized a flange on the pulley or wheel with its four arms; and when it was desired to stop the mill by the same device the spider or clutch was withdrawn from the pulley wheel and it came to a stop. This pulley or wheel weighed about 1,800 pounds. There was upon it a hub, and projecting from it to the rim 12 spokes in pairs, or 6 pairs to the wheel. There were 4 grease cups to this wheel. They were attached to the hub between the spokes in pairs. The pairs were opposite each other on the hub and 12 to 15 inches apart. These grease cups had frequently to be screwed down, and it was a part of plaintiff's duty to do that. It is manifest that this could not be done from the left side of the wheel, as the revolving spider or clutch would cut off the operator's arm. It was therefore necessary to do this work wholly from the right side. If 2 of the grease cups stopped at the bottom and 2 at the top, it was necessary to screw the 2 at the bottom down from the floor and then climb upon an idler with one foot and upon another iron with the other and screw down those above the hub. There is a slight difference in the testimony as to how far the operator had to reach into the wheel to perform his duty, but he had to reach in from 8 to 10 inches from the collar to reach the first grease cup and 20 or 25 inches to reach the second.

On September 23, 1913, the plaintiff, having stopped the mills of which he had charge in pursuance of orders from his superior, attempted to screw down the grease cups, and succeeded in doing so at several of the mills, and screwed down the lower cups at mill No. 7. While he was attempting to screw down the upper cups at this mill, or at the corresponding point upon the shaft to this mill, and while the center of his body was, in the discharge of his duty, brought close to the line shaft, a projecting bolt or bolt head in the collar referred to caught in his jacket, threw him up over the line shaft and to the concrete floor north of it, and fractured his left leg. He brought this suit to recover damages. The case was tried and a verdict was returned in his favor, upon which judgment was rendered and the defendant sued out this writ of error.

[1, 2] The Revised Statutes of Missouri of 1909 contained the following provision:

"Sec. 7828. *Belting, etc., to be Guarded.*—The belting, shafting, machines, machinery, gearing and drums, in all manufacturing, mechanical and other establishments in this state, when so placed as to be dangerous to persons employed therein or thereabout while engaged in their ordinary duties, shall be safely and securely guarded when possible; if not possible, then notice of

its danger shall be conspicuously posted in such establishments. (R. S. 1899, § 6433, amended, Laws 1909, p. 502.)"

The amendment of 1909 inserted the words "machines" and "machinery."

The answer contains the statement that:

"Defendant further admits the allegation in the plaintiff's petition that the danger and peril connected with plaintiff's work was an obvious danger and peril."

The defendant called as a witness the assistant general superintendent of the Western district of the Atlas Portland Cement Company who testified: "It is a dangerous shaft." In view of this admission and testimony, corroborated as it is by all the evidence and contradicted by nothing, we have no hesitancy in reaching the conclusion that the machine in question was "dangerous to persons employed therein or thereabout."

When the question first came before this court, it held that, notwithstanding the Missouri statute referred to, the defenses of assumption of risk and contributory negligence were both available to the defendant in cases brought under that section. St. Louis Cordage Co. v. Miller, 61 C. C. A. 477, 126 Fed. 495, 63 L. R. A. 551; Glenmont Lumber Co. v. Roy, 61 C. C. A. 506, 126 Fed. 524; Federal Lead Co. v. Swyers, 88 C. C. A. 547, 161 Fed. 687; Mengel Box Co. v. Dulin, 98 C. C. A. 401, 174 Fed. 647. And this court held to the same effect as to a similar Colorado statute. Denver & R. G. R. Co. v. Norgate, 72 C. C. A. 365, 141 Fed. 247, 6 L. R. A. (N. S.) 981, 5 Ann. Cas. 448. And the same under a Wyoming statute. Maki v. Union Pacific Coal Co., 109 C. C. A. 221, 187 Fed. 389; Owl Creek Coal Co. v. Goleb, 127 C. C. A. 27, 210 Fed. 209.

That was the best judgment of this court after the most careful consideration, but there was a great conflict in the authorities, state and federal, on this question. See Welsh v. Barber Asphalt Paving Co., 93 C. C. A. 101, 167 Fed. 465, and Narramore v. Cleveland, C., C. & St. L. Ry. Co., 37 C. C. A. 499, 96 Fed. 298, 48 L. R. A. 68. This is not claimed to be an exhaustive review of all the cases bearing on this subject, but suffices to show the court's attitude at first upon the question.

In Columbia Box Co. v. Saucier, 129 C. C. A. 659, 213 Fed. 310, this court held that the Supreme Court of Missouri had so construed this particular statute that assumption of risk was not a defense, citing Durant v. Mining Co., 97 Mo. 62, 10 S. W. 484, Lore v. American Manufacturing Co., 160 Mo. 622, 61 S. W. 678, Butz v. Construction Co., 199 Mo. 286, 97 S. W. 897, Huss v. Heydt Bakery Co., 210 Mo. 44, 108 S. W. 63, and Simpson v. Witte Iron Works, 249 Mo. 376, 155 S. W. 810, and numerous decisions of the various Courts of Appeals of Missouri. This court held that the decisions of the Supreme Court of Missouri were binding upon this court.

In a quite able and ingenious argument the plaintiff in error here cites Patrum v. St. Louis & S. F. R. Co., 259 Mo. 109, 168 S. W. 622, as holding that a portion of the assumption of risk has become a form of contributory negligence. In view of the fact that contribu-

tory negligence always arises in tort, while assumption of risk always arises on contract, we cannot quite understand how this could be true. We can understand how the same evidence can make out a defense arising in tort and one on contract, but not how a defense arising on contract and abolished by law can become one arising in tort; but the Patrum Case was not under this or any similar statute, but was a common-law action against the railroad for negligence. In the statement of facts as prepared by the court it is said:

"The bone of contention in the case is as to whether the trainmen, the fellow servants of deceased, used ordinary care in making the coupling in which they were engaged when deceased lost his life."

That case, therefore, really involved nothing with reference to assumption of risk or contributory negligence. In that case the court quoted with approval from the Iowa Supreme Court the following:

"The term 'assumption of risk' has come to be used in a twofold sense. It is often said that an employé assumes the ordinary risk that is incident to his employment. This form of assumption of risk is often pleaded by defendants in personal injury cases, although it is quite unnecessary to do so. Assumption of risk in its true sense has reference to those risks arising out of the negligence of the master when such negligence is known to the employé, and the danger therefrom appreciated by him. In the first form herein indicated, a specific pleading of assumption of risk of the ordinary dangers incident to an employment is a mere amplification of the general denial, and adds nothing to it in the legal sense. In the second form herein indicated, it is an affirmative defense, and must be specifically pleaded as such."

The court said in that case:

"Under the doctrine found in the Missouri cases dealing with so-called assumption of risk, the employé 'does not assume the negligence of the master or that of a vice principal.' The moment negligence comes in at the door, it may well be said that the doctrine of assumption of risk goes out at the window."

It is clear that, if we accept the distinction made between the two alleged classes of assumption of risk, which upon authority we do, the first class is not a portion of the law of the assumption of risk at all in a practical sense, because it applies only when the master is not negligent, and where the master is not negligent there is no necessity for resorting to the defense of assumption of risk.

The second subdivision is then the only material one to consider, and it is to this the courts of Missouri have held there is no assumption of risk, because they have uniformly held that a violation of this statute is itself negligence. The case in question, not having arisen under this statute, is in no event so conclusive as to require us to modify our holding in Columbia Box Co. v. Saucier, 129 C. C. A. 659, 213 Fed. 310.

[3] It is assigned as error that the court failed to give to the jury the question as to whether the machine was so "placed as to be dangerous to persons employed upon the same while engaged in their ordinary duties"; but it has already been intimated that the pleadings and evidence were so clear upon this question that it was proper for the court to have positively instructed the jury that they should find

the machine was so dangerous, and its merely ignoring the question cannot be error.

[4, 5] It is contended that it is essential to plaintiff's right to recover that the jury find that the failure to guard and give notice caused the injuries. Of course this is true. But the court adopted as a part of the charge a portion of the opinion in Simpson v. Witte Iron Works, 249 Mo. 376, 155 S. W. 810, and expressly quoted:

"If these statutory directions are obeyed, then the employer is not liable for injuries occasioned by such agencies to such employés. If they are not obeyed, then the employer's disobedience is an act of negligence, and he is responsible for any and all *injuries directly caused by such failure*, saving the defense of contributory negligence."

In the absence of a request for a more detailed instruction, this was certainly sufficient. If the jury had first found that the machinery could be guarded, then the question could have been well taken from the jury; but the fact that the jury might have found for the plaintiff upon the absence of notice alone made an instruction upon the subject necessary. The court instructed the jury upon the law of contributory negligence substantially in the language used by this court in Motey v. Pickle Marble & Granite Co., 20 C. C. A. 366, 74 Fed. 155. The charge was full and ample on the subject.

[6] In its argument the defendant says:

"So that, under the Missouri doctrine as at present existing, the trial court in this case, in withdrawing assumption of the risk from the jury, should have done so with the qualification that if the plaintiff remained at work for the defendant with either actual or constructive knowledge of the condition of the machinery, to wit, that it was dangerous and not guarded, without the defendant having promised to remedy the same, then such assumption of the risk became contributory negligence."

Without again referring to what seems to us an inaccuracy of expression that assumption of risk, a defense arising on contract, became contributory negligence, a defense arising in tort, suffice it to say that, when an ample general instruction was given on contributory negligence, the failure of the defendant to ask the alleged additional one on the subject would prevent our consideration of whether, if so asked, it should have been given or not. In the case of Northern Central Coal Co. v. Hughes, 139 C. C. A. 619, 224 Fed. 57, cited by the defendant, the court gave correct general instructions, but the defendant asked a specific instruction upon what the court described as the crucial question in the case, but here there was no instruction asked at all except instructions to find for the defendant, and one other not on this subject. In this case there was not even an exception to the instruction on contributory negligence.

[7] The defendant asked the giving of an instruction that:

"The court instructs the jury that the defendant is not responsible for any injury to plaintiff caused by any act, operation, or conduct of plaintiff's physicians or surgeons."

This instruction was refused. It was erroneous upon its face, but especially so as shown by the record. The plaintiff testified, and the jury had a right to believe, that Dr. Chilton, the company's surgeon,

set his limb; that one day, when they were putting him upon a bed pan, he felt the bones slip. This was about three days after the injury. He called the attention of Dr. Chilton and the nurse to it, but the Doctor did not even make an examination. Plaintiff remained at the hospital six weeks, and was then taken home and remained there a week. At the end of five weeks the bandages were taken off. Dr. Chilton took him home and then pronounced the leg in good shape. In a day or two he came back and the leg was bent, and the next day he again called and wanted to break the leg again. After seven weeks of suffering with this broken leg, more than six weeks after it slipped and the doctor had been notified, and a bony union had been formed, he was justified in declining to let the same doctor break it again and operate further. Plaintiff simply told Dr. Chilton he could not break it again, and Dr. Chilton then turned the case over to Dr. Winn; but before this, at a conference of Dr. Chilton, Dr. Bounds, Dr. Winn, and other physicians, it was agreed by all of them that a second operation was necessary. The plaintiff then employed Dr. Bounds, a prominent surgeon, to perform a second operation, assisted by Drs. Schmidt, Hays, and Winn. These were all competent physicians and surgeons, and there is no evidence of negligence in their selection. From their testimony it appears that the union formed under Dr. Chilton was with the ends of the bones overlapping. The new operation was not a success, but there was no negligence upon plaintiff's part in refusing to let the same surgeon perform the second operation who had concededly failed in the first, perhaps without fault on his part, nor in the selection of the new ones; and if the defendant was liable at all, it was liable for the entire injury which plaintiff sustained as the result of its negligence in failing to comply with the statute.

[8] There is considerable criticism of the instructions on the measure of damages. The only exception made to this portion of the charge was:

"The Court: I will hear any exceptions to this charge.

"Mr. Mahan: * * * We except also to that part of the charge which gives the measure of damages, as charged by the court. * * *

"The Court: I think it is necessary, Mr. Mahan, under the practice, when you object to the court's charge as to damages, that you specify. If I am wrong in any particular, I want to correct it before the jury retires. You have objected generally to the charge I have given in reference to the amount of damages; now I would like for you to specify in what particular the court has not laid down the law as to the damages.

Mr. Mahan: I can only object in a general way as specifying the different items for which damages may be found, for the reason I understand those items are not specified in the plaintiff's petition."

Had the objections now made been then made, it is possible some of them would have been sustained; but the items were all mentioned in the petition, perhaps in several cases without sufficient details, and it was the duty of counsel, when called on by the court, to have pointed out in what respects the instruction was erroneous, and, having failed to do so, it cannot now complain.

[9] It is strenuously insisted that it conclusively appears that plaintiff was guilty of contributory negligence. This is based chiefly upon the fact that he had for a few months done the same work and not

been hurt, upon the fact that he used his left hand and not his right in doing the work, and upon a deduction from the evidence that he could have kept his body at a considerable distance from the bolt on which he was caught and from the shaft. The fact that he had done the work for a few months and not been injured, while admissible, is of comparatively slight weight. The statute of Missouri was enacted to protect employés from danger, not from the certainty of being hurt. It appears that one other man had been injured in a similar way, and the fact that for 400 or 500 times such operator escaped injury would not of itself conclusively show contributory negligence when one was hurt. It appears that the plaintiff was what was known as a left-handed man, and had always done the work with his left hand, and there is no evidence that he had previously been instructed to use his right hand. We think that there is quite as good reason to believe any one would have been hurt using his right hand as his left, and more reason to think that the plaintiff, who was more adept with his left hand than his right, would have been hurt by the use of his right rather than his left hand.

The deductions from the evidence referred to and relied upon are of such a character that we cannot follow them.

The judgment of the District Court is affirmed.

DELAWARE & HUDSON CO. v. KETZ.

(Circuit Court of Appeals, Third Circuit. April 24, 1916.)

No. 2081.

1. TRIAL ⟸219, 255(13)—INJURIES TO SERVANT—INSTRUCTIONS—PROXIMATE CAUSE—NECESSITY—REQUEST.

In an action for the death of a railroad employé, who fell from a bridge, where the evidence was not clear that the negligence of the company in leaving one side of the bridge unguarded was the proximate cause of the accident, it was error for the trial judge to pass over the subject of proximate cause with only an allusion to the fact that the jury must determine whether the death was the proximate result of defendant's negligence, without defining "proximate cause," though his attention was called to the subject by defendant's requests for instructions that the company was not liable, unless it had been guilty of negligence that was the proximate cause of the death.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 489, 639; Dec. Dig. ⟸219, 255(13).]

2. MASTER AND SERVANT ⟸276(2)—INJURIES TO SERVANT—EVIDENCE—PROXIMATE CAUSE.

In an action for the death of a railroad employé, who fell from a bridge one side of which was unguarded, testimony of the only witness to the accident that the employé crossed diagonally from the guarded to the unguarded side of the bridge, where he seemed to stumble and then fell, and that 24 hours later there was no obstruction on the bridge over which he could have stumbled, is not sufficient to warrant the jury in finding that the negligence of the company in leaving the side of the bridge unguarded was the proximate cause of the death.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 951, 959; Dec. Dig. ⟸276(2).]

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

In Error to the District Court of the United States for the Middle District of Pennsylvania; Charles B. Witmer, Judge.

Action by Anna Ketz, administratrix, against the Delaware & Hudson Company. Judgment for plaintiff, and defendant brings error. Reversed, and new trial awarded.

W. J. Torrey and James H. Torrey, both of Scranton, Pa., for plaintiff in error.

R. L. Levy and Leon M. Levy, both of Scranton, Pa., for defendant in error.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

McPHERSON, Circuit Judge. The plaintiff, Anna Ketz, is the widow of George Ketz, who was drowned on the afternoon of Sunday, April 26, 1914. He had been working at a roundhouse of the Delaware & Hudson Company, and while on his way home fell from a bridge spanning the Lackawanna river between his place of work and the town of Carbondale. The bridge had been built and was maintained by the company primarily as a means of access to the roundhouse and other shops, although its use by the public was also permitted. In her statement of claim the plaintiff describes herself as the administratrix of her husband, and also as a citizen of Pennsylvania, declaring her husband also to have been a citizen of that state. She sues as his personal representative, in behalf of herself and their minor children, and describes the company as a citizen of New York. She then goes on to state that on April 26 the company was engaged in interstate commerce; that her husband also was so engaged as a servant of the company; and that, in order to enable its servants to reach and leave the roundhouse, the company furnished the bridge in question. She asserts that the bridge was dangerous, because it was provided with a guard rail or barrier upon only one of its sides; avers that her husband lost his footing, fell into the river from the unguarded side, and was drowned; and charges that the fall was due to the company's negligence in failing to protect the bridge adequately, and to "its failure to furnish a safe place to work and safe appliances in and about the place of his employment, and safe approaches and exits in and about the said place of employment."

There is no material dispute about the facts. Ketz had been in the company's service about a year; he was a pipe fitter, and was charged with the duty of repairing the pipes of such engines as might come into the roundhouse from time to time. The company operates a railroad running from Wilkes-Barre, Pa., into the state of New York, and is largely engaged in interstate commerce; but part of its business is intrastate, for example, the carriage of passengers between Wilkes-Barre and Carbondale, neighboring towns in the state of Pennsylvania. About 20 engines used the roundhouse as a place of storage or repair. Some of them were of the Mallet type, and were used to push trains upgrade from Carbondale to Ararat Summit; both these points are in Pennsylvania, but nearly all the trains went on from

Ararat into the state of New York. Some engines, however, were used only for passenger service between Carbondale and Wilkes-Barre, and on Sundays another engine might come in from a passenger train that was run on that day between New York state and Carbondale. At times still other engines might be sent in for unexpected repairs.

The bridge is a little more than 14 feet wide and about 114 feet long; it has a railing 4 feet high on the upper side, but on the lower side there was no guard, except a wheel rail, or block—a heavy timber about 9 inches high and 10 inches wide, fastened to the planks and running the length of the bridge. There were two of these wheel rails one on each side of the bridge, and the roadway between them is nearly 12 feet wide. On the day in question Ketz had been employed in the roundhouse, but no evidence was offered to show what he had been doing, or upon what engine. At 5 o'clock he started for his home in Carbondale. The daylight was ample, and he was familiar with the bridge, having crossed it many times during the year preceding. On this occasion, for some reason that is left in doubt by the meager evidence, he fell off the bridge from the lower or unguarded side and was drowned. The only witness of the occurrence was a woman, who was looking across the river from her kitchen window about 300 feet away, and saw Ketz approach the bridge, enter upon it close to the guard rail, and cross diagonally to the lower side. There he stumbled (as she thought), threw up his hands, and fell into the water. Twenty-four hours later she visited the spot, but found nothing that would account for his fall, and there is no other testimony concerning the condition of the roadway or the bridge. If the river had not been in flood, he would probably have escaped without serious mishap. A board sidewalk, more than 2 feet wide, runs along the street or highway on both sides of the river, and leads to and from the ends of the upper or guarded side of the bridge. Crossing was perfectly safe under all ordinary conditions. Another man preceded Ketz by a few feet, using the upper side of the bridge, and crossed without having his attention called to the accident.

The suit is brought under the Carriers' Liability Act of 1908 (Act April 22, 1908, c. 149, 35 Stat. 65, 4 Comp. Stat. § 8657 et seq.) and the federal questions presented by the statement of claim are whether the death occurred while the company was "engaged in commerce between any of the several states," and whether the deceased suffered death "while he [was] employed by such carrier in such commerce." On these subjects the evidence is scanty and not satisfactory, and the plaintiff is compelled to rely on such presumptions or inferences as are said to be warranted by the few facts in proof. The argument is thus outlined in her counsel's brief:

"1. A workman whose general employment is in the interstate commerce and intrastate commerce of a railroad is, generally speaking, engaged in interstate commerce, and is within the protection of the act.

"2. An employé who meets with injury while, generally speaking, engaged in interstate commerce, is within the protection of the act, and he does not lose the protection of the act unless it appears by affirmative evidence that he was engaged in intrastate commerce at the time that he came to his death."

We do not find it necessary to consider these propositions, or to examine the cases referred to by one side or the other. Railroad v. Behrens, 233 U. S. 473, 34 Sup. Ct. 646, 58 L. Ed. 1051, Ann. Cas. 1914C, 163; Railroad v. Glynn, 219 Fed. 148, 135 C. C. A. 46; Pedersen v. Railroad, 229 U. S. 146, 33 Sup. Ct. 648, 57 L. Ed. 1125, Ann. Cas. 1914C, 153; Horton v. Railroad & Navigation Company, 72 Wash. 503, 130 Pac. 897, 47 L. R. A. (N. S.) 8; Lamphere v. Railway Company, 196 Fed. 336, 116 C. C. A. 156, 47 L. R. A. (N. S.) 1; Erie R. R. v. Jacobus, 221 Fed. 336, 137 C. C. A. 151; Railroad v. Zachary, 232 U. S. 248, 34 Sup. Ct. 305, 58 L. Ed. 591, Ann. Cas. 1915C, 159; Railroad v. Davide, 210 Fed. 870, 127 C. C. A. 454; Railroad v. Rogers, 221 Fed. 52, 136 C. C. A. 530; Boyle v. Railroad (D. C.) 221 Fed. 453; Shanley v. Railroad (D. C.) 221 Fed. 1012. We think our decision should rest on other grounds, and shall therefore assume (but without deciding) that the act would be satisfied if the fact were that Ketz had just been engaged in the repair of interstate engines, and shall assume also that the jury was properly allowed to find this fact; and for the purposes of this opinion we shall assume further that the jury was justified in finding that the company was negligent in leaving the lower side of the bridge unguarded, but it is plain that a vital question still remained, namely: Was this negligence the proximate cause of the death?

[1] This rather perplexing subject of proximate cause has received much attention, both from text-writers and the courts, and the numerous cases are by no means harmonious. Elaborate notes, with very full citations, may be found in 13 L. R. A. (N. S.) 1219, 18 L. R. A. (N. S.) 1135, and 20 L. R. A. (N. S.) 732; but for the rule in the federal courts we need not go beyond Railway Co. v. Kellogg, 94 U. S. 474, 24 L. Ed. 256, and Insurance Co. v. Boon, 95 U. S. 117, 24 L. Ed. 395. In the Kellogg Case Mr. Justice Strong said:

"The true rule is that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or of legal knowledge. It is to be determined as a fact, in view of the circumstances of fact attending it. The primary cause may be the proximate cause of a disaster, though it may operate through successive instruments, as an article at the end of a chain may be moved by a force applied to the other end, that force being the proximate cause of the movement, or as in the oft-cited case of the squib thrown in the market place. 2 Bl. Rep. 892. The question always is: Was there an unbroken connection between the wrongful act and the injury, a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? It is admitted that the rule is difficult of application. But it is generally held that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances."

And in the Boon Case the same justice expressed the same thought in different language:

"The proximate cause is the efficient cause, the one that necessarily sets the other causes in operation. The causes that are merely incidental, or instruments of a superior or controlling agency, are not the proximate causes and the

responsible ones, though they may be nearer in time to the result. It is only when the causes are independent of each other that the nearest is, of course, to be charged with the disaster. * * * The proximate cause, as we have seen, is the dominant cause, not the one which is incidental to that cause, its mere instrument, though the latter may be nearest in place and time to the loss."

These rules have been often followed, e. g., in Scheffer v. Railroad, 105 U. S. 251, 26 L. Ed. 1070; Hayes v. Railroad, 111 U. S. 228, 4 Sup. Ct. 369, 28 L. Ed. 410; The G. R. Booth, 171 U. S. 450, 19 Sup. Ct. 9, 43 L. Ed. 234; Railway Co. v. Calhoun, 213 U. S. 7, 29 Sup. Ct. 321, 53 L. Ed. 671; Railway Co. v. Stewart, 228 U. S. 363, 33 Sup. Ct. 548, 57 L. Ed. 875; Hartford Co. v. Pabst Co. (C. C. A. 7th) 201 Fed. 626, 120 C. C. A. 45, Ann. Cas. 1915A, 637; and Armour & Co. v. Harcrow (C. C. A. 9th) 217 Fed. 227, 133 C. C. A. 218. In Railway Co. v. Calhoun, supra, it is said by Mr. Justice Moody:

"Few questions have more frequently come before the courts than whether a particular mischief was the result of a particular default. It would not be useful to examine the numerous decisions in which this question has received consideration, for no case exactly resembles another, and slight differences of fact may be of great importance. The rules of law are reasonably well settled, however difficult they may be of application to the varied affairs of life. In the case undoubtedly the plaintiff's injury was traceable to the original negligence, in the sense that it would not have occurred if the plaintiff had not been separated from his mother. Nevertheless, that negligence may not be the cause of the injury, in the meaning which the law attributes to the word 'cause' when used in this connection. The law, in its practical administration, in cases of this kind regards only proximate or immediate and not remote causes, and in ascertaining which is proximate and which remote refuses to indulge in metaphysical niceties. Where, in the sequence of events between the original default and the final mischief, an entirely independent and unrelated cause intervenes, and is of itself sufficient to stand as the cause of the mischief, the second cause is ordinarily regarded as the proximate cause and the other as the remote cause. Insurance Co. v. Tweed, 7 Wall. 44, 52 [19 L. Ed. 65]. This is emphatically true when the intervening cause is the act of some person entirely unrelated to the original actor. Nevertheless, a careless person is liable for all the natural and probable consequences of his misconduct. If the misconduct is of a character which, according to the usual experience of mankind, is calculated to invite or induce the intervention of some subsequent cause, the intervening cause will not excuse him, and the subsequent mischief will be held to be the result of the original misconduct. This is upon the ground that one is held responsible for all the consequences of his act which are natural and probable, and ought to have been foreseen by a reasonably prudent man."

And in Armour & Co. v. Harcrow, supra, the Circuit Court of Appeals said:

"An injury which is the natural and probable cause of an act of negligence is actionable, and such an act is the proximate cause of the injury. But an injury that could not have been foreseen or reasonably anticipated as the probable result of an act of negligence is not actionable, and such an act is either the remote cause, or no cause whatever, of the injury. The natural consequence of an act is the consequence which ordinarily follows it, the result which may reasonably be anticipated from it. A probable consequence is one that is more likely to follow its supposed cause than it is not to follow it [citing cases]."

Now, we do not intimate that the subject should have been elaborately discussed in the charge, but unless the jury received adequate in-

structions thereon they could neither know nor apply the rules that have thus been laid down for the federal courts. We cannot assume that the jury knew how to deal with the testimony, unless they were properly instructed, and the matter should have been explained with sufficient clearness. Unfortunately the trial judge passed over the subject altogether, barely alluding to it in one sentence of the charge, "* * * And, second, was his death the proximate result of the defendant's negligence?" although the general subject had been brought to his attention by the company's fifth and ninth points, which asked for instructions that the plaintiff could not recover unless the company had been guilty of negligence that was the proximate cause of the death. In our opinion, the charge was inadequate on this vital matter, and for this reason alone it would be necessary to reverse the judgment.

But we think we should say, also, that upon the evidence presented by this record the defendant was entitled to binding instructions. So far as appears, the proximate cause of the decedent's death may as well have been his own negligence, or some unexplained happening, as the company's negligence in leaving the bridge unguarded. Practically the jury was permitted to guess at what had occurred, without sufficient evidence to point to the company's negligence as the dominant, efficient, cause. Nobody could tell what started the train of events that ended in the decedent's plunge into the river. He may have voluntarily left a concededly safe place, and taken up a position of danger; if so, was his death solely due to his own fault? He may have slipped; he may have stumbled over something lying in the roadway, for whose presence the company was not liable; he may have stumbled awkwardly over his own feet, as sometimes happens; he may have been seized with dizziness, as not infrequently occurs with people otherwise in good health; or he may have been suddenly attacked by some more serious disorder. He may perhaps have been led by curiosity to look at the stream, and may have lost his balance. In short, the slight evidence is consistent with any one of several theories concerning what took place, and does not point satisfactorily toward one rather than another. In such a situation the jury should not have been allowed to indulge in conjecture, but in effect, this, we think, was done. Without further evidence pointing to the company's negligence as the proximate cause of the death, the District Judge should instruct the jury at another trial to find for the defendant.

The judgment is reversed, and a new trial is awarded.

On Reargument.

PER CURIAM. This case has been reargued, but we see no reason to change the conclusion already reached, or the opinion supporting that conclusion. Indeed, the reargument did not touch one sufficient reason for reversal, namely, the inadequacy of the charge concerning the federal rule affecting proximate cause.

The judgment heretofore entered will therefore not be disturbed.

SIERRA v. UNITED STATES.

(Circuit Court of Appeals, First Circuit. May 25, 1916.)

No. 1156.

1. PLEADING ⟸214(1)—DEMURRER—EFFECT OF.
A demurrer to the answer admits all averments of fact therein contained.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 525, 529; Dec. Dig. ⟸214(1).]

2. CUSTOMS DUTIES ⟸134—INDICTMENT—CONSTRUCTION.
Rev. St. § 2865 (Comp. St. 1913, § 5548), declares that if any person shall knowingly and willfully, with intent to defraud, smuggle into the United States any goods subject to duty and which should have been invoiced, without paying the duty, and shall make out or attempt to pass through the customs house, any false invoice, he shall be deemed guilty of misdemeanor. Section 3082 (section 5785) declares that if any person shall fraudulently and knowingly import into the United States, or assist in so doing, any merchandise contrary to the law, such merchandise shall be forfeited and the offender fined. An indictment charged that defendant fraudulently and knowingly imported into the United States, contrary to law, goods subject to customs duty, importing them clandestinely, secretly, and without an entry being made at the customs house as required by law, and without the payment of duty thereon, with intent to defraud the United States of its lawful revenue. *Held* that, though the indictment was predicated on section 3082, it also charged the offense denounced by section 2865.

[Ed. Note.—For other cases, see Customs Duties, Cent. Dig. §§ 336–339; Dec. Dig. ⟸134.]

3. CUSTOMS DUTIES ⟸133—FORFEITURES—BAR BY INDICTMENT—CONCLUSIVENESS—MATTERS CONCLUDED.
In such case, as the indictment charged a violation of both sections, an acquittal under the indictment is a bar to a proceeding under Rev. St. § 3082 (Comp. St. 1913, § 5785), to forfeit the goods introduced into the country, where the libel of information charged the same acts contained in the indictment and the essentials of both sections.

[Ed. Note.—For other cases, see Customs Duties, Cent. Dig. §§ 316–331; Dec. Dig. ⟸133.]

In Error to the District Court of the United States for the District of Porto Rico; Hamilton, Judge.

Libel of information by the United States of America against seventeen pieces of jewelry, claimed by Francisco Sierra. A demurrer to a paragraph of the answer was sustained, and defendant brings error. Reversed and remanded.

Carroll G. Walter, of New York City (Edward J. Patterson, of New York City, on the brief), for plaintiff in error.

James S. Allen, Jr., Asst. U. S. Atty., of Boston, Mass. (George W. Anderson, U. S. Atty., of Boston, Mass., on the brief), for defendant in error.

Before DODGE and BINGHAM, Circuit Judges, and ALDRICH, District Judge.

BINGHAM, Circuit Judge. This was a libel of information brought by the United States Attorney for Porto Rico, in the District Court for

that district, against 17 pieces of jewelry described in the libel, and under seizure by the collector of customs for that district, as being forfeited to the United States. The "grounds or causes" of forfeiture set out in the libel are as follows:

"That on or about, to wit, the twenty-second day of January, in the year of our Lord one thousand nine hundred and fifteen, the said goods, wares, and merchandise were, by one Francisco Sierra, late of the republic of Venezuela, fraudulently and knowingly imported and brought into the United States, contrary to law, to wit, at the city of San Juan, in the district of Porto Rico, from the republic of Venezuela, said goods, wares, and merchandise, having been so imported, contrary to law, in that they were, when so imported and brought into the United States, subject by law to the payment of a customs duty to the United States, and in that said goods, wares, and merchandise were imported and brought into the United States, as aforesaid, clandestinely and secretly, and without an entry thereof being made at the customs house of the United States, as required by law, and without the payment of the duties thereon, or any part thereof, and with intent to defraud the United States of its lawful revenue, contrary to the statutes of the United States in such case made and provided."

Sierra appeared and filed a claim to the property and an answer, wherein he denied all the allegations of the libel, and in paragraph 7 set up the following defense:

"And, further answering, the said claimant alleges that the fraudulent acts, omissions, and intents set out in said libel, and the importation and bringing into the United States of said seventeen pieces of jewelry alleged therein, are the same acts, omissions, and intents, and the same importation and bringing in of the said articles of jewelry, as are recited and charged in an indictment presented and filed against him at the April term of this court, 1915, and that the fraudulent importation and bringing into the United States of the said articles of jewelry, and the clandestine and secret introduction of the same, and intents to defraud the revenues of the United States alleged in the said libel, might have been established if said allegations be true under sections 3082 and 2865 of the Revised Statutes of the United States upon which or some one or more of which the counts in said indictment were based; that all competent evidence which would be necessary to establish the fraudulent, clandestine, and secret importation and bringing in of said articles of jewelry, and intents to defraud the revenues and to establish the liability of such articles to the payment of duties, would also be competent and would tend to establish the allegations of this libel; that the charges of fraud and causes for forfeiture alleged by plaintiff herein relate to the same subject-matter and are based upon the same acts, omissions, and intents as the various allegations in said indictment contained.

"And claimant avers and says that the United States ought not to maintain its action herein for forfeiture of the said property under the provisions of section 3082 of the Revised Statutes, for at the April term, 1915, in the district and in this court, an indictment, the same above referred to, was found against him, based upon the sections 3082 and 2865 of the Revised Statutes, or on some one or more of them, alleging the fraudulent, clandestine, and secret importation and bringing into the United States of the said articles of jewelry with intent to defraud the revenues; that the counts in the said indictment contained the same charges in substance and effect, and are the same allegations of offenses and frauds, and are founded on the same sections of the statutes of the United States, as the matters and things alleged herein in plaintiff's libel, and he says that all and singular of said matters at said term, and in this court, were tried and inquired into and fully heard, and on the hearing thereof the jury * * * found this defendant not guilty, and the court rendered a judgment acquitting this defendant of the fraudulent acts, omissions and intents therein alleged, and all of which are the same fraudulent acts, omissions, and intents now set out by plaintiff, and

herein answered by the claimant; that all and singular the premises are true."

The United States filed a demurrer to this paragraph of the answer, assigning as ground therefor that it did not state facts sufficient to constitute a defense to the cause of action alleged in the information. The demurrer was sustained, trial by jury was waived, and by agreement of the parties the cause was tried by the court upon the evidence presented at the trial of the criminal cause. The court found for the United States, except as to 3 pieces of the jewelry, and judgment was entered condemning the remaining 14 pieces as forfeited.

The cause is brought here on the claimant's writ of error, and the errors assigned are:

(1) That the court erred in sustaining the demurrer and in deciding that the facts set forth in the paragraph above quoted from the answer did not constitute a defense to the suit.

(2) In holding that, upon the allegations of the libel, it was not necessary to prove a fraudulent intent of the party claimant.

(3) In rendering judgment against the claimant declaring forfeited the 14 pieces of jewelry.

(4) In giving judgment against the claimant upon the same issues and facts previously decided in favor of the claimant by the verdict of the jury.

The ground assigned for sustaining the demurrer in the District Court was that the acquittal in the criminal case which was pleaded as a bar to the suit for forfeiture was not conclusive, in that it was not necessary in that suit to prove that the jewelry was imported with an intent to defraud the government of its revenue, while in the criminal case it was. The contentions of counsel as presented to us relate to this question.

Counsel for the claimant, in support of their contention that the plea set out in the answer was a bar to the libel, rely largely upon the cases of Coffey v. United States, 116 U. S. 436, 6 Sup. Ct. 437, 29 L. Ed. 684, and United States v. A Lot of Precious Stones, 134 Fed. 61, 68 C. C. A. 1, decided by the Circuit Court of Appeals for the Sixth Circuit. Both cases were civil informations to condemn certain personal property as being forfeited to the United States. In the first case it was sought to enforce the forfeiture on account of the violation of certain statutes relating to distilled spirits, while in the latter the forfeiture was sought on account of violation of statutes relating to duties on imports. In both cases pleas in bar were filed containing allegations of fact substantially of the same nature as those set out by the claimant in his plea, and in both cases it was held that the judgment in the criminal proceeding was a bar to the proceeding to forfeit the property. In the Coffey Case, 166 U. S. at page 443, 6 Sup. Ct. at page 440 (29 L. Ed. 684), the court said:

"Where an issue raised, as to the existence of the act or fact denounced, has been tried in a criminal proceeding instituted by the United States, and a judgment of acquittal has been rendered in favor of a particular person, that judgment is conclusive in favor of such person on the subsequent trial of a suit in rem by the United States, where, as against him, the existence of the same act or fact is the matter in issue as a cause for the forfeiture of

the property prosecuted in such suit in rem. It is urged as a reason for not allowing such effect to the judgment that the acquittal in the criminal case may have taken place because of the rule requiring guilt to be proved beyond a reasonable doubt, and that, on the same evidence, on the question of preponderance of proof, there might be a verdict for the United States in the suit in rem. Nevertheless the fact or act has been put in issue and determined against the United States, and all that is imposed by the statute, as a consequence of guilt, is a punishment therefor. There could be no new trial of the criminal prosecution after the acquittal in it, and a subsequent trial of the civil suit amounts to substantially the same thing, with a difference only in the consequences following a judgment adverse to the claimant.

"When an acquittal in a criminal prosecution in behalf of the government is pleaded or offered in evidence by the same defendant, in an action against him by an individual, the rule does not apply, for the reason that the parties are not the same, and often for the additional reason that a certain intent must be proved to support the indictment, which need not be proved to support the civil action. But upon this record, as we have already seen, the parties and the matter in issue are the same."

To avoid the effect of the decision in the Coffey Case as being controlling here, the District Attorney makes the following contentions: (1) That the indictment in the criminal case against Sierra was based on section 2865 of the Revised Statutes (Comp. St. 1913, § 5548), which relates to smuggling or clandestinely introducing dutiable articles, which should be invoiced, into the United States, without payment of duty and without invoicing the same, and with intent to defraud the government of its revenue; (2) that the information is brought under section 3082 of the Revised Statutes (section 5785), and that, under this section, in an information to enforce a forfeiture of property, it is not necessary to allege or prove that the goods sought to be condemned were imported with an intent to defraud the government of its revenue; that it is at least sufficient if it appears that the importer knew that the goods were imported contrary to law (Friedenstein v. United States, 125 U. S. 224, 233, 8 Sup. Ct. 838, 31 L. Ed. 736; Cotzhausen v. Nazro, 107 U. S. 215, 219, 2 Sup. Ct. 503, 27 L. Ed. 540); and (3) that if it be necessary, under section 3082, to allege and prove wherein the importation was knowingly "contrary to law," the libel charges that the importation was unlawful for two reasons: (a) because the jewelry was subject to the payment of customs duty and none was paid; and (b) because they were imported clandestinely and secretly without entry at the customs house as required by law, and that, under section 2799 (section 5496), it is made a violation of law to import goods without entry thereof at the customs house, even though they are not subject to duty.

[1, 2] Did the indictment charge an offense denounced by section 2865? In the plea it is alleged that the fraudulent acts, omissions, and intents set out in the libel, and the importation alleged therein, are the same acts, omissions, and intents and the same importation as are recited and charged in the indictment; that the charges of fraud and causes for forfeiture alleged by plaintiff in the information relate to the same subject-matter and are based upon the same acts, omissions, and intents as the various allegations in said indictment contained; and that the counts in said indictment contain the same charges in substance and effect, and are founded on the same sections of the stat-

utes of the United States, as the matters and things alleged in plaintiff's libel. These allegations are all admitted in so far as they are allegations of fact and not of law, and they are all allegations of fact with the possible exception of the one in which it is alleged that the charges in the two proceedings are founded on the same sections of the statutes of the United States. Inasmuch as, by the demurrer, it is admitted that the indictment contained the same charges and the same allegations of offenses and of frauds as the matters and things alleged in the libel, we think it is plain that, while the indictment must have been brought under section 3082 (Keck v. United States, 172 U. S. 434, 437, 19 Sup. Ct. 254, 43 L. Ed. 505; Rogers v. United States, 180 Fed. 54, 58, 103 C. C. A. 408, 31 L. R. A. [N. S.] 264; United States v. Kee Ho [D. C.] 33 Fed. 333), the acts, omissions, and intents alleged as rendering the importation "contrary to law" were those denounced by section 2865.

[3] We are also of the opinion that the information was likewise brought under sections 3082 and 2865. The allegations of the information wherein it is set out that the importation was "contrary to law" include the following elements: (1) That the goods were, when imported, subject by law to the payment of a customs duty to the United States; (2) were imported clandestinely and secretly; (3) without an entry thereof being made at the customs house of the United States as required by law; (4) without the payment of the duties thereon; and (5) with intent to defraud the United States of its lawful revenue. These are the five specific elements constituting the offense denounced in section 2865, and demonstrate that the information was based on that section taken in connection with section 3082. They are not the assignment of two causes, wherein the importation was "contrary to law," as the government contends, but of a single cause, into which all the enumerated elements enter. Therefore, as the acts, omissions, and intents denounced in section 2865 are set out in the information as showing wherein the importation in question was "contrary to law," and section 2865 provides that the acts therein denounced shall have been done with the intent to defraud the United States of its revenue, it was necessary, in order to sustain the information, to prove such an intent. This being so, we are of the opinion that the plea was a bar to the suit, and that the court below erred in sustaining the demurrer.

If in the information the government, instead of alleging that the importation was "contrary to law" in the way and manner therein set out, could have alleged acts in violation of some other provision or provisions of law, rendering the goods liable to forfeiture, and not involving an intent to defraud the United States of its revenue, that is not this case.

The judgment of the District Court is reversed, and the case is remanded to that court, with directions to enter a judgment not inconsistent with this opinion.

RIEDERICH v. McCOOK COUNTY et al.

(Circuit Court of Appeals, Eighth Circuit. May 16, 1916.)

No. 4545.

1. DRAINS ⊂=28—ESTABLISHMENT BY PUBLIC AUTHORITIES—PROCEEDINGS—PETITION.

Under Laws S. D. 1907, c. 134, § 2, which authorizes boards of county commissioners to order the construction of drains on the filing of a petition by landowners affected, setting forth the necessity for the drainage and "a description of the proposed route by its initial and terminal points and its general course," and also provides for a subsequent inspection of the locality by the board with the aid of a surveyor, with power to make changes according to their judgment, such petitions should be regarded liberally, since they are usually prepared by men who are not experts, and a petition which fixes the initial point of a drain as on a described 40-acre tract is sufficiently specific to give the board jurisdiction.

[Ed. Note.—For other cases, see Drains, Cent. Dig. §§ 20–23; Dec. Dig. ⊂=28.]

2. DRAINS ⊂=35—ESTABLISHMENT BY PUBLIC AUTHORITIES—RECORD OF PROCEEDINGS.

Further provisions of such statute are that the board shall determine the exact line and width of the ditch and file their determination with the petition; that they shall then fix a time for hearing and give public notice of the same, and that if at such hearing they shall act favorably and order the drain they shall give it a name, and "the proceedings thereafter taken shall be recorded and indexed in a book kept for that purpose in the auditor's office." *Held* that, under such special provisions, the board is not required to make a record of its decisions prior to such hearing, notwithstanding a general provision of Pol. Code S. D. § 824, that the board shall "keep a book in which all orders and decisions made by them shall be recorded."

[Ed. Note.—For other cases, see Drains, Cent. Dig. §§ 40–42; Dec. Dig. ⊂=35.]

3. EVIDENCE ⊂=333(2)—COMPETENCY—TRANSACTIONS OF COUNTY BOARD.

Where the books of record of transactions of boards of county commissioners or other similar public bodies are not by statute made the sole evidence, such transactions may be proved by papers on file, or by proof of their contents, if lost or destroyed.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1248; Dec. Dig. ⊂=333(2).]

Appeal from the District Court of the United States for the District of South Dakota; James D. Elliott, Judge.

Suit in equity by Joseph Riederich against McCook County, S. D., and others. Decree for defendants, and complainant appeals. Affirmed.

Edward E. Wagner, of Sioux Falls, S. D., for appellant.

A. K. Gardner, of Huron, S. D., E. H. Wilson, of Salem, S. D., and Irwin A. Churchill, of Huron, S. D., for appellees.

Before HOOK and SMITH, Circuit Judges, and REED, District Judge.

HOOK, Circuit Judge. This was a suit by a property owner to cancel special tax certificates issued by the authorities of McCook

county, S. D., in drainage proceedings. Upon final hearing the trial court held that the proceedings were in compliance with the state statutes, that plaintiff had actual knowledge and notice of them in time to have appealed or otherwise to have asserted his objections, but allowed the improvement to go to completion at a large cost without complaint, save as to one matter which was corrected at his instance, and that his land was actually benefited by the needed improvement more than the amounts charged against him. The bill was dismissed on the merits, and the plaintiff appealed.

[1] The statutes of South Dakota provide that the board of county commissioners to which such matters are committed shall act only upon a petition of one or more owners of lands likely to be affected, setting forth the necessity for the drainage, "a description of the proposed route by its initial and terminal points and its general course," etc. Laws 1907, c. 134, § 2. It is urged that the petition for the drain in question is so defective in the description of the initial point that the board never acquired jurisdiction to go ahead. The petition specified the point as being on a certain forty-acre tract of land directly east of the land of plaintiff. The initial point or head of the drain was afterwards located by the board and the surveyor about a third of a mile westward on plaintiff's land. There is no merit in the criticism of the petition. Petitions of that kind should be regarded liberally. They are generally prepared by men without the aid of a surveyor and without personal ability to select the most practicable termini and route of a drain. The case in hand is illustrative. On the lands of plaintiff and his neighbor on the east there was a lake of varying depth covering about 80 acres which it was desired to drain. Obviously the selection of the most advantageous initial point called for knowledge and skill not commonly possessed. The statutes of the state recognize such difficulties by providing for a subsequent inspection of the locality by the board with the aid of a surveyor, and by conferring power upon the board to make changes according to their judgment in the premises, giving property owners to be affected due opportunity to be heard. In Smith v. Pence, 33 S. D. 516, 146 N. W. 709, the court upon an exhaustive consideration of precedent held a petition sufficient in which the initial point of a proposed drain was specified generally as being on the north line of a quarter section of land, a half mile in length. In the case before us the fixing by the board of the initial point of the drain on complainant's land instead of on the land adjoining on the east made a shorter drain and was in the interest of efficiency and economy. A subsequent extension of the drain further into plaintiff's land than as established by the board was in conformity with his special request.

[2] It is also urged that in the proceedings subsequent to the petition, the board of county commissioners failed to comply with certain statutory provisions of a mandatory character. But one of the instances claimed need be noticed; the others are of no greater importance. The statute provides that after personal inspection or after the receipt of the surveyor's report the board of county commissioners shall determine the exact line and width of the ditch, if not fixed in

the petition, and file their determination with the petition; that they shall then fix a time and place for the hearing of the petition and give public notices by publication and posting. Laws 1909, c. 102, § 2. As to this it is contended that the general provision of the Political Code of the state (section 824) requires the board to "keep a book in which all orders and decisions made by them shall be recorded" with an exception not material here; that the only competent evidence of the action of the board upon the matters referred to was such a record book; and finally no such book was produced at the trial, but, on the contrary, the court admitted parol and other evidence of what was done. Since there is a special provision on this subject in the drainage statutes it may be questioned whether the general provision of the Political Code applies. As already noted, the section of the drainage statute relating to the determination by the board of the exact line and width of the ditch and of the time and place of hearing the petition provides that they "shall file their determination with the petition." There is no suggestion here of the necessity of a record of such action in a book. The succeeding section of the same statute relates to the meeting of which notice has been given and to the hearing on the petition for the drain. It provides that, if the board act favorably and decide to go on with the work, they shall give the drain a name *"and the proceedings thereafter taken shall be recorded and indexed in a book kept for that purpose in the auditor's office."* Nor is there any suggestion here of the necessity of a recording of the prior decisions of the board. Indeed the implication of the special provision is to the contrary. Moreover such provisions are sometimes held to be mere statutory requirements of a clerical duty not essential to the validity of the proceedings. See Hackney v. Elliott, 23 N. D. 373, 137 N. W. 433.

[3] The course indicated was followed in the case before us. The entries in the record book commenced with those of the meeting at which the petition was heard. The state statutes do not declare that record books shall constitute the sole evidence of the action of the board of county commissioners. The determination of the line and width of a ditch prior to the hearing and the fixing of a time and place for the hearing of the petition were provisional and preliminary, and it was not contemplated that a record thereof should be relied upon as imparting constructive notice to property owners. Those matters were cared for by the notices which were required by the statute to be given. The proof of the action of the board in the instance in question was therefore properly received. Sims v. Milwaukee Land Co., 20 Idaho, 513, 119 Pac. 37; Nickeus v. Lewis County, 23 Wash. 125, 62 Pac. 763; Burrows v. Kinsley, 27 Wash. 694, 68 Pac. 332. It is common knowledge that transactions of boards of county commissioners and of other similar public bodies are frequently shown in filed papers, as distinguished from accounts or transcripts recorded in books. Where the latter is not commanded by statute and made the sole evidence, the former are admissible as proof; and when they have been lost or destroyed it is generally sufficient to show they once existed, and then their contents by the best evidence available.

In the case before us there was a record entry of the meeting at

which the petition for the drain was heard, and it showed indisputably the prior action of the board. It recited the meeting as having been "heretofore set and fixed"; that a notice was duly published in a newspaper, "which paper was designated by the board"; that the matter came on to be heard, and no person appeared to contest the petition, the surveyor's report, "and the finding of the board as to the width and route of said drainage, and which was established and fixed by said board"; that after full hearing the drainage was established along the line set forth in the petition *"and in the findings of the board prior to said hearing and on the 10th day of July, 1909, duly filed herein."* Other references appear to the prior action of the board. Moreover, testimony was received that the prior proceedings were reduced to writing, signed by the chairman of the board, attested and filed by the county auditor as ex officio clerk, and placed among the files. This was missing from the files, but an identified carbon copy of the original was received in evidence, and its contents agreed with the recitals in the record book. It would be idle to pursue this matter further.

Other objections to the validity of the proceedings are urged. Some of them are not warranted by the bill of complaint, some are not embraced in the assignments of error, and none are more meritorious than those discussed.

The decree is affirmed.

SAN FRANCISCO BREWERIES, Limited, v. BRAINARD.

(Circuit Court of Appeals, Ninth Circuit. May 1, 1916.)

No. 2620.

MUNICIPAL CORPORATIONS ⇐706(6)—STREETS—INJURIES TO PERSONS—JUDGMENT—EVIDENCE—SUFFICIENCY.

In an action by one run down by a team of horses, the questions whether the team was in charge of defendant at the time of the injury, it appearing defendant had hired the horses, and whether defendant was guilty of negligence, *held* under the evidence for the jury.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1518; Dec. Dig. ⇐706(6).]

In Error to the District Court of the United States for the Second Division of the Northern District of California; Wm. C. Van Fleet, Judge.

Action by Sylvia A. Brainard against the San Francisco Breweries, Limited. There was a judgment for plaintiff, and defendant brings error. Affirmed.

H. B. M. Miller and William Rix, both of San Francisco, Cal. (L. M. Hoefler, of San Francisco, Cal., of counsel), for plaintiff in error.

Harrison & Harrison, Richard C. Harrison, Byron F. Stone, Jr., and Stanley Moore, all of San Francisco, Cal., for defendant in error.

Before GILBERT and ROSS, Circuit Judges, and RUDKIN, District Judge.

⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

ROSS, Circuit Judge. The record in this case shows that the defendant in error, who was plaintiff in the court below, while standing on the sidewalk at the corner of Twentieth street and Broadway, in the city of Oakland, was without fault on her part struck by a team of runaway horses, thrown down, kicked, and trampled upon, thereby sustaining very serious injuries, for which she brought the suit to recover damages against the plaintiff in error.

The record shows that at the time in question the plaintiff in error was operating a brewery known as the John Wieland Brewery, situated on the westerly side of Broadway, between Nineteenth and Twentieth streets, of Oakland, to which premises were two entrances from Broadway, each about 10 feet wide, at the rear of which was a barn. The team of horses that caused the injuries to the plaintiff was owned by one Thun, from whom the plaintiff in error had hired it for that day. Thun took the horses to the brewery shortly after 7 o'clock a. m., and left them there in charge of employés of the plaintiff in error, who used them during the day for drawing a wagon of the Brewery Company. During the afternoon Thun was notified by telephone that the horses would not be needed the following day, and was told to call for them at about half past 5 o'clock in the afternoon, which he accordingly did.

The real questions involved on the trial were: First, in whose possession or control was the team at the time the horses started to run away? and, secondly, the question of negligence. The instructions of the trial court to the jury upon those questions were clear and correct, and, in our opinion, covered the case. It is insisted, however, on the part of the plaintiff in error, that the evidence was practically without substantial conflict that at the time the horses started to run away they were not in the possession or under the control of the defendant, but had theretofore been delivered over to their owner, Thun, in which event the plaintiff in error could not be liable for damages inflicted by them, and, further, that even if the team, at the time of starting to run, was in the possession of the plaintiff in error, the evidence was likewise without substantial conflict that there was no negligence on the part of the latter, and therefore that the court should have taken the case from the jury and directed a verdict in favor of the defendant to the action.

A brief reference to the evidence will readily solve those contentions. It is undisputed that one Crow, an employé of the plaintiff in error, was the man who drove the team during the day, and upon the completion of his route drove it back to the brewery and left it hitched to the wagon and standing in one of the driveways mentioned, 20 or 30 feet back from the entrance and facing it. The substance of the testimony of Thun, so far as the points in question are concerned, is that when he rented the team to the Brewery Company he told them "that it was a free team, and I did not like to let everybody have it. They said they would take good care of it. By free team I mean free team in traveling. I suppose it was the manager that called me up. I do not know his name. I know him when I see him. I took the team over there the next morning at 7 o'clock, and saw the man, I

suppose it was, that was taking care of the barn; I told him about it. I do not know his name. He was the man I saw there taking care of the barn. I told him the team had done nothing for a couple of days, to be a little careful with them, because a team that does not do anything for a couple of days, they are feeling quite full of life, and a person cannot trust them any. He said he would look after that, and I left the team there."

Thun further testified that: When he went to get the team, about half past 5 o'clock in the afternoon, "the team was standing in the yard hooked to the wagon. By the word 'yard' I mean kind of a shed or floor boarded up from the outside. There is a door where they drive in and out through." That when he went in the yard one of the attendants there said, "'There's your team; hold on, and we will unhitch 'em for you.' Then the driver and me started up toward the wagon, and I started for the office to make a settlement for the day's work, and he started to unhook them, and I started in the doorway, and they started off. * * * It was the driver who said, 'We will unhitch them.'" He further testified that, when he went to the office to get his money, the driver "went on up to the team; that is the last I seen of him until the team started."

The witness further testified, in substance, that when he next saw the driver he was lying on the sidewalk as if he had fallen or been knocked over; that the witness ran after the team, which was going at a full gallop, to the corner of the street at which the plaintiff received her injury, and where the skull of one of the horses was fractured—being about half a block from the doorway of the brewery. The witness also testified: That, when he took the horses to the brewery in the morning, Crow, Cooper, and McKinnon of the brewery were there, but he did not know which one of them took the horses. That he "told the three men that were there to be careful with the horses, because they had not worked for three days, and to watch out a little for them. The three men I saw were the two I have just seen—that is, Mr. Cooper and Mr. McKinnon—and the driver, Mr. Crow; and when I told them that all three of them were together. I handed the lines over to one of them, and they took the horses and hitched them up. I did not stand watching them. I went back to my business." That when he went for them in the afternoon, all three of the men mentioned were there, and that at that time the team was standing about 20 or 30 feet back from the street, with the heads of the horses facing Broadway. That when he went in he asked the men if they were through with the team.

On behalf of the defendant, Crow was called as a witness, and testified on direct examination, among other things, as follows:

"On the 29th day of May, 1914, I was in the employ of the San Francisco Breweries as a driver of a bottling wagon and two horses. I remember the accident that occurred at the premises of the brewery, on the west side of Broadway, between Nineteenth and Twentieth streets, about 5:30 o'clock in the afternoon of May 29, 1914. I was working as a driver for the brewery on that date. I was an extra driver for the brewery, and had worked, I think, about a week at that time, and then before that, maybe, a few days at a time, when they would call me. I continued in their employ for three or four days, I guess, after the accident. I drove the team that caused the acci-

dent. I was present at the brewery on the morning of the 29th day of May, 1914, when the team of horses which I drove on that day were brought there. A man by the name of Thun brought them, I think, about 7:15, or somewhere near that, in the morning. These horses were driven into the brewery premises by Thun, on the south driveway. They were harnessed when he brought them. I asked him if the horses were wild in any way, and he said, 'No; they are free drivers; one of them is a free driver.' Thun, I think, stayed there while Cooper, McKinnon, and myself hitched up the horses; but I am not sure of that. I got back to the brewery, after the day's work, about 4 o'clock in the afternoon. When I got back there there was no further route for me to drive over during the day. I drove into the place where we always unload our empties, and unloaded all of the empties, and went in to cash in with Mr. Walker. I went out and asked the stable man, 'Shall I unhitch them?' and he said, 'No; they have already telephoned us that the gentleman was coming after his team.' I put them at the platform where we always load up, at the same place that we drive them in, and left them standing there. That was the platform nearest Broadway. * * * When I stopped the wagon and the horses there I put on the brake and tied the lines up. There were no rings on the lines. When I drove into the brewery I set my brakes, and there were no rings on the lines, and there is a rail on the back of the seat. I just tied a loop right there with the lines, like you would tie a bowknot and put the lines through, and pulled them through like this (illustrating). The brakes were set. The lines were pulled back about the same as the rings would set them, pretty tight. I was on the platform next to the icehouse, over where they keep the keg of beer. It is just this side of the stable. The platform I refer to is the one on the diagram (Defendant's Exhibit A) shown as adjoining the stable. It is designated on the diagram as 'Loading Platform.' I was there alone until Mr. Thun came in. He came up and sat down on the platform alongside of me. Cooper and McKinnon were working on the horse, that had a nail in its foot. They were right at the doorway of the barn or stable. When Thun came up, he said something about his team, and Cooper said, 'They are waiting in the driveway,' or something to that effect. Thun and I talked possibly five minutes, and then he said, 'All right, I will take my team.' I said, 'All right, I have been driving them all day, and I will come and help you unhitch them.' He then started off ahead of me toward the team, and I followed up behind him. He possibly was three paces ahead of me. He went on the left-hand side of the wagon, and I went on the right-hand side, and he walked from this platform, and I went on the right. There is no platform there, just a gangway there; and all at once the horses started to go, and I made a jump on the step and grabbed for the lines, and I caught one line, and they dragged me through the doorway. I suppose I went through a space of about two feet there, and they dragged me onto the curb, and I had to let go; I had only one line. I could not tell where Thun was at that time. He was on the other side of the wagon, and I could not tell. Just as I got to the step there was something started them. Then I made a grab for the lines and jumped on the step to get hold of the line. The brake was still on, and the lines were still fast. I got only one line. I hung onto the line to the curb, about 50 feet. The horses were right at the curb, right on Broadway there, when I dropped the lines. The reason I dropped it was I could not hold on any longer. They were turning to the left, and they would run over me, and I had to let go of the lines, they hurt me as it was."

On cross-examination the witness testified, among other things:

"When the team was brought in there that morning, Cooper told me that, as this is a strange team, I had better chain the wagon. I asked Mr. Thun if the horses were all right, and he said that one horse was a little bit bad about his head or something. He said one of them was a free horse. He referred to the one on the left-hand side; it had a halter on it. Q. Had you noticed during the day that that horse was unusually free? A. Yes; up until possibly I had reached Elmhurst. After that he was quiet. Q. Did you ever state that you knew that horse was a free horse, and that, in fact, he had several times during the day tried to run away from you? A. Only in the

morning he was. He may not have tried it, but it appeared that way to me. He was a good free horse; he was right on the bit all the time. Q. Did you tell Mr. Thun that night, when he came in there, that the horse was a good free horse, and had been on the bit all day? A. I could not tell you whether I did or not. Q. Is not it a fact that you told him they were a good team, and had been on the bit all day? A. I don't remember if I did. Q. Do you remember his asking you how you got along with the team? A. I do not. Q. Is not it a fact that you stated to Inspector Hodgkins that the left horse of the team was a bad horse? A. After he had run away, I might have; yes. Q. Did not you say to him, further, he tried several times during the day to run away? A. In the morning I do not know if he tried to run away; but, as I said before, he was a good free horse; he would have gone if you had let him go. Q. Whether he was a good free horse or not, did you make the statement to the inspector on June 6th that he was a bad horse, and that he tried several times during the day to run away? A. I may have made that statement; yes, up till that time in the morning."

Enough has been quoted from the testimony, we think, to show that the case was plainly one for the jury to determine the two questions of fact upon which the rights and liabilities of the respective parties depended.

The judgment is affirmed.

JONES et al. v. MISSOURI-EDISON ELECTRIC CO. et al.

(Circuit Court of Appeals, Eighth Circuit. May 1, 1916.)

No. 4283.

1. CORPORATIONS ⊂=584—IMPROPER CONSOLIDATION—VALUE OF STOCK.
Where the holders of the majority of the shares of two corporations improperly consolidated them, and the new company did not immediately declare dividends, that fact is not conclusive as to the value of the properties consolidated, and the master appointed to ascertain such value in a suit by the minority shareholders should not proceed by a capitalization on the first dividend declared after consolidation, but should consider all other competent evidence.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2343-2347; Dec. Dig. ⊂=584.]

2. CORPORATIONS ⊂=584—IMPROPER CONSOLIDATION—VALUE OF STOCK.
In determining the value of corporate property which was consolidated, the master should not reject evidence as to the value of the properties consolidated, because it was not sufficient alone to show value.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2343-2347; Dec. Dig. ⊂=584.]

3. CORPORATIONS ⊂=584—CONSOLIDATION—IMPROPER CONSOLIDATION.
Where the holders of a majority of the shares of two corporations consolidated such companies in violation of the rights of the minority shareholders, the minority shareholders, upon recovering the value of their shares, are entitled only to interest at the statutory rate from the date of the improper consolidation, without annual stops in computation, and are not entitled to counsel fees necessarily expended in their suit, for their recovery does not inure to the benefit of the corporation in which they held shares, although such fees may be determined and paid out of the recovery, and the surplus distributed.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2343-2347; Dec. Dig. ⊂=584.]

Appeal from the District Court of the United States for the Eastern District of Missouri; David P. Dyer, Judge.

Action by Morgan Jones and others against the Missouri-Edison Electric Company and others. From the decree, plaintiffs appeal. Reversed and remanded, with directions.

Eleneious Smith, of Los Angeles, Cal., David T. Bomar, of Ft. Worth, Tex., and Ford W. Thompson, of St. Louis, Mo. (Douglas W. Robert and William B. Thompson, both of St. Louis, Mo., on the briefs), for appellants.

Theodore Rassieur, of St. Louis, Mo., and C. M. Rosecrantz, of New York City (H. S. Priest and B. Schnurmacher, both of St. Louis, Mo., on the brief), for appellees.

Before HOOK and CARLAND, Circuit Judges, and AMIDON, District Judge.

HOOK, Circuit Judge. This is an appeal by holders of 3179 shares of preferred stock of the Missouri-Edison Electric Company from a decree of relief from an inequitable consolidation of their company with the Union Electric Light & Power Company effected by an abuse of power by majority stockholders who had control of both companies. For brevity the constituent companies have been called the "Edison Company" and the "Union Company No. 1," and the consolidated company, the "Union Company No. 2." We shall adopt those designations. The history of the litigation will be found in Jones v. Missouri-Edison Electric Co. (C. C.) 135 Fed. 153; 75 C. C. A. 631, 144 Fed. 765; 117 C. C. A. 442, 199 Fed. 64; 122 C. C. A. 247, 203 Fed. 945—and need not be repeated here.

[1] On a former appeal it was held that in addition to a fair adjustment of the relative values of the properties, tangible and intangible, of the two constituent companies, the appellants as minority stockholders of the Edison Company were entitled to share in the accession of value resulting from the consolidation and in the potential value of a power installation known as the "Ashley street plant." The decree of the trial court was reversed and the cause was remanded—

"with instructions to ascertain the value of the property of Union Company No. 2 immediately after its consolidation, to assign 43 per cent. of that value to the Edison Company, to find the value of the stock of the appellants on that basis, and to enter a decree to rehabilitate the Edison Company, or that the appellants have a lien upon the property of Union Company No. 2 for the value of their stock and interest thereon from the date of the consolidation, and the costs of this suit, and that that lien be foreclosed, or for such other permissible relief in equity as to the court below shall seem meet and effective to satisfy the claim of the appellants, unless within a short day, named by the court, the defendants shall pay to the appellants the said value of their stock, and interest thereon from the date of the consolidation, and the costs of this suit."

The decree now before us was rendered upon a confirmation of the report of a master to whom the matters were referred. It was conceded that the rehabilitation of the Edison Company was practically impossible. All that remained was to give appellants a money decree with means for enforcing it, also incidentally to ascertain and make

suitable provision for the costs and expenses of the litigation. The consolidation occurred September 9, 1903, but as the business was in a transitional condition for some months afterwards and the consolidated company, Union Company No. 2, opened its books December 31, 1903, the latter date was taken as a time for convenient figuring. The master found the value of the property of Union Company No. 2 on December 31, 1903, to be $5,121,772.23, of which he assigned 43 per cent., or $2,202,362.05, to the Edison Company according to the mandate of this court. The capital stock of the Edison Company was $4,000,000, consisting of 20,000 shares of preferred and an equal amount of common. The master then found the relative values of these shares as 2 to 1, and on that basis set off $1,468,241.36 of the Edison value to its preferred stock and determined that the 3,179 shares owned by appellants were worth $73.41 each. On that value he allowed them simple interest at 6 per cent. per annum from December 31, 1903. He also found the expenses of appellants' counsel and the value of their services. The latter was fixed with regard to the amount of actual recovery, instead of the entire value assigned to the Edison Company. The fees and expenses were charged upon the fund recovered, so that in the end the appellants would contribute thereto ratably.

The value of the property of Union Company No. 2 on December 31, 1903, was found in this way: The net income of the company for 1907, after deducting all operating expenses, fixed charges, $176,780.77 for depreciation, taxes, and interest, amounted to $469,951.92. The net income was then capitalized on a 7 per cent. basis, and the result, $6,713,598.37, was taken as the value December 31, 1907, of the equity in the incumbered consolidated properties. This amount was discounted back four years to December 31, 1903, at the same rate, 7 per cent., with annual rests. The result was $5,121,772.23, of which, as already noted, 43 per cent. was assigned to the Edison Company. The net income for 1907 was taken to start with, because, as believed, more likely to reflect intangible and potential values of the consolidation and the Ashley street plant, and also because the financial results of later years were complicated by the acquisition of other properties and further additions to capital.

The report of the master is an excellent one, but we think he erred in selecting a single method in ascertaining value, to the exclusion of a great mass of other evidence upon the subject. Moreover, the method selected was not altogether correctly applied. It is true that the first dividend upon the stock of Union Company No. 2 was not declared until 1907, but the discounting of the capitalized net income of that year back to 1903 implied an absence of net income for the years 1904, 1905, and 1906. The books of the company for those three years showed net income passed to surplus aggregating $642,112.54 after all deductions including $300,000 for depreciation were charged out. That dividends are not paid during the early years of a venture is frequently a choice of financial policies, without much, certainly without controlling, significance as to the value of the stock or of the property it represents; and during the formative or adjusting period stock is often recognized as having substantial value, even without net earnings

from the business. The theory adopted of discounting regardless of intervening factors and conditions, if pursued far, could be made to result in an initial value near the vanishing point, although the enterprise was being developed or constantly strengthened by a wise and conservative management.

[2] The very nature of the case precludes proof of value and damage with the precision of a mathematical computation. It is one which calls for the exercise of judgment upon consideration of every relevant evidential fact or circumstance. As we have said, there was a great mass of evidence upon the value of the property of Union Company No. 2, in which appellants had legal shares. To recite all of it would be unnecessarily tedious. There was error in subjecting each item to the test of self-sufficiency, instead of considering it as part of a whole. Evidence was received of the values of the separate properties of the constituent companies; the declaration in the articles of consolidation that the capital stock of $10,000,000 was fully paid by the combined properties, though qualified later by the retention of part of the stock in the treasury; a series of statements of values by a company that was an efficient actor in the consolidation and heavily interested in the stocks of the constituent and consolidated companies; representations by Union Company No. 2 of paid-up value in an instrument to increase its capitalization presented to a public official; the borrowing of $3,000,000, with an equal amount of stock as sole collateral, and an agreement by a responsible party to purchase the stock at par; an exhaustive report of capitalization, properties, values, earnings, and expenses, prepared by expert valuers and accountants, and adopted, sworn to, and submitted by Union Company No. 2 to a municipal public service commission in a matter of rates, included in which is a showing as of January 1, 1904; expert estimates based on earnings shown by the books; values extended on the records of Union Company No. 2 shortly after the consolidation; sales of and subscriptions to stock; exchange of stock for stock in a holding company, the market value of the latter, and the basis of exchange; testimony of the manager of the syndicate, which with an associate owned nearly all the stock of the constituent companies and effected the consolidation, that at the time of the consolidation the $5,850,000 of stock of Union Company No. 2 was worth par, and his responsible offer September 9, 1903, to buy all offered at that rate; and so on. Some of the evidence received is of a high and some of a low valuation; part is remote and of little evidential bearing, and part directly in point. We have considered it all, including that upon which the conclusion below was based, and are of the opinion that, after allowance for the incumbrances, the value of the equity in the tangible and intangible consolidated properties of Union Company No. 2 immediately after the consolidation was $7,500,000.

[3] The stockholders of the Edison Company were entitled to 43 per cent. of the value—$3,225,000. We think the master correctly determined the relative values of the preferred and common shares of the Edison Company; that is, that a preferred share was worth twice as much as a common share. That was the equation fixed by those who managed the consolidation. The result is an assignment of $2,150,000

to the 20,000 shares of Edison Company preferred stock, or $107.50 per share. The appellants own in varying amounts 3,179 of those shares. They were deprived of their rights September 9, 1903, and are entitled to interest from that time at 6 per cent. per annum. Having regard to the nature of the case and the principle of the recovery, we see no reason for a rate of interest greater than that prescribed by statute, for annual rests in the computation, for awarding counsel fees and expenses upon the basis of a recovery of $3,225,000 in the name of the Edison Company, nor for contribution thereto by others than appellants. The Edison Company is not restored or rehabilitated, and the ascertainment of the proportion to be assigned to it of the value of the consolidated properties is but a step in the process of determining the individual rights of appellants. Since Union Company No. 2 is not to be charged with appellants' counsel fees and expenses it is not concerned with the matter; but at the instance of appellants and at their cost the amounts may be judicially ascertained to the date of the decree and paid from the gross amount of recovery before distribution. We cannot say the findings below upon this matter are erroneous, but as the amounts were as of the time of hearing before the master, they should be brought by further proof to the date of the decree, so that what has since occurred shall receive consideration.

The decree below is reversed, and the cause is remanded, with directions to enter a decree, in accordance with the foregoing opinion, for a recovery by appellants from the consolidated Union Electric Light & Power Company of September 9, 1903, of amounts determined by the number of their shares of stock in the Missouri-Edison Electric Company at $107.50 per share, with interest thereon from September 9, 1903, at the rate of 6 per cent. per annum, and costs, excepting those incurred in the matter of appellants' counsel fees and expenses, adjudging the recovery, with interest and costs, to be a lien upon the property of the said consolidated company, fixing some short time for payment, and providing that upon default the property be sold to satisfy the decree; also to find the amounts of appellants' counsel fees and expenses, and to provide in the decree for the payment thereof and of the costs incurred in that matter from the gross recovery; and for the distribution of the balance among the appellants in proportion to their respective stockholdings upon surrender of their certificates of stock for the use of the consolidated company.

In re VANOSCOPE CO.

In re LOWERY.

(Circuit Court of Appeals, Second Circuit. April 11, 1916.)

No. 214.

1. BANKRUPTCY ⊂⊃444—ORDERS—PETITION TO REVISE.

A petition to revise an order of the District Court sitting in bankruptcy, not filed within the 10 days prescribed by rule 38 (150 Fed. liv, 79 C. C. A. liv), must be dismissed.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 920-927; Dec. Dig. ⊂⊃444.]

⊂⊃For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

2. BANKRUPTCY ⊂=446—ORDERS—PETITION TO REVISE.
An order made in a common-law action wherein the bankrupt was a defendant cannot, after bankruptcy, be reviewed on petition to revise orders in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 929; Dec. Dig. ⊂=446.]

3. BANKRUPTCY ⊂=11—PROCEEDINGS—JURISDICTION OF COURT.
After bankruptcy of the defendant, an order made in a common-law action against the defendant cannot be resettled in the bankruptcy proceeding.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 11; Dec. Dig. ⊂=11.]

4. BANKRUPTCY ⊂=440—ADJUDICATION—ORDER OF—PROCEEDING TO REVIEW.
Under Bankr. Act July 1, 1898, c. 541, §§ 24a, 24b, and 25, 30 Stat. 553 (Comp. St. 1913, §§ 9608, 9609), providing for revision of proceedings in inferior courts of bankruptcy, and for appeals from judgments adjudging or refusing to adjudge the defendant a bankrupt, etc., an order denying a motion to vacate an adjudication in bankruptcy should be reviewed by petition to revise.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 915; Dec. Dig. ⊂=440.]

5. BANKRUPTCY ⊂=18½—ADJUDICATION—VACATION.
Bankr. Act, § 1, declares that a person against whom a petition has been filed shall include a person who has filed a voluntary petition. General Order No. 6 (89 Fed. v, 32 C. C. A. v) provides that, where two or more petitions shall be filed against the same individual in different districts, the first hearing shall be had in the district in which the debtor has his domicile, that proceedings upon the other petitions may be stayed until an adjudication is made upon the petition first heard, and that the court which makes the first adjudication of bankruptcy shall retain jurisdiction over all proceedings therein until the same shall be closed. In September an involuntary petition to have a corporation adjudged a bankrupt was filed in the District Court of Delaware and in October the corporation filed a voluntary petition in the Southern district of New York, in which proceeding the corporation was adjudicated a bankrupt. The involuntary proceedings were instigated by the corporation, and creditors intervened in such proceedings. *Held* that, the corporation having been adjudged a bankrupt by the New York District Court, which was the court of its domicile, such adjudication should not be vacated because of the pendency of the proceedings in the Delaware court.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. ⊂=18½.]

Petition to Revise Orders of the District Court of the United States for the Southern District of New York.

In the matter of the bankruptcy of the Vanoscope Company. Petition by William D. Lowery to revise orders of the District Court made in such proceeding. Dismissed as to two orders; affirmed as to the others.

See, also, 230 Fed. 1023, — C. C. A. —.

A. L. Rosenberg, of New York City, for petitioner.

Hitchings & Burdick, of New York City (H. M. Hitchings, of New York City, of counsel), for respondent.

Before COXE and ROGERS, Circuit Judges, and MAYER, District Judge.

MAYER, District Judge. [1] The petition to revise was filed November 15, 1915. One of the orders sought to be revised was dated and entered November 1, 1915, and therefore the petition to revise was not filed within the time prescribed by rule 38 (150 Fed. liv, 79 C. C. A. liv)—10 days—and must be dismissed.

[2] Another order brought here was made in a common-law action wherein one Robinson was plaintiff and Vanoscope Company defendant. This order is not reviewable upon a petition to revise, and the petition as to it must be dismissed.

[3] A third order, dated November 5, 1915, was made in a voluntary bankruptcy proceeding. This order denied a motion to set aside a sale and to resettle an order made by the District Court on September 9, 1915, in the action of Robinson v. Vanoscope Company above referred to. As the District Judge pointed out:

"The third motion is utterly irregular, in that it is made in the bankruptcy proceeding and has for its object the resettlement of an order entered in the common-law case."

With this conclusion we agree, and that order is affirmed.

[4] There thus remains for consideration only the order dated November 5, 1915, entitled "In the Matter of Vanoscope Company, Bankrupt," denying a motion to vacate in a voluntary proceeding the bankruptcy adjudication of the Vanoscope Company made by this (District) Court on October 8, 1915, and to stay all proceedings therein.

The motion which resulted in this order was made by an attorney "for the petitioning creditor herein," without stating who such petitioning creditor was, and, while the record is supposed to bring up all the papers, we fail to find the affidavit and order to show cause made by the District Court on October 8, 1915, directed to the receiver in supplementary proceedings in Robinson v. Vanoscope Company, and requiring him to show cause why he should not be stayed from selling certain alleged assets of the Vanoscope Company.

We have, however, sufficient before us to determine the questions presented, and thus not to prolong this branch of the proceedings. There is some question as to whether the review of an order denying a motion to vacate an adjudication in bankruptcy should be by appeal or by petition to revise (Bankruptcy Act, §§ 24a, 24b, 25); but the weight of authority seems to support the proposition that the review is by petition to revise. Brady v. Bernard & Kittinger, 170 Fed. 576, 95 C. C. A. 656; B-R. Electric, etc., Co. v. Ætna Life Ins. Co., 206 Fed. 885, 124 C. C. A. 545.

[5] On April 16, 1915, one William J. Robinson recovered in the District Court for the Southern District of New York a judgment against Vanoscope Company, a Delaware corporation, for $190,017.98. Execution on this judgment was duly issued to and returned wholly unsatisfied by the United States marshal, and thereafter supplementary proceedings were instituted, and on June 21, 1915, a receiver, Augustin Derby, in such supplementary proceedings, was duly appointed. On July 14, 1915, Robinson also obtained a judgment of $100,646.08 against one Van Riper, who either controlled or was closely connected with Vanoscope Company. On September 9, 1915,

the District Court made an order directing a sale by the receiver of all of the assets of Vanoscope Company.

On September 14, 1915, one Peirce filed a petition in the District Court of Delaware to have Vanoscope adjudicated a bankrupt, and upon this petition the District Court of Delaware appointed ex parte a receiver of Vanoscope Company and issued the usual injunction. On September 17, 1915, a motion was made by Receiver Derby for instructions as to selling, in view of the restraining order of the District Court of Delaware, and on October 5, 1915, an order was made by the District Court here to proceed forthwith with the sale of the assets as had been directed by the order of September 9th. The sale took place on October 9, 1915.

On October 8, 1915, for the obvious purpose of heading off and preventing this sale, Vanoscope Company, alleging the necessary jurisdictional facts, filed a voluntary petition in bankruptcy in the Southern district of New York and on the same day an order with a meanwhile stay was issued to Receiver Derby to show cause why he should not be stayed from selling in accordance with the previous orders requiring him so to do. When this motion came on, it was denied on October 14, 1915, and the stay in the order to show cause was vacated.

Prior to this date, and on September 25, 1915, Inventions Corporation, which had become the assignee and owner of Robinson's judgment against Vanoscope Company, filed an answer to Peirce's petition in Delaware, alleging, among other things, that Peirce was not a bona fide creditor of Vanoscope Company and that it (Inventions Corporation) owned the only existing valid debt against Vanoscope Company. It further alleged that one Morhardt had begun a collusive suit against Vanoscope Company in Illinois for $1,000,000—which, as appears later, ripened into a judgment. On October 7, 1915, after the filing of this answer by Inventions Corporation, Peirce filed a new petition in Delaware in which he set forth that he had been induced by the attorney of the Vanoscope Company and of Van Riper to sign and verify his original petition for the express purpose of preventing Robinson from collecting his judgment against Vanoscope Company and also against Van Riper; that Vanoscope's attorney had told him that he would have the present attorney for the unnamed petitioner here (presumably one Lowery) represent him in the proceeding; that the $30 necessary clerk's fees were advanced to him by the Vanoscope Company's attorney and Van Riper; and that he did not realize that a fraud on Robinson was contemplated. Other details appear in Peirce's petition, but it is sufficient to point out that in substance and effect Peirce asserted that the Delaware proceeding was begun in the interest and at the request of the attorney for the Vanoscope Company and Van Riper for the purpose of defeating the efforts of Robinson's assignee to collect the large judgment which Robinson had obtained. Peirce asked for permission to withdraw his petition and for its dismissal.

It thus appears that Vanoscope Company not only filed its voluntary petition in the Southern district of New York, but was also the instigator of the involuntary proceeding in Delaware, and, as amply

appears, each step taken has been obviously an attempt to defeat the judgment creditor of Vanoscope Company, by the technique possible at times under the bankruptcy statute.

On October 13, 1915, the day before the sale by Receiver Derby was to take place as advertised, and five days after the adjudication of bankruptcy by the District Court of this district, one Lowery, claiming to be a general creditor of Vanoscope Company, filed a petition to intervene in the involuntary proceeding in Delaware which had been started by Peirce and that motion was granted. The Inventions Corporation filed a new or supplemental answer to the Delaware petition, alleging, among other things, that Lowery was not a bona fide creditor and that the proceedings brought by him were not brought in good faith.

Thereafter, on October 27, 1915, the attorney for the present petition moved (by order to show cause) that the adjudication in the voluntary proceeding in this distirct be vacated because of the pendency of the proceedings in involuntary bankruptcy in Delaware. That motion was denied by order dated November 5, 1915, and is now here on review.

General Order in Bankruptcy No. 6 of the Supreme Court (89 Fed. v, 32 C. C. A. v) provides in part as follows:

"In case two or more petitions shall be filed against the same individual in different districts, the first hearing shall be had in the district in which the debtor has his domicile, and the petition may be amended by inserting an allegation of an act of bankruptcy committed at an earlier date than that first alleged, if such earlier act is charged in either of the other petitions; and in case of two or more petitions against the same partnership in different courts, each having jurisdiction over the case, the petition first filed shall be first heard, and may be amended by the insertion of an allegation of an earlier act of bankruptcy than that first alleged, if such earlier act is charged in either of the other petitions; *and, in either case, the proceedings upon the other petitions may be stayed until an adjudication is made upon the petition first heard; and the court which makes the first adjudication of bankruptcy shall retain jurisdiction over all proceedings therein until the same shall be closed.*"

Section 1 of the Bankruptcy Act provides:

"'A person against whom a petition has been filed' shall include a person who has filed a voluntary petition."

By virtue of the fact that the District Court for the Southern District of New York made the first adjudication of bankruptcy, it is apparent that it was its duty to retain jurisdiction over all proceedings so long as that adjudication remained in full force and effect. It undoubtedly had the power to vacate the adjudication in the voluntary proceeding for good cause satisfactorily shown and thereupon to stay all proceedings until the disposition of the involuntary proceeding in Delaware. So far as upon the papers and proceedings before it, the District Court decided that the order of adjudication in the voluntary proceeding should not be vacated because lacking good cause satisfactorily shown, we fail to find any error of law requiring revision. If it were contended that the order sought to be revised rested in the discretion of the court, it should not be disturbed for there was not only no abuse of discretion, but the order was precisely what the situation, as shown by the record, called for.

The order of adjudication in this district thus remaining in full force and effect, we think that the District Court here, having made the first adjudication of bankruptcy, is entitled as matter of law to retain jurisdiction. The petition, so far as it brings up the order of November 1, 1915, and the order in Robinson v. Vanoscope Company, is dismissed; and the order of November 5, 1915, denying a motion to set aside the sale, and the order of November 5, 1915, denying the motion to vacate the voluntary bankruptcy adjudication, are affirmed, with costs.

FREEMAN v. KINSTON MFG. CO. et al.

(Circuit Court of Appeals, Fourth Circuit. May 13, 1916.)

No. 1411.

1. BROKERS ⊂=86(7)—COMPENSATION—ACTIONS—EVIDENCE.
In a broker's action for compensation for procuring a purchaser for standing timber, evidence *held* to warrant a finding that he relied on the vendor's representations as to the amount of the timber, and was not responsible because the purchaser refused to pay the agreed price; a shortage being discovered.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 116, 117; Dec. Dig. ⊂=86(7).]

2. BROKERS ⊂=62—COMPENSATION—RIGHT TO RECOVER.
Where a broker engaged to secure a purchaser for standing timber, relied on the vendor's statements as to the amount of the timber, and secured a purchaser, but the purchaser, on discovering a shortage, refused to pay the price fixed, the broker's right to commissions cannot be defeated because the vendor made his representations in good faith.

[Ed. Note.—For other cases, see Brokers, Dec. Dig. ⊂=62.]

3. BROKERS ⊂=71—COMPENSATION—SUBSEQUENT AGREEMENT.
Where a broker, who procured a purchaser for standing timber, agreed to accept a reduction of commissions, the purchaser discovering the shortage and refusing to pay the price first fixed, the broker cannot recover more than the amount subsequently agreed upon, but is entitled to recover the reasonable value of his services up to that amount; the purchaser accepting the timber at a reduced price.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 56; Dec. Dig. ⊂=71.]

4. BROKERS ⊂=50—COMPENSATION.
Where a broker procured a purchaser for standing timber, but the purchaser, on discovering a shortage, refused to accept the timber at the price fixed, and thereafter, the broker having consented to a reduction of commissions, the parties consummated the sale at the reduced price, the fact that the sale was made after the expiration of an option given the purchaser will not defeat the broker's recovery.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 68; Dec. Dig. ⊂=50.]

In Error to the District Court of the United States for the Eastern District of North Carolina, at Newbern; Henry G. Connor, Judge.

Action by E. B. Freeman against the Kinston Manufacturing Com-

pany and others. Judgment for defendants, and plaintiff brings error. Reversed and remanded.

Walter H. Taylor, of Norfolk, Va., and M. T. Dickinson, of Goldsboro, N. C. (E. F. Adylett, of Elizabeth City, N. C., and A. D. Ward, of Newbern, N. C., on the brief), for plaintiff in error.

O. H. Guion, of Newbern, N. C., and G. V. Cowper, of Kinston, N. C., for defendants in error.

Before PRITCHARD and KNAPP, Circuit Judges, and BOYD, District Judge.

KNAPP, Circuit Judge. Plaintiff in error, plaintiff below, brings this suit for commissions alleged to have been earned by him as a broker in selling a large quantity of standing timber and other property in North Carolina belonging to the defendant corporations. On the trial a verdict was directed for the defendants, and the case comes here on writ of error.

The contract of employment, which is evidenced by letters between the parties, was to the effect that the vendors were to get $350,000 for the timber, manufacturing plant, machinery, etc., plus a certain sum per thousand, about which there is no dispute, for the logs and lumber on hand, and that plaintiff was to have for his compensation whatever he could obtain for the property in excess of that sum. He claims to have procured a purchaser, one J. T. Deal, of Norfolk, Va., who was willing, able, and ready to pay $390,000 for the property, if the quantity of timber had equaled the amount which plaintiff says was represented to him by the owners and assumed to be approximately correct in the earlier stages of the negotiations. At any rate, Deal went to Kinston, N. C., near which the property was located, and spent two or three days in looking it over and acquainting himself generally with its condition and value. As the result an option contract was executed on the 4th of April, 1912, which gave Deal the right for 60 days to purchase the property, on specified terms of payment, for $390,000. Before the option was signed, and on the same day, the question arose as to what plaintiff would accept for his services, if there was found to be a shortage of timber and the price had to be reduced on that account, and plaintiff says it was agreed in that case that he should have $25,000, "and they could make any price they pleased."

Deal declined to take the property, for the sole reason, as plaintiff contends, that examination made while the option was running showed that the quantity of timber on the tract was not much more than half the amount which had been represented. Negotiations, however, continued, the details of which need not be recited, and Deal finally made an offer of $305,000, which the owners were apparently disposed to consider. The sale then seems to have hinged upon a settlement with plaintiff for his services. He was offered $5,000 and refused it. Deal proposed to add $2,500 to his offer, thereby in effect paying half the $5,000 which plaintiff was asked to take, but no agreement was reached. Negotiations were thereupon broken off, at least for the time being, and plaintiff went in quest of other purchasers. A few days later the

owners sold the property to Deal for $307,500. They refused to pay plaintiff anything for what he had done, and this suit followed.

The proofs offered by plaintiff consisted of the letters above referred to and his own testimony. These proofs tended to show, and would have permitted the jury to find, as it seems to us, that when this property was put in plaintiff's hands for sale the owners represented that there were 130,000,000 feet of standing timber; that plaintiff in good faith relied upon this representation, believing it to be substantially correct, and had no suspicion to the contrary when he undertook to find a purchaser; that he succeeded presently in interesting Deal in the property and introduced him to the owners; that Deal supposed there were 130,000,000 feet of timber, or thereabouts, as plaintiff had informed him, and that negotiations followed upon that basis; that Deal was willing, able, and ready, upon that assumption, to buy the property and pay $390,000 therefor, upon terms satisfactory to the owners; that after examination he refused to purchase at that price, or anything near it, because there was no such amount of timber as he had been led to suppose; that he would have bought it if the quantity of timber had approximated 130,000,000 feet; that the very large shortage ascertained was the sole cause of his failure to buy at the price named in the option contract; that at the time the option was given plaintiff agreed to accept for his services, and defendants agreed to pay, the sum of $25,000, if it turned out that there was a shortage of timber and a less price realized on that account; and that the subsequent sale was effected through his instrumentality.

[1, 2] Upon this evidence and the permissible inferences therefrom we are of opinion that plaintiff was entitled to have his case submitted to the jury and that it was error to direct a verdict for the defendants. It is argued that he failed to show any representations upon which he relied as to the quantity of timber and therefore cannot maintain his action; but we are persuaded that sufficient appears from the contents of the letters and plaintiff's testimony to present a question of fact upon that issue which the jury might reasonably have decided in his favor. All the circumstances now appearing indicate that he undertook to sell a quantity of timber which approximated 130,000,000 feet, that his negotiations with Deal were upon that assumption, and that he was in no wise at fault because Deal did not take the property at the price named in the option. It was not necessary to show that the owners knowingly misrepresented the amount of property which they authorized the plaintiff to sell; it was enough to show that their statements were materially inaccurate. If plaintiff relied upon what they told him, his right to compensation cannot be defeated because the defendants honestly supposed they had the quantity of timber which plaintiff assumed and stated to Deal in soliciting him to become a purchaser. As the Supreme Court said in Dotson v. Milliken, 209 U. S. 237, 244, 28 Sup. Ct. 489, 492 (52 L. Ed. 768):

"It does not matter how much or how little the purchaser relied upon the defendant's representations if the plaintiff relied upon them and obtained a purchaser ready and able to purchase upon the basis that the defendant's representations to the plaintiff were true."

[3] The plaintiff, of course, cannot recover the $40,000 which he would have obtained if the property had been sold at the option price, because his own testimony shows that he agreed, at the time the option was given, to accept $25,000, if there proved to be a shortage of timber and the owners on that account sold to Deal at a lower price; and he says that was the first intimation he ever had that there might be a smaller amount of timber than had been theretofore assumed. But he had then procured a purchaser who seemed desirous to buy and to whom the defendants were willing to give a sixty-day option. If plaintiff gives a truthful version of what occurred when this option was signed, as the jury might believe, we perceive no reason why he may not enforce the agreement which he says was then made. Clearly, as we think, it was a question of fact for the jury.

[4] It is also contended that plaintiff is not entitled to compensation because the sale to Deal was not consummated within the limit of time fixed by the option contract. We are not impressed with the force of this contention. Plaintiff was not a party to that contract, and his rights are not to be determined by its provisions. His employment did not cease when the sixty days expired, and Deal declined to purchase at the option price. He appears to have participated in the subsequent negotiations and to have been actively related to the same until dispute arose as to his compensation. Nor could the defendants escape liability to him by assuming, when that dispute happened, to terminate his employment. The outstanding fact is that plaintiff procured the purchaser who actually bought the property and may fairly claim to have been the efficient agency in bringing about the sale. True, the sum accepted was not sufficient to entitle him to commissions under his original contract; but if the lower price resulted solely from a shortage of timber, for which plaintiff was in no wise responsible, he should not go unrewarded for his services in bringing the sellers and buyer together. Martin v. Holly, 104 N. C. 36, 10 S. E. 83; Trust Co. v. Goode, 164 N. C. 19, 80 S. E. 62; Ice v. Maxwell, 61 W. Va. 9, 55 S. E. 899.

We are also of opinion, from the record before us, that plaintiff is entitled to recover, independent of any contract, a reasonable compensation for his services, not exceeding $25,000. As already stated, his evidence tends to show that he brought about a sale of this valuable property, and that the owners accepted for the same much less than the price originally set, simply and solely because it turned out that they did not have nearly so much timber as was represented to plaintiff when he became their authorized agent. If he undertook to realize $350,000 net for them, and more or less in excess of that sum for himself, it was because he was led to believe that there was timber enough, with the other property, to bring the price he expected to get, and if the owners saw fit to sell at a much lower figure, because they had not the quantity of timber which plaintiff was warranted in offering for sale, they cannot escape liability for honest services of which they got the benefit, when it was their fault, and not the plaintiff's, as the jury might find, that the greater price could not be obtained. And we think the complaint sufficient to permit a recovery upon quantum

meruit. The second count, it is true, is lacking in clearness of statement and cannot be regarded as a model pleading; but it purports to set forth a cause of action upon quantum meruit, it states the facts with sufficient particularity, and its allegations are ample, in our judgment, to apprise the defendants of the grounds upon which plaintiff claims the right to recover independent of the original agreement.

Without amplifying the argument, we are constrained to hold that a case was made for submission to the jury, and it follows that the judgment must be reversed, and the cause remanded with instructions to grant a new trial.

Reversed.

DENVER & R. G. R. CO. v. UNITED STATES.

UNITED STATES v. DENVER & R. G. R. CO.

(Circuit Court of Appeals, Eighth Circuit. May 1, 1916.)

Nos. 4483, 4484.

1. MASTER AND SERVANT ⟸13—HOURS OF SERVICE—DISCHARGE OF TRAIN CREW.

Where, after derailment, the crew of a freight train while awaiting the arrival of a derrick, proceeded about a mile and a half from the point of derailment to a farmhouse, where they left the engine in charge of a watchman and partook of a luncheon and rested under the trees, they were not released from duty, there being no superior present, within Hours of Service Act March 4, 1907, c. 2939, 34 Stat. 1415 (Comp. St. 1913, §§ 8677-8680), and that time must be included in determining whether they were on duty for more than the 16-hour period allowed.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 14; Dec. Dig. ⟸13.]

2. MASTER AND SERVANT ⟸13—HOURS OF SERVICE—"CONTINUOUS JOURNEY."

Where a freight train proceeded from Salt Lake City to a smaller town, and thence returned, and no crews were kept at the smaller town, and there was no person there competent to take charge of the train, such town must be treated as a way station and the round trip as a "continuous journey," within the Hours of Service Act.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 14; Dec. Dig. ⟸13.

For other definitions, see Words and Phrases, First and Second Series, Continuous.]

3. MASTER AND SERVANT ⟸13—HOURS OF SERVICE—DEFENSES—"CASUALTY."

Under Hours of Service Act, § 3 (Comp. St. 1913, § 8679), making it unlawful for any common carrier, its officers, or agents to require or permit any employé to remain on duty for a longer period than 16 consecutive hours, provided that the act shall not apply in case of casualty or unavoidable accident, or the act of God, a railroad company, where the crew of a train which was derailed remained on duty for more than 16 consecutive hours, is not liable to the penalty of the act, for, while the term "casualty" does not include ordinary accidents incidental to railroading, a derailment is not incident to good railroading, and in such case, for the protection of other employés and passengers, the crew in

charge of a derailed train may be required to remain on duty for more than 16 hours.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 14; Dec. Dig. ⊂⊃13.

For other definitions, see Words and Phrases, First and Second Series, Casualty.]

4. MASTER AND SERVANT ⊂⊃13—HOURS OF SERVICE—DEFENSES.
Where, without ascertaining when tracks would be cleared, trains were dispatched over tracks on which it was known there had been a wreck, so that the crews of such train were kept on duty for more than 16 consecutive hours, the fact of the wreck furnishes no defense to a prosecution for the violation of the Hours of Service Act; it being the duty of the railroad company's servants to ascertain such facts before dispatching trains.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 14; Dec. Dig. ⊂⊃13.]

5. MASTER AND SERVANT ⊂⊃13—HOURS OF SERVICE—DEFENSES.
Where the watchman at an intermediate point, where a train was required to lay over, refused to watch the engine, claiming that he was afraid of the injector, and the fireman, who volunteered to watch the engine, was on duty more than 16 hours, the watchman's unforeseen insubordination was a casualty, excusing the railroad company from any violation of the Hours of Service Act.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 14; Dec. Dig. ⊂⊃13.]

In Error to the District Court of the United States for the District of Utah; John A. Marshall, Judge.

The Denver & Rio Grande Railroad Company was convicted of several violations of the Hours of Service Act, and acquitted as to other violations, and both it and the United States bring error. Reversed on defendant's writ as to some of the counts, and otherwise affirmed.

Philip J. Doherty, Sp. Asst. U. S. Atty., of Washington, D. C. (William W. Ray, U. S. Atty., of Salt Lake City, Utah, on the brief), for the United States.

Russell G. Lucas, of Denver, Colo. (Waldemar Van Cott, E. M. Allison, Jr., and William D. Riter, all of Salt Lake City, Utah, on the brief), for defendant.

Before CARLAND, Circuit Judge, and VAN VALKENBURGH and AMIDON, District Judges.

AMIDON, District Judge. This case involves section 3 of the Hours of Service Act (34 Statutes at Large, 1415 [Comp. St. 1913, § 8679]). The complaint charges in separate counts, a large number of violations, and demands the penalty fixed by the law. The case was submitted on an agreed statement of facts. Upon this the court directed a verdict in favor of the plaintiff as to all counts embraced in this writ of error, except 18. As to that it directed a verdict in favor of the company. Both parties bring error, the government as to count 18, and the company as to the others.

[1] Counts 1 to 5 charge the employment of a crew of five men overtime on a run from Salt Lake City to Park City, Utah, and re-

turn, a distance of 33 miles. Soon after the train left Salt Lake City it was derailed. The conductor in charge communicated with the train dispatcher by telephone, advising him of the derailment, and stating that the crew could accomplish nothing further until the arrival of a derrick. The crew thereupon cut the engine loose and proceeded about a mile and a half from the point of derailment to a farmhouse where they left it in charge of a watchman. They were told by the dispatcher that a derrick to be sent from Salt Lake City would be at the derailment about 1 p. m. From the farmhouse the smoke of the approaching derrick would be visible. They partook of a luncheon and rested under the shade of some trees at the farmhouse until the approach of the derrick, whereupon they returned to the scene of the derailment. The crew was not released by any officer or agent of the company empowered to release them during the time they were at the farmhouse. If this period is deducted, there would be no violation of the law. Counsel for the company urge that the crew "released themselves." This we think they could not do. They were on duty, as between themselves and the company, during the entire period. A release, so as to justify a deduction of time, under the statute, can only be given by some officer or agent having authority to give it. The men, therefore, remained on duty for more than 16 hours.

[2] No extra crews were kept at Park City, nor was there any occasion to keep them. The journey from Salt Lake City and return was usually made well within the 16-hour period. If the crew had been released from the train at Park City, the company had no person there competent to take charge of the train or the engine. We are therefore of the opinion that the round trip must be treated as a continuous journey, and Park City simply as a way station.

[3] This brings us to the question whether the derailment was such a "casualty" as to place the company within the protection of the proviso of section 3 of the Hours of Service Act. The stipulation is silent as to the cause of the derailment. There is nothing to show whether it was due to the negligence of the company or its employés, or was an unavoidable accident. Counsel for the government urges that it was incumbent upon the company, in order to bring itself within the proviso, to show that the derailment was not due to its negligence or the negligence of its employés. The trial court adopted that theory. We think this was error.

A carrier must use diligence to anticipate, as this court held in United States v. Kansas City Southern Railway Co., 202 Fed. 828, 121 C. C. A. 136, "all the usual causes incidental to operation." And when any casualty occurs the carrier must still use diligence to avoid keeping its employés on duty overtime. Failure to perform either of those duties deprives it of the benefit of the proviso. Poor coal, meeting of trains, switching, defective shaker rod, leaky flues (United States v. Kansas City Southern Ry. Co., 202 Fed. 829, 121 C. C. A. 136), pulled out drawbar, bursted air hose (United States v. Great Northern Railway Co., 220 Fed. 630, 136 C. C. A. 238), extraordinary head wind, heavy grain movement, hot box (Great Northern Railway Co. v. United States, 218 Fed. 302, 134 C. C. A. 98, L. R. A. 1915D, 408), high wind, broken tail pin, hot box (United States v. Lehigh

Valley Railroad Co., 219 Fed. 532, 135 C. C. A. 282), have been held to be causes of delay "incidental to operation." We stated generally in United States v. Kansas City Southern Railway Co., 202 Fed. 828, 121 C. C. A. 136, that:

"It has been uniformly held by the courts that ordinarily delays in starting trains by reason of the fact that another train is late; from sidetracking to give superior trains the right of way, if the meeting of such trains could have been anticipated at the time of leaving the starting point; from getting out of steam or cleaning fires; from defects in equipment; from switching; from time taken for meals; and in short from all the usual causes incidental to operation—are not, standing alone, valid excuses within the meaning of this proviso."

As to such causes of delay we said:

"The carrier must go still further and show that such delays could not have been foreseen and prevented by exercise of the high degree of diligence demanded."

The casualty here is not of the character mentioned in any of the cases above referred to. It was a derailment. That is an event which is not to be anticipated in good railroading. A history of the statute will show that accidents which are of a character to seriously interrupt traffic, and suspend for a considerable time the operation of trains, come within the proviso. As the statute was originally drafted, it simply provided that the carrier should not require or permit any employé to remain on duty more than 16 consecutive hours, "except when by casualty occurring after such employé has started on his trip, or by unknown casualty occurring after such employé has started on his trip, he is prevented from reaching his terminal." The report of the committee having the bill in charge, and the debate in the Senate, disclose that the statute was drafted by counsel representing the Brotherhoods of Railroad Trainmen, and it was thought by them that the word "casualty" alone expressed precisely the meaning intended; that is, an unforeseen accident. Certain Senators pointed out that the term "casualty" was not a legal term, and they were not sure that it would embrace unavoidable accidents and acts of God. While the bill was pending in the Senate these words were added, not for the purpose of reducing the meaning of the term "casualty," but to make certain that the carrier would have the protection of acts of God and unavoidable accidents. At that time the statute did not contain the clause in regard to telegraph operators. When that was added by the House committee, the exception could not be conveniently embodied in section 2, and for that reason was carried forward and attached as a proviso to section 3.

We do not think it was the intent of Congress in case of such serious matters as derailments and collisions to take from the company the protection of the proviso even if such events were caused by the negligence of the company or its employés. On the other hand, it was the intent of the statute in case of such an event to leave the company free to deal with the situation and to retain employés in the service if that result could not be avoided by the exercise of reasonable diligence after the occurrence of the accident. As was pointed out by this court in United States v. Missouri Pacific Ry. Co., 213

Fed. 169, 130 C. C. A. 5, in case of such an accident the first duty of the company is to protect the traveling public and other employés, and if keeping employés on duty overtime is necessary in order to meet the situation the carrier is permitted to do so under the proviso. In the presence of such an event the law does not look to the question how it was brought about; on the other hand, it is chiefly concerned with the protection of those whose lives may be imperiled. The penalties prescribed in the statute are not a punishment for negligence, but for keeping men on duty for excessive periods. The statute clearly recognizes that there may be emergencies justifying such longer period of service. Not to permit it would imperil the traveling public and other employés of the carrier. "The usual causes incidental to operation" do not come within this class, for the reason that they can usually be anticipated, or their consequences avoided, by the exercise of diligence after they occur.

We are of the opinion, therefore, that the derailment involved in these counts brought the company within the scope of the proviso. This would be true, whether it was caused by negligence or was a pure accident. The stipulation of facts clearly shows that the keeping of the men on duty for the excessive time was caused wholly by the derailment, and could not have been avoided by the exercise of diligence on the part of the company after the derailment occurred. We are of the opinion, therefore, that the trial court erred in directing a verdict in favor of the government as to these counts, and its judgment must be reversed.

[4] Counts 6 to 10 involve the crew in charge of a train from Helper to Salt Lake City, a distance of 114 miles. Before this trip was entered upon, an accident had occurred to another train, involving the derailment of 14 cars. Defendant's train dispatcher knew of this accident before the train here involved left Helper, and directed it not to leave that point until further orders. At about that time he received telephonic advice from the conductor of the wrecked train that the track would be cleared for traffic within 20 or 30 minutes after the arrival of a derrick. A derrick was sent forthwith from Helper, arriving at the scene of the derailment about 7 a. m. The train dispatcher, relying on the advice given him as to the time it would take to clear the track, ordered the train in question to leave Helper for Salt Lake City at 6:30 in the morning. He did this without waiting to see what time would be necessary to clear away the wreck. Much more time was in fact consumed than was anticipated, and when the train approached the point where the wreck occurred, it was detained, and this caused the keeping of the crew on duty for a longer period than 16 hours. The point at which the derailment occurred was only 6 or 7 miles from Helper, and telephonic communication existed between the points. No reason is shown why the train was ordered to leave this terminal before the derrick had actually arrived at the scene of the wreck and some progress had been made in removing it. There was no excuse for acting on first impressions as to the time that the line would be obstructed. In our judgment, therefore, the trial court was right in directing a verdict in favor of the plaintiff as to these counts.

Counts 11 to 15 involve a crew of five men in charge of a train running from Colton to Salt Lake City, Utah, a distance of 96 miles. Before the train in question left Colton another train had been derailed at a point 43 miles distant towards Salt Lake City. The conductor in charge of the derailed train notified the train dispatcher by telephone of the derailment, and expressed the opinion that the wreck could be cleared within 1 hour after the arrival of the derrick. The superintendent went promptly with the derrick to the scene of the wreck, where he was in easy communication with the train dispatcher by telephone. That officer, however, did not wait for advice from him, but ordered the train here involved to leave its terminal on the hasty opinion of the conductor of the wrecked train as to the time that would be necessary to clear the wreck. This, instead of taking 1 hour, took 6. The train here involved was stalled for 3 hours and 30 minutes waiting for the wreck to be cleared. It then proceeded, but when it reached its terminal at Salt Lake City the crew had been on duty for 17 hours and 15 minutes. Upon these facts the trial court was clearly justified in holding that the overtime service was due, not to the derailment, but to the ordering of the train out of its terminal before the wreck was cleared up. After the derrick reached the wreck there was ample time and opportunity to learn the actual situation. The train dispatcher should have waited for trustworthy information. The duty of the carrier to comply with this beneficent statute must be placed above its zeal to hasten transportation.

Counts 16 and 17 involve the engineer and fireman of two passenger trains which were delayed by the wreck above described in connection with counts 11 to 15. These trains were ordered out of their terminals on the statement of the conductor that the wreck could be cleared in 1 hour, and were delayed because that operation required in fact 6 hours. For the reasons stated in connection with the other counts, the trial court correctly ruled that the government was entitled to judgment upon these counts.

[5] Count 18 involves an employé on a train from Thistle to Richfield, Utah. It started on its journey at 7:30 a. m., and reached an intermediate point, Manti, at 11:29 p. m. It had then been discovered that the train could not complete its trip without retaining its crew overtime, and it was ordered to lay up at Manti. A coalheaver at that point, employed by the company as an engine watchman, was expected to take charge of the engine. When asked to do so, however, he refused, for the alleged reason that he feared the engine might blow up, as he had previously had some difficulty in operating its injector. The trainmen endeavored to arrange for somebody else to take charge of the engine without avail. Finally the fireman volunteered to meet the emergency and remained on duty until 7 o'clock the following morning, when he was released, having been on duty as fireman and as engine watchman continuously for 23 hours and 30 minutes. It is conceded that the injector was in fact not defective, and there was no justification for the refusal of the watchman to take charge of the engine. We think the trial court properly held that the unforeseen insubordination of this employé was a casualty within the meaning of the statute. In United States v. Denver & Rio Grande

Ry. Co., 220 Fed. 293, 136 C. C. A. 275, we held that insubordination of an employé may constitute an "emergency," within the meaning of section 2 of the statute, justifying the retention of a telegraph operator overtime. No sound reason can be given why similar insubordination does not constitute a "casualty," within the proviso of section 3.

The order in this case will be that the judgment of the trial court as to counts 1 to 5, inclusive, be reversed, and a new trial granted.

As to the other counts here under review, the judgment of the trial court will be affirmed. Neither party will recover costs.

MERKO v. STURM & DILLARD CO.

(Circuit Court of Appeals, Sixth Circuit. May 2, 1916.)

No. 2722.

COURTS ⊂=375—LIMITATIONS—NEW ACTION AFTER DISMISSAL OF FORMER ACTION—CONSTRUCTION OF STATUTE—"COURT OF THIS COMMONWEALTH."

Ky. St. 1909, § 2545, which provides that where an action is "commenced in due time and in good faith in any court of this commonwealth" and it shall be adjudged that the court is without jurisdiction the plaintiff may within three months commence a new action in the proper court, "and the time between the commencement of the first and last actions shall not be counted in applying the limitation," applies where an action commenced in a federal court in Kentucky is dismissed for want of jurisdiction because not brought in the state of defendant's residence, and gives the plaintiff the right to commence a new action within three months, although the statutory period has run since the cause of action accrued.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 983; Dec. Dig. ⊂=375.

For other definitions, see Words and Phrases, Second Series, Courts of This Commonwealth.]

In Error to the District Court of the United States for the Eastern District of Kentucky; Andrew M. J. Cochran, Judge.

At Law. Action by Mike Merko against the Sturm & Dillard Company. Judgment for defendant and plaintiff brings error. Reversed.

H. M. Healy, Jr., of Newport, Ky., for plaintiff in error.

B. R. Jouett, of Winchester, Ky., for defendant in error.

Before WARRINGTON and DENISON, Circuit Judges, and KILLITS, District Judge.

WARRINGTON, Circuit Judge. The question presented upon this writ of error is whether Merko is entitled to the benefit of a three months' extension provision of a statute of limitations of Kentucky. Merko is an alien, a citizen of Austria, and was injured in Clark county, Ky., October 10, 1912, while in the employ of the Sturm & Dillard Company, a West Virginia corporation. Merko commenced an action against that company in the United States District Court for the

Eastern District of Kentucky, July 15, 1913, to recover damages for his injuries; and on the following November 14th a plea of defendant to the jurisdiction was sustained, on the ground that defendant had not been sued in the district of its residence. Later, January 7, 1914, Merko commenced a suit against the company in the Clark Circuit Court of Kentucky to recover for the same injuries. February 2d following, the defendant filed a petition for removal of the cause to the court below, alleging the diversity of citizenship pointed out above, and an order of removal was entered on the 9th of the following April. In the court below defendant demurred to Merko's petition, alleging that it did not state facts sufficient to constitute a cause of action and also, by way of plea in avoidance, that the negligence and injuries complained of in the petition occurred more than twelve months prior to commencement of the suit in the Clark Circuit Court. The demurrer was sustained, and, plaintiff failing to plead further, the petition was dismissed.

Reliance for this dismissal is placed on certain statutes of Kentucky. Section 2516 provides that an action like this "shall be commenced within one year next after the cause of action accrued, and not thereafter" (Carroll, Ed. 1909), but section 2545 (Id.) provides:

"Where an action has been or shall be commenced in due time and in good faith, in any court of this commonwealth, and the defendants, or either of them, have or shall make defense, and it shall be adjudged that such court had or has no jurisdiction of the action, the plaintiff or his representative may, within three months from the time of such judgment, commence a new action in the proper court, and the time between the commencement of the first and last action shall not be counted in applying the limitation."

It is true, as the dates before pointed out show, that more than one year elapsed between the date of plaintiff's injuries, and the commencement of his action in the Clark Circuit Court; though it will be observed that less than three months passed between the first dismissal in the court below and the commencement of plaintiff's action in the Clark Circuit Court. The proposition of the defendant company is that the federal District Court, in which the action was originally commenced, is not a "court of this commonwealth" within the meaning of section 2545, and consequently that Merko's action does not fall within the three months' period there provided. This question has not been determined in the state of Kentucky, except in the present case; and we have not the benefit of an opinion of the learned trial judge.

The question is one of purely statutory intent. The District Court mentioned was of course created and its jurisdiction defined by acts of Congress. In the sense then of its origin and jurisdiction, the District Court is not a court of the commonwealth of Kentucky; but we cannot think that this is decisive of the present question. The pendency of a suit between the same parties and involving the same subject-matter, in both a state and federal court existing within a given state, does not warrant abatement of the suit in either tribunal (Hunt v. N. Y. Cotton Exchange, 205 U. S. 322, 339, 27 Sup. Ct. 529, 51 L. Ed. 821); but this rule has no present pertinency, for the jurisdiction of each is foreign to that of the other. Here, in accordance with sec-

tion 721 (U. S. Rev. Stat.; Comp. St. 1913, § 1538), the state statutes of limitation involved must be "regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply" (Michigan Insurance Bank v. Eldred, 130 U. S. 693, 696, 9 Sup. Ct. 690, 691, 32 L. Ed. 1080); and thus the present question must in obedience to the federal statute depend solely upon a true interpretation of the state statute (section 2545). It is said that conditions prevailing in the system of procedure of Kentucky induced the legislative body of that state to enact section 2545. This does not, however, show an intent to restrict the extension provision to actions only that shall have been commenced in a court created by the state and there dismissed for want of jurisdiction. In the absence, as here, of distinct language to the contrary, the state Legislature is to be presumed to have legislated with reasonable reference to all similar conditions that might arise within the state, such as the commencement of cases and their failure for like reasons in a federal court under federal procedure within the state. When, for example, section 2545 was enacted in 1866 (Acts of Kentucky 1865–66, p. 74), it was well known that the right given by the federal judiciary act to a citizen of a state to be sued in the district of which he was an inhabitant was a personal privilege that might be waived by voluntary appearance (Gracie v. Palmer, 8 Wheat. 699, 700, 5 L. Ed. 719; Toland v. Sprague, 37 U. S. [12 Pet.] 300, 330, 9 L. Ed. 1093; Irvine v. Lowry, 39 U. S. [14 Pet.] 293, 299, 10 L. Ed. 462);[1] and the circumstance that the defendant company did not waive its privilege in the first suit brought by Merko in the court below would seem to furnish a strong illustration of a case which would fall fairly within a reasonable construction of the state statute; for the plea of defendant to the jurisdiction of the court in that case was not, as it plainly could not have been, aimed at the subject-matter of the suit, but only the parties; and yet in the end the same defendant, through the removal proceeding, sought and obtained the jurisdiction of the same court. The very idea of enacting the extension statute was to enlarge the time within which wrongs might be redressed, and so to prevent cases from failing otherwise than upon their merits; such a statute should not be narrowly construed.

We therefore think the present case is ruled by the decision in Ex parte Schollenberger, 96 U. S. 369, 376 (24 L. Ed. 853). A statute of Pennsylvania was there involved which required insurance companies organized under states foreign to Pennsylvania to do certain things as a condition precedent to their right to conduct business in the state, among which was to maintain an agency there to receive service of process in any suit commenced "in any court of this commonwealth"; and the question whether a federal Circuit Court was

[1] It is scarcely necessary to say that the same statutory policy and rule of decision still prevail, and regardless, too, of the fact that the plaintiff is an alien. Sections 24 and 51, Fed. Jud. Code (Act March 3, 1911, c. 231, 36 Stat. 1091, 1101 [Comp. St. 1913, §§ 991, 1033]); Lehigh Valley Coal Co. v. Yensavage, 218 Fed. 547, 549, 134 C. C. A. 275 (C. C. A. 2d Cir.); Eldorado Coal & Mining Co. v. Mariotti, 215 Fed. 51, 54, 131 C. C. A. 359, and citations (C. C. A. 7th Cir.); Fribourg v. Pullman Co. (C. C.) 176 Fed. 981, 983–4, and citations, and see Smith v. Farbenfabriken of Elberfeld Co., 203 Fed. 476, 482, 121 C C. A. 598 (C. C. A. 6th Cir.)

a "court of this commonwealth" within the meaning of the statute was directly presented. In the course of the opinion Mr. Chief Justice Waite said:

"It was insisted in argument that the statute confines the right of suit to the courts of the state: but we cannot so construe it. There is nothing to manifest such an intention. * * * While the Circuit Court may not be technically a court of the Commonwealth, it is a court within it; and that, as we think, is all the Legislature intended to provide for."

We are unable effectively to distinguish the instant case from the rule of that decision; for there is no claim that Merko's first suit was not brought in the court below in "good faith" within the meaning of the statute. It results that the decision below must be reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

ELEVEN GROSS PACKAGES, MORE OR LESS, OF DR. WILLIAMS' PINK PILLS v. UNITED STATES.

(Circuit Court of Appeals, Third Circuit. May 22, 1916.)

No. 2080.

1. DRUGGISTS ⊂=11—MISBRANDING OF DRUGS—FORFEITURE.
Under Food and Drugs Act (June 30, 1906, c. 3915, 34 Stat. 771) § 8, as amended by Act Aug. 23, 1912, c. 352, 37 Stat. 416 (Comp. St. 1913, § 8724), declaring that drugs are misbranded if the package or label shall contain any statement regarding the curative effect of such drug which is false or fraudulent, the only question in a proceeding to forfeit drugs on the ground that they were misbranded is whether statements on the label were false, and, if so, whether they were fraudulent.
[Ed. Note.—For other cases, see Druggists, Cent. Dig. § 10; Dec. Dig. ⊂=11.]

2. DRUGGISTS ⊂=11—DRUGS—FORFEITURE—EVIDENCE.
In a proceeding to forfeit drugs as being misbranded under the Food and Drugs Act, where there was evidence that the drugs were stated to benefit locomotor ataxia, testimony by a medical expert that in the opinion of doctors generally such drugs would not have any curative effect is admissible, over objections that it was opinion evidence.
[Ed. Note.—For other cases, see Druggists, Cent. Dig. § 10; Dec. Dig. ⊂=11.]

3. DRUGGISTS ⊂=11—DRUGS—JURY QUESTION.
Whether pills were misbranded under the Food and Drugs Act, and so subject to forfeiture, *held* under the evidence a question for the jury.
[Ed. Note.—For other cases, see Druggists, Cent. Dig. § 10; Dec. Dig. ⊂=11.]

4. DRUGGISTS ⊂=11—DRUGS—MISBRANDING.
In a proceeding under the Food and Drugs Act to forfeit pills on the ground that the labels stating their curative properties were false and fraudulent, charges that the jury should determine whether the pills were sold with an honest belief that they were efficacious for the purposes stated on the labels, and that, if the labels were written with intent to create an impression that the pills were efficacious for diseases which the sellers knew or must have known they were not, then the labels were false and fraudulent, were proper.
[Ed. Note.—For other cases, see Druggists, Cent. Dig. § 10; Dec. Dig. ⊂=11.]

In Error to the District Court of the United States for the Eastern District of Pennsylvania; J. Whitaker Thompson, Judge.

Libel by the United States of America against Eleven Gross Packages, More or Less, of Dr. Williams' Pink Pills, claimed by the Dr. Williams Medicine Company. There was a decree of forfeiture, and claimant brings error. Affirmed.

James Collins Jones, of Philadelphia, Pa., and H. B. Thompson, of Washington, D. C., for plaintiff in error.

Francis Fisher Kane, U. S. Atty., and Robert J. Sterrett, Asst. U. S. Atty., both of Philadelphia, Pa.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

BUFFINGTON, Circuit Judge. In the court below the United States filed a libel to forfeit certain packages of pills. Thereupon the Dr. Williams Medicine Company claimed the packages seized, answered the libel, and the case proceeded to trial. After a verdict for the plaintiff and a decree of forfeiture, the claimant sued out this writ.

[1] The claim of forfeiture is based on an alleged misbranding of the packages of pills in violation of an amendment to the Food and Drugs Act, passed August 23, 1912, which provides:

"That for the purposes of this act an article shall also be deemed to be misbranded: In case of drugs: * * * Third. If its package or label shall bear or contain any statement, design, or device regarding the curative or therapeutic effect of such article or any of the ingredients or substances contained therein, which is false and fraudulent." Comp. St. 1913, § 8724.

The errors alleged group themselves into rulings on evidence, answers to points, and exceptions to the court's charge. Without entering into a discussion of the many refined questions of words, terms, and medical theories with which the general subject is beclouded, we may say that to our mind the words used in the statute are clear in meaning, and the court below tried the case on that basis. The purpose of the act was, in the branding of drugs, to punish false and fraudulent statements regarding the curative or therapeutic effect of such drug or any of its ingredients. It follows, therefore, the case below resolved itself into two questions: First, were the statements regarding the curative or therapeutic effects of these pills false; and, second, were they fraudulent?

[2] Without citing in detail the rulings of the court in admitting the evidence, in answering the points, and in charging the jury, we may say the court consistently adhered to admitting proof and directing the attention of the jury in points and charge to the two decisive elements of the branding being false and fraudulent. Limiting our extracts to locomotor ataxia alone, we note the branding complained of made the statement that the pills were:

"Useful in locomotor ataxia and partial paralysis. * * * This remedy is offered to the public with full confidence in its efficacy in the treatment of diseases arising from or dependent upon impoverished blood, * * * rheumatism, leucorrhoea. * * * These pills are a valuable remedy for * * * sciatica, * * * and have accomplished beneficial results in * * * partial paralysis and locomotor ataxia. * * * Cases diagnosed

as locomotor ataxia and as partial paralysis, and having characteristic symptoms have shown beneficial results under this tonic treatment, and in the cases under observation the resulting improvement has been lasting."

The libel alleged that:

"These statements were false and fraudulent in this: That they indicated to the purchaser thereof, and created in the minds of the purchasers thereof, the impression and belief that the said article was a remedy for, when in fact it was not a remedy for, locomotor ataxia, partial paralysis," etc.

And that:

"These statements were false and fraudulent in this: That they indicated to the purchaser thereof, and created in the minds of the purchasers thereof, the impression and belief that the said article was a remedy for, when in fact it was not a remedy for, partial paralysis, locomotor ataxia, etc., which statements were made with the knowledge of their falsity, and in reckless and wanton disregard of their truth or falsity, for the purpose of defrauding purchasers."

In support of its case, the government called several witnesses, physicians of proven ability, knowledge, and experience, who testified that the pill would not, and why it could not, have any beneficial effects in locomotor ataxia and the other diseases named. They also testified to the fact that medical opinion was unanimous in so saying. It was also shown, and all of this without contradiction, that the pill was practically the well-known Blaud pill, used generally in medical practice. It is complained, however, that the testimony of these witnesses was not competent, being a mere expression of their personal opinions or views. But an examination of the proofs shows that the case was wholly different from one where witnesses were testifying to their personal views upon a controverted question of opinion. The testimony here was of fact, namely, that there was general, uncontroverted consensus of opinion. For example, referring to the effect of these pills, the proofs were:

"Q. How about locomotor ataxia? A. Utterly useless. Q. Is there any difference at all in medical opinion on that point? A. I should say not, as far as I know medical opinion. * * * Q. Is there anything known to medicine that can have a beneficial effect upon all these various troubles in one pill? A. No, sir. Q. Is there any difference of medical opinion on that point? A. None whatever. I think medical opinion would be unanimous on that."

[3, 4] In the absence of countervailing proof in such matters, it was manifestly a question for the jury to determine the fair or fraudulent character of the branding statement. This question the court left to it, saying:

If they were satisfied "that the pills were shipped in interstate commerce, with an honest belief on the part of those responsible for making the statement that they would do just what was stated on the label they would do, then it would be your duty to return a verdict in favor of the defendant."

Referring to such statements, the court further said:

"You will take those facts into consideration, and determine whether or not it was the intention of this language, interpreting it as an ordinarily intelligent man would, on the part of the claimants to convey the impression that they were to cure or act as a remedy for the diseases and ailments, even where the language does not directly say so. If it was the intention to so frame a statement that it conveyed those impressions, and those statements

were false, and they are known to be false, or you can infer the intention to defraud, then it would be your duty to return a verdict in favor of the government. If you do not find that intention, of course, you will return a verdict in favor of the defendant."

So, also, in answer to points, the court said, in substantial accord with Cooper v. Schlesinger, 111 U. S. 148, 4 Sup. Ct. 360, 28 L. Ed. 382, and Lehigh Co., etc., v. Bamford, 150 U. S. 665, 14 Sup. Ct. 219, 37 L. Ed. 1215:

"If you find it as a fact that the statements were false, and known to be false, then, of course, your verdict would be for the government. If you find as a fact that they were not false, or that, being false, there was no intent on the part of the defendant, whether actual intent or implied intent, to defraud, then your verdict would be for the claimant."

"If you believe from the evidence that any one of the therapeutic claims as to the effect of these pills upon locomotor ataxia, St. Vitus' dance, sciatica, rheumatism, impotence, spermatorrhœa, or partial paralysis was false, and was made by the claimant with a reckless and wanton disregard as to whether it was true or false, you may find a verdict for the government."

On the whole, we may say the cause was properly tried and fairly submitted, and, finding no error in the rulings, charge, points, or answers in the court below, its decree is affirmed.

FIRST NAT. BANK OF PORTLAND, OR., v. E. J. DODGE CO.

(Circuit Court of Appeals, Ninth Circuit. May 1, 1916.)

No. 2710.

INJUNCTION ⇐41—PENDENTE LITE—RIGHT TO.

Under Civ. Code Cal. § 309, which was the law of the state of complainant's domicile, a corporation was forbidden to buy in its own stock. A purported agent of the complainant corporation entered into a contract to purchase from defendant its own stock, and executed notes for the purchase price. Complainant denied that the agent was authorized, and also asserted the invalidity of the contract. *Held* that, as defendant might negotiate the notes to bona fide purchasers, who would take them free from such defenses, and as complainant might repudiate the contract, an injunction pendente lite against negotiation should be granted, notwithstanding an affidavit by defendant that the agent had authority.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 95; Dec. Dig. ⇐41.]

Appeal from the District Court of the United States for the District of Oregon; Charles E. Wolverton, Judge.

Bill by the E. J. Dodge Company, a corporation, against the First National Bank of Portland, Or., a corporation. From an order granting an injunction pendente lite, defendant appeals. Affirmed.

Dolph, Mallory, Simon & Gearin, of Portland, Or., for appellant.
F. A. Cutler, of San Francisco, Cal., for appellee.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

HUNT, Circuit Judge. The substance of the complaint is: That about September 25, 1914, E. D. Porter, who was manager, secretary, and treasurer, and one of the directors, of the Dodge Company, a lumber manufacturing corporation of California, plaintiff below and appellee here, "purporting to represent" the Dodge Company, entered into an agreement with the bank, which then owned 200 shares of the capital stock of the Dodge Company, to buy these shares for $41,000. That in payment of the purchase price Porter executed and delivered, in the name of the Dodge Company, four promissory notes, negotiable in form, bearing interest at 4 per cent. per annum, payable to the bank in amounts and at the times following: $10,000 one year after date, $10,000 two years after date, $10,000 three years after date, and $10,000 four years after date. That the notes were held by the bank, and were to be held by it until the notes were fully paid, when they were to be delivered to the Dodge Company. That Porter had no right or authority from the Dodge Company, or otherwise, to make or enter into the agreement with the bank for the purchase of the 200 shares of stock, and no authority to make, execute, and deliver the notes to the bank, or to make any payments thereon. That the agreement referred to was made, and the notes executed and delivered by Porter, without the knowledge, consent, or ratification of the board of directors, or any of the stockholders, other than Porter, of the Dodge Company. That no record of the agreement or of the notes was ever entered on the records of the Dodge Company, and no knowledge of the same came to the directors or stockholders until about October 26, 1915, when the directors disapproved of and disaffirmed the transaction, and ordered that action be commenced to have the agreement of purchase and sale of the stock declared void, and to have the notes canceled and surrendered, and the money paid recovered. The complaint avers that the agreement of the Dodge Company to purchase its own stock from the bank is illegal and void, under section 309 of the Civil Code of California, and that the notes were executed without consideration and are wholly void; that the bank has the possession of the 200 shares of stock, which have never been transferred, and intends to negotiate and transfer the notes to bona fide purchasers for value, and that such negotiation and transfer will greatly damage the Dodge Company; and that Porter, without right or authority, in carrying out the terms of the agreement, has paid to the bank from funds of the Dodge Company various sums on account of interest and principal on the notes. The Dodge Company relinquishes all right to the 200 shares, and consents that title and possession may remain with defendant. The prayer is for preliminary injunction restraining the bank from negotiating the notes pending suit and from instituting suit upon the notes, or any of them, and for decree canceling and ordering the bank to surrender the notes to the Dodge Company, and for $7,054 paid by Porter to the bank on account of the notes.

Upon the return day of the order to show cause the bank appeared and filed an affidavit of its vice president and cashier, admitting that about September 25, 1914, the Dodge Company, by Porter, and the bank entered into and executed the agreement for the sale by the bank to the Dodge Company of 200 shares of stock; but the affiant

denied that Porter had no authority to make and execute the agreement and the notes, denied that the transaction was without the knowledge of the board of directors or stockholders of the Dodge Company, other than Porter, denied that there was no record of the transaction in the books of the Dodge Company, or that the directors and stockholders knew nothing of the matter until about October 26, 1915. Affiant alleged good faith in the whole transaction, and that the bank bought the stock in pursuance of an understanding and agreement with the Dodge Company that the bank would acquire the stock and sell the same to the Dodge Company, and that the negotiations with respect to the sale were had with Porter, who, in affiant's belief, was clothed with full authority to act. Attached to the affidavit is what appears to be a copy of a resolution adopted by the board of directors of the Dodge Company at a special meeting of the corporation held in San Francisco September 25, 1914. The resolution recites the advisability of acquiring 200 shares of the capital stock of the corporation "issued to E. H. Dodge, now owned by the First National Bank of Portland, for the sum of $41,000," and authorizes the secretary, on behalf of the corporation, to issue three notes, for $10,000 each, maturing in one, two, and three years, respectively, and one note, for $11,000, maturing in four years, to the bank in full payment of the stock.

The court having issued the injunction pendente lite, the question for our consideration is whether or not, upon the showing made, the District Court erred in granting injunctive relief pending the litigation. The contract between the Dodge Company and the bank is executory, in that the bank is not to deliver the stock to the Dodge Company until the notes are all paid in full; it being provided that until such payments are made, title and possession of the stock are to remain in the bank. Clearly, unless prevented by judicial order, the bank can negotiate the notes made to it by the Dodge Company, and if the notes are negotiated, and pass into the hands of bona fide purchasers for value without notice, and suit is brought to collect, the Dodge Company may not be able to make the defense that the notes were made without authority in Porter and without knowledge by the directors, and that the stock was purchased in violation of the laws of the state of California. No rights of creditors are in question. The issue of purchase and sale of shares is directly between the corporation and the stockholders therein. Therefore, if the agreement made by the alleged representative of the corporation and a shareholder, whereby the corporation was to buy its capital shares, was never authorized or assented to, and is malum prohibitum, the corporation itself may rescind or assail the validity of such contract and under just conditions be relieved.

Section 309 of the Civil Code of California provides that the directors of corporations must not divide, withdraw, or pay to the stockholders, or any of them, any part of the capital stock (except as specially provided in the statutes), nor must they reduce or increase the capital stock, except as specially provided by statute. In Schulte v. Boulevard Gardens Land Company, 164 Cal. 464, 129 Pac. 582, 44 L. R. A. (N. S.) 156, Ann. Cas. 1914B, 1013, the Supreme Court of the state defined the phrase "capital stock," as used in the section re-

ferred to, as "not the shares of which the nominal capital is composed, but the actual capital, i. e., assets with which the corporation carries on its business," and held that under the statutes of California a corporation cannot employ its assets for the purchase of its own stock, "for the result would be to illegally withdraw and pay to a stockholder a part of the capital stock." The court says that want of power to buy its own stock may not prohibit a corporation from taking its stock in satisfaction of a loan, or when otherwise necessary to save itself from loss, or, for instance, where the particular facts show that an agreement has existed whereby the corporation, in part consideration of an entire contract under which its stock was originally issued, has obligated itself to repurchase stock at a stated price upon election by a shareholder.

With this interpretation of the statute of the state under which the Dodge Company is incorporated, and with positive allegations of lack of any authority in Porter to act for the corporation, and of lack of knowledge in the directors of the execution of the agreement to purchase, and of the execution of the notes in the name of the Dodge Company, we cannot hold that the bill lacked equity, and that the affidavit filed by the bank made such a strong showing as to take from the court that latitude of discretion whereby it maintained the status quo until final hearing, when all the facts are brought out and the question of right between the parties can be decided. Wright et al. v. Pipe Line Company, 101 Pa. 204, 208, 47 Am. Rep. 701.

The order of the lower court is affirmed.

THE OCEANIA VANCE.

(Circuit Court of Appeals, Ninth Circuit. May 1, 1916.)

No. 2599.

1. COLLISION ⊂=82(3)—SCHOONER AND TUG WITH TOW—EXCESSIVE SPEED IN FOG.

A schooner sailing before the wind at a speed of from 6½ to 7 knots an hour in a thick fog, and where passing vessels were frequent, *held* in fault for a collision with a tug having a tow, on the ground of excessive speed.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 171–174; Dec. Dig. ⊂=82(3).]

2. COLLISION ⊂=82(3)—INTERNATIONAL RULES—NAVIGATION IN FOG.

Article 16 of the International Rules (Act Aug. 19, 1890, c. 802, § 1, 26 Stat. 326 [Comp. St. 1913, § 7854]), which requires every vessel to go at moderate speed in a fog, applies to sailing as well as steam vessels.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 171–174; Dec. Dig. ⊂=82(3).]

Appeal from the District Court of the United States for the Northern Division of the Western District of Washington; Jeremiah Neterer, Judge.

Suit in admiralty for collision by the Puget Sound Tugboat Company, owner of the tug Sea Lion, against the schooner Oceania Vance;

the Coast Shipping Company, claimant. Decree for libelant, and claimant appeals. Affirmed.

For opinion below, see 217 Fed. 973.

Harry Ballinger and Charles T. Hutson, both of Seattle, Wash., for appellant.

Hughes, McMicken, Dovell & Ramsey and Otto B. Rupp, all of Seattle, Wash., for appellee.

Before GILBERT and ROSS, Circuit Judges, and RUDKIN, District Judge.

ROSS, Circuit Judge. [1] This case grew out of a collision between the steam tug Sea Lion, at the time bound from Waldron Island to Grays Harbor and having in tow a barge laden with rock, and the schooner Oceania Vance, at the time in ballast under sail before a stiff breeze. The place where the collision occurred was one much frequented by vessels, and there was a thick fog prevailing. The collision resulted in the sinking and total loss of the tug and the personal effects of its officers and crew. The trial court found that the schooner was at the time proceeding at a speed of from 6½ to 7 knots an hour, which speed was an immoderate one, and was the sole cause of the accident, and accordingly gave judgment against the claimant of the schooner for the full amount of the damage caused by the collision.

We think the evidence in the case justified the conclusion that the speed of the schooner was from 6½ to 7 knots an hour, and we are also of the opinion that that speed, under the circumstances then prevailing, was immoderate, and therefore that the schooner was in that respect rightly held in fault. The Chattahoochee, 173 U. S. 540, 19 Sup. Ct. 491, 43 L. Ed. 801; The Umbria, 166 U. S. 404, 17 Sup. Ct. 610, 41 L. Ed. 1053; The Belgian King, 125 Fed. 869, 60 C. C. A. 451; The Eagle Point, 120 Fed. 449, 56 C. C. A. 599. Speeds much less than 6 knots have frequently been condemned. The Umbria, supra; The George W. Roby, 111 Fed. 601, 49 C. C. A. 481; The Michigan, 63 Fed. 280, 11 C. C. A. 187.

[2] The same rule in respect to the necessity of slackening speed in foggy weather that applies to steamers is equally applicable to sailing vessels. The Chattahoochee, supra. In that case the court further said, among other things:

"While sailing vessels have the right of way as against steamers, they are bound not to embarrass the latter, either by changing their course or by such a rate of speed as will prevent the latter from avoiding them. There is also the contingency that a schooner sailing with the wind free, as in this case, may meet a vessel close-hauled, in which case the latter has the right of way, and the former is bound to avoid her. Beyond this, however, a steamer usually relies for her keeping clear of a sailing vessel in a fog upon her ability to stop and reverse her engines; whereas it is impossible for a sailing vessel to reduce her speed or stop her headway without maneuvers which would be utterly impossible after the two vessels come in sight of each other. Indeed, she can do practically nothing beyond putting her helm up or down to 'ease the blow' after the danger of collision has become imminent. The very fact that a sailing vessel can do so little by maneuvering is a strong reason for so moderating her speed as to furnish effective aid to an approaching steamer charged with the duty of avoiding her."

Article 16 of the International Rules provides:

"Every vessel shall, in a fog, mist, falling snow, or heavy rainstorms, go at a moderate speed, having careful regard to the existing circumstances and conditions. A steam vessel hearing, apparently forward of her beam, the fog signal of a vessel the position of which is not ascertained shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over." 26 Stat. 326 (Comp. St. 1913, § 7854).

It is unnecessary to determine whether the tug was also at fault, for the reason that the record shows that the tug was a total loss, and that its value was over $30,000, and that the damage to the schooner did not exceed $500. Therefore, assuming that the two boats were equally at fault, and that the damages should be equally divided under the rule applicable to such cases, the judgment rendered by the court below in favor of the libelant did not exceed the sum for which the claimant would be responsible.

Judgment affirmed.

In re HUNTER ARMS CO.

In re HODGES et al.

(Circuit Court of Appeals, Second Circuit. April 11, 1916.)

No. 240.

1. CORPORATIONS ⟸519(3)—CORPORATE FUNDS—LOANS.

Where one of three interlocking corporations, which received moneys raised from the sale of the bonds of the second company, loaned them to the third corporation, evidence *held* insufficient to show that the loan was authorized or ratified by the second company.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2085, 2089; Dec. Dig. ⟸519(3).]

2. BANKRUPTCY ⟸303(3)—EVIDENCE—BONDS.

Where a bankrupt corporation, whose directors interlocked with a second company, which sold bonds, received the proceeds, evidence showing that the bankrupt corporation had with authority lent the proceeds to another corporation, which was accepted as the debtor, must be clear and convincing, to free the bankrupt from liability.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 462; Dec. Dig. ⟸303(3).]

Appeal from the District Court of the United States for the Northern District of New York.

In the matter of the bankruptcy of the Hunter Arms Company. From an order (226 Fed. 866) confirming the report of the master allowing a claim, Frank B. Hodges and others, trustees, appeal. Affirmed.

The order appealed from confirmed the report of a special master, proving and allowing the claim of Arvin L. Rice, as trustee in bankruptcy of Hunter Bros. Paper Company against the bankrupt estate of Hunter Arms Company, for the sum of $59,000, with interest. For brevity, the two above-named corporations will be called

the Paper Co. and the Arms Co., and a third, the Battle Island Paper Company, will be called the Island Co.

Nelson P. Bonney, of Norwich, N. Y., and William A. Mackenzie, of Syracuse, N. Y. (J. P. Hill, of Norwich, N. Y., of counsel), for appellants.

E. J. Mizen, of Oswego, N. Y., for appellee.

Before WARD, and ROGERS, Circuit Judges, and MAYER, District Judge.

MAYER, District Judge. There were three corporations, all now bankrupt, and all exploited by six brothers, named Hunter.

Arms Co. made firearms, and had a factory and office at Fulton, N. Y.; Island Co. made pulp, and had a plant at Battle Island, near Fulton; Paper Co. was incorporated in 1905, after the two other corporations had been in existence for some time. Shortly after incorporation, Paper Co. bought for $1,700 some vacant land at Battle Island. The authorized common capital stock of Paper Co. was $250,000, but only $2,500 was issued. Paper Co. executed a trust mortgage on the $1,700 vacant premises to secure an issue of bonds up to $300,000, the proceeds from the sale of these bonds to be used for the erection of a paper mill on the mortgaged premises.

The Hunter brothers were majority stockholders in Arms Co., sole stockholders in Paper Co., and held stock in Island Co. They were sole directors of Arms Co., and until 1913, when one of them dropped out, were also sole directors of Paper Co. They appear, also, to have been directors of Island Co. They were likewise the officers of all three companies, Thomas Hunter being treasurer of Paper Co. and president of Arms Co. and Island Co. As might be expected, these Hunter brothers treated these corporations as if they were their personal property, and thus frequently acted informally, with the natural result of leaving in doubt the effect of their conduct.

Between February and August, 1906, Thomas Hunter sold 82 bonds of Paper Co. for $82,000. Fifty-nine of these bonds are now outstanding. Paper Co. neither kept books nor had a bank account. Without authority and without power, even though his board of directors had so authorized, Thomas Hunter paid the proceeds of these bonds as fast as received into the bank accounts and to the credit of Arms Co., and Arms Co. in its books charged itself with these moneys and credited itself with various sums paid out by it for Paper Co.

The proceeds of the bonds never went to build a mill, and no mill was ever built; but, on the contrary, these proceeds were used by Arms Co., mixed with its own funds, and treated as its own, and there cannot be any doubt that Arms Co. became responsible for this money to Paper Co. It is unnecessary to determine whether, by virtue of the transactions, Arms Co. became a trustee or merely a debtor of Paper Co. At this time and thereafter there was an open and general running account between Arms Co. and Island Co., and Island Co. was the debtor of Arms Co. to the extent of $100,000 or more.

[1, 2] At a meeting at which it is claimed the affairs of all three com-

panies were discussed, it is said that Thomas Hunter advised loaning $75,000 of the proceeds of the bonds to Island Co. One of the others present approved this suggestion, but the remainder made no comment. No formal resolution was prepared, offered, or voted on, and it is now urged that Island Co., instead of Arms Co., became the debtor of Paper Co. by virtue of this alleged agreement thus loosely made. In other words, it is contended that Arms Co. was relieved by an agreement which in effect amounted to a novation.

Irrespective of questions of power, the proof is inconclusive to establish any such understanding. After the $82,000 of Paper Co. had gone into the treasury of Arms Co., the latter on December 31, 1906, made an entry on its ledger account with the Paper Co., charging off $75,000 against Paper Co. The entry read: "1906, Dec. 31. Note given, $75,000.00."

On the same day Arms Co. gave Island Co. on Arms Co.'s ledger account with Island Co., credit for having paid to it $75,000. That entry read: "1906, Dec. 31. Note given, $75,000.00." On December 31, 1906, Island Co. owed Arms Co. on open account, $190,362.95, and the sums thus loaned by Arms Co. to Island Co. were not earmarked in any manner, and none of them can be identified as Paper Co. money. No note was ever given, not a piece of paper money existed to identify the alleged transaction, and no money ever passed.

In the books of Island Co. there is not any entry contemporaneously made, nor, indeed, until June 30, 1909—2½ years later—when Island Co. charged itself with having borrowed $75,000 of Paper Co., the entry reading: "1909, June 30. Transfer of account from Hunter Arms Co., $75,000.00."

Throughout this period Arms Co. and Island Co. had many transactions, and after the alleged loan Arms Co. nevertheless paid interest on the Paper Co. bonds on 11 separate occasions from January, 1907, to January, 1913, to an amount aggregating $21,350. In brief, Arms Co. has fallen far short of proving that it was relieved or released of its debt to Paper Co., and, on the contrary, the evidence leads affirmatively to the contrary conclusion.

The foregoing sufficiently outlines the transactions, the details of which are set forth in an exhaustive and careful review in Judge Ray's opinion. Without considering any questions as to the power of the directors of Paper Co., nor the application of section 23 of the New York Stock Corporation Law, it is enough to state that, where the money of investing bondholders has been used and dealt with as is shown in this record, any agreement in derogation of their rights must be established by clear and convincing proof, and must, of course, be lawful.

As the fact (i. e., the agreement to substitute Island Co. as the debtor, instead of Arms Co.) has not been proved, the obligation remains as Thomas Hunter originally placed it, and as Arms Co. originally accepted it, and it becomes unnecessary to consider questions of law which might have arisen, had the proof justified the conclusion that the agreement was made.

The order is affirmed, with costs.

LOUISVILLE & N. R. CO. v. WESTERN UNION TELEGRAPH CO.

(Circuit Court of Appeals, Fifth Circuit. May 15, 1916.)

No. 2772.

1. APPEAL AND ERROR ⟸231(1)—PRESENTATION OF GROUNDS OF REVIEW IN COURTS BELOW—OBJECTIONS—SUFFICIENCY.

Where complainant objected below to the admission in evidence of a transcript of prior proceedings between the same parties on the ground that it was not properly authenticated, and there was nothing to call the trial court's attention to the fact that the name of the clerk appearing at the foot of the certificate, which was under the seal of the court, was in typewriting, that objection cannot be taken advantage of on appeal, for the defect might easily have been obviated, had attention been called to it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1352; Dec. Dig. ⟸231(1); Trial, Cent. Dig. §§ 194, 206.]

2. JUDGMENT ⟸570(4)—CONCLUSIVENESS—EFFECT OF.

Where complainant's bill, filed in the state court, which presented the same issues as that filed in the federal court, was dismissed, the decree of dismissal is a conclusive adjudication, precluding complainant from maintaining a bill in the federal court.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1031; Dec. Dig. ⟸570(4).]

3. COURTS ⟸522—PRIORITY OF JURISDICTION—DISTRICT COURTS—INJUNCTION —RIGHT TO MAINTAIN.

Where the Federal District Court of one district issued an injunction against certain acts, complainant cannot by bill in another district be granted relief against such injunction, and permission to perform the acts enjoined.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1444; Dec. Dig. ⟸522.]

Appeal from the District Court of the United States for the Southern District of Mississippi; Henry C. Niles, Judge.

Bill by the Louisville & Nashville Railroad Company against the Western Union Telegraph Company. From a decree dismissing the original bill and the supplemental bill, complainant appeals. Affirmed.

Gregory L. Smith, of Mobile, Ala., for appellant.

George H. Fearons, of New York City, J. B. Harris, of Jackson, Miss., and Charles P. Fenner and W. B. Spencer, both of New Orleans, La., for appellee.

Before PARDEE and WALKER, Circuit Judges, and NEWMAN, District Judge.

WALKER, Circuit Judge. This is an appeal from a decree dismissing the original bill and a supplemental bill filed in the District Court. That decree followed a motion of the defendant to dismiss the bill for the reason that the merits of the cause have been fully adjudicated adversely to the complainant in a suit instituted by it in a court of the state of Mississippi against the defendant, and to dismiss the supplemental bill for the reason that the same was filed in violation of an injunction issued by the District Court of the United States for the Western District of Kentucky in a suit between the same parties.

[1] On the hearing of the motion the defendant offered in evidence what purported to be a transcript of the proceedings, including a final decree of dismissal, in a suit between the same parties in a chancery court of Mississippi. The plaintiff objected to so much of that paper as purported to be a decree of the chancery court, upon the ground that it was not properly authenticated as a final decree of said court. The evidence was admitted over this objection. This ruling is assigned as error. It is urged upon us as a ground supporting the objection to the admissibility of the purported transcript that the name of the clerk of the court appearing at the foot of the certificate, which was under the seal of the court, was in typewriting. There is nothing in the record to indicate that this specific ground of objection to the evidence offered was called to the attention of the trial court or made known to the opposing party or its counsel. In the statement of the evidence which was made part of the record for this appeal, there is a recital in reference to the paper offered and admitted in evidence that every part of it was in typewriting. It is not made to appear that in any way attention was called to this fact prior to the recital of it in the statement of evidence prepared and submitted after the decree appealed from was rendered. An appellate court is not required to regard such a general objection to evidence, made in such terms as to be calculated to conceal rather than disclose the real reason relied on for the rejection of the evidence. The objection as made cannot be permitted to form the basis of a reversal of the decree, because it failed to point out in what respect the authentication of the state court decree was deemed to be insufficient, and failed to make known to the court or to opposing counsel the ground of objection really relied on. Ottumwa Box Car Loader Co. v. Christy Box Car Loader Co., 215 Fed. 362, 131 C. C. A. 504; 38 Cyc. 1388. It well may be supposed that the ground of objection now urged could and would readily have been obviated if it had been made known.

[2] The bill in the state court presented substantially the same issues as were presented by the original bill in this case. Those issues were adjudicated against the appellant by the decree of the state court dismissing the bill filed in it, and are not subject to be relitigated in this case. Dowell v. Applegate, 152 U. S. 327, 14 Sup. Ct. 611, 38 L. Ed. 463; Forsyth v. Hammond, 166 U. S. 506, 17 Sup. Ct. 665, 41 L. Ed. 1095; Mitchell v. First National Bank of Chicago, 180 U. S. 471, 21 Sup. Ct. 418, 45 L. Ed. 627.

[3] The supplemental bill filed by the appellant prayed for an injunction restraining and enjoining the defendant, the appellee here, from maintaining and operating upon the rights of way of the appellant the poles, wires, and other telegraphic appliances which the appellee had constructed, maintained, and operated upon said rights of way under a contract with the appellant which it was alleged expired on August 17, 1912. By writs of injunction issued under orders made in a suit between appellant and appellee in the United States District Court for the Western District of Kentucky, certified copies of which were made exhibits to the appellee's answer to the supplemental bill, the appellant was enjoined and restrained from taking possession of or interrupting the appellee in the use of any of its poles, wires, or

other apparatus situated upon the right of way of the defendant, which was referred to in the original and supplemental bills in this case, and by the terms of the last of said orders the injunction issued thereunder was to be operative until the further order of the court from which it issued. We think it is apparent that the necessary effect of granting the relief which the supplemental bill prayed would be to enable the appellant to do, under the protection of the orders of one court, what it has been forbidden to do by a valid order of another court, which is in full force and effect. A bill, the object of which is to bring about such a result, is not maintainable.

The conclusion is that it has not been made to appear that the decree appealed from was erroneous, and it is affirmed.

GENERAL ELECTRIC CO. v. RICHARDSON et al.

(Circuit Court of Appeals, Third Circuit. May 13, 1916.)

No. 2094.

1. PARTIES ⇐7(1)—DEFENDANTS—REAL PARTY IN INTEREST.
A defendant, joined only on the ground that it is a debtor of its codefendant, and against which the only relief prayed is that it be enjoined from paying its codefendant and be required to pay to complainant the amount of the latter's claim, is only a stakeholder and not a real party in interest.
[Ed. Note.—For other cases, see Parties, Cent. Dig. § 9; Dec. Dig. ⇐7(1).]

2. COURTS ⇐372(4)—FEDERAL COURTS—STATE LAWS AS RULES OF DECISION.
The respective rights of a seller of property by a contract of conditional sale and of creditors of the buyer are to be determined in a federal court by the law of the state so far as applicable.
[Ed. Note.—For other cases, see Courts, Cent. Dig. § 979; Dec. Dig. ⇐372(4).]

3. SALES ⇐472(5)—CONDITIONAL SALES—RIGHTS OF SELLER AGAINST RECEIVER OF PURCHASER.
Under the law of Pennsylvania the rights of a receiver appointed in a creditors' suit in property held by the defendant under a contract of conditional sale are superior to those of the seller.
[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1375; Dec. Dig. ⇐472(5).]

Appeal from the District Court of the United States for the Eastern District of Pennsylvania; Oliver B. Dickinson, Judge.

Suit in equity by the General Electric Company against James A. Richardson and others, as receivers of Doak & Co., and the Thomas W. Evans Museum & Institute Society. Decree for defendants, and complainant appeals. Affirmed.

For opinion below, see 228 Fed. 758.

H. B. Gill and W. B. Linn, both of Philadelphia, Pa., for appellant.

R. D. Brown and Ira J. Williams, both of Philadelphia, Pa., for appellees.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

McPHERSON, Circuit Judge. Federal jurisdiction of this suit depends on the diverse citizenship of the parties. The facts are as follows:

On June 3, 1914, the firm of Doak & Co. contracted with the Evans Museum to build and equip a power house for $65,232 on the property of the Museum in West Philadelphia. On July 11 the Electric Company agreed with the firm to furnish, deliver, and erect four generators and other appliances for the sum of $5,151—the material to be shipped "to Messrs. James G. Doak & Co. at Philadelphia for the Thomas W. Evans Museum & Institute Society." The agreement further provided that:

"The title to the apparatus herein sold shall not pass from the company until all payments hereunder (including deferred payments, if any) shall have been fully made in cash. The purchaser agrees to do all acts necessary to perfect and maintain such retention of title in the company."

And it provided, also, that the price should be—

"* * * payable 85 per cent. of the value of the work done and material furnished each month as evidenced by a certificate to be issued by the architect * * * and the balance in full * * * after final certificate," etc.

The machinery (which the Electric Company was thus to install) was shipped to Philadelphia on bills of lading made out in the name of the firm and mailed to them. The Electric Company's teamsters presented the bills to the carrier, received the machinery, and hauled it to the Museum's property, where the Electric Company installed it. Practically all of it was in place on November 25, when upon a creditors' bill the District Court for the Eastern District of Pennsylvania appointed receivers for the firm on the ground of insolvency. Up to this time, the Electric Company had received no part of the price agreed upon, although the Museum had paid the firm $3,690 on account of three of the generators—these having been included in a monthly bill of the firm under date of November 2, and the architect having certified the bill on November 6 as correct. The Museum had no notice or knowledge of the Electric Company's title. On November 25 the Museum still owed Doak & Co. on the general contract more than $10,000, and (after the Museum had refused to return the machinery upon the Electric Company's demand) this action was begun, in which an equitable lien for $5,151 is claimed upon the unpaid balance. The district court dismissed the bill.

As it seems to us, this appeal presents only two questions, of which neither requires much discussion.

[1] (1) We think it clear that the Museum has no real interest in the suit. Neither its title nor its possession is attacked; the bill merely prays for an injunction restraining payment of any part of the $5,151 to Doak & Co. or to the receivers; and for an order directing payment of that sum to the plaintiff. In a word, the Museum is only a stakeholder; and moreover there is now no serious dispute that $3,690 has already been paid in effect on the cost of the machinery, and that only the difference is now payable to one or other of the claimants.

[2, 3] (2) Turning then to the real antagonists, we may say first

that the law of Pennsylvania, as far as applicable, is the law of the controversy. Bryant v. Swofford Bros., 214 U. S. 279, 29 Sup. Ct. 614, 53 L. Ed. 997; Bank v. Trust Co. (C. C. A. 3) 178 Fed. 187, 101 C. C. A. 507. Under that law it is plain that the contract of July 11 was a conditional sale, good between the parties, but (as a general rule) invalid against the vendee's creditors. Ott v. Sweatman, 166 Pa. 217, 31 Atl. 102, and many later cases. In favor of an execution creditor at least, the rule undoubtedly prevails. In Bullock Co. v. Traction Co., 231 Pa. 137, 80 Atl. 570, the court said:

"But, even as to personal property, a vendor who makes a conditional sale cannot assert his title against an execution creditor who has levied upon the property so sold. Such a sale is within the meaning of the law fraudulent as against a levying creditor. When a general creditor has obtained a judgment upon which an execution has been issued and a levy has been made, a lien is created against the property so seized. In such a case the rights of the levying creditor are superior to those of a vendor of personal property who makes a conditional sale of the same, reserving title in himself until the purchase price is paid. Ott v. Sweatman, 166 Pa. 217 [31 Atl. 102]. Unsecured creditors have no lien until judgment has been entered and execution issued, but when these steps have been taken their rights are superior to a vendor who sought to retain a lien upon the property sold until the purchase price was paid."

What, then, are the rights of the receivers in the case before us? This question also has been answered by the supreme court of Pennsylvania. In Duplex Co. v. Clipper Co., 213 Pa. 207, 62 Atl. 841, the court considered the powers of a receiver under a creditors' bill against an insolvent corporation. After pointing out the difference between such a receiver, who derives his authority, not from the insolvent (as does a voluntary assignee for the benefit of creditors), but from the law itself, Chief Justice Mitchell summarized the opinion as follows:

"When, therefore, on a creditors' bill, a receiver is appointed for an insolvent corporation, he is not limited, like an assignee for the benefit of creditors, by the rights of the debtor corporation as to property held by it under a conditional sale, but has the rights of a levying creditor, and a sale by him passes a good title against the vendor, irrespective of the purchaser's status as a creditor, either with or without notice."

This ruling was followed by Judge Orr in the Western District of Pennsylvania in Re Trunk Co. (D. C.) 176 Fed. 1009, and by this court in Bank v. Trust Co. (C. C. A. 3) 178 Fed. 190, 101 C. C. A. 507.

Without further discussion we hold that the right of Doak & Co.'s receivers would have been superior to the right of the Electric Company, even if the generators had been in the firm's possession on November 25, and also that the receivers' right to the fund in question (which now takes the place of the property) is in like manner superior.

The decree is affirmed.

MIDDLESEX BANKING CO. v. EATON, Internal Revenue Collector.

(Circuit Court of Appeals, Second Circuit. April 11, 1916.)

No. 199.

INTERNAL REVENUE ⊂⊃9—EXCISE TAX ON CORPORATIONS—ASCERTAINMENT OF NET INCOME—"DEPOSIT."

A corporation was engaged in the business of selling to investors so-called debenture bonds and guaranteed real estate securities, the former of which were its own obligations, with interest coupons payable to bearer and underwritten by a trust company, with which it deposited as collateral security farm mortgages payable to itself, and bearing a higher rate of interest than the bonds, and the latter being obligations payable to itself, bearing its guaranty and secured by farm mortgages, to which were attached interest coupons at the rate agreed upon with the purchaser, the corporation retaining separate obligations of the mortgagor securing additional interest. The difference in the interest rates thus paid and received represented the gross profit of the corporation on those two classes of transactions. *Held* that though the corporation was chartered as a bank, yet, within Act Aug. 5, 1909, c. 6, § 38, par. 2, 36 Stat. 113 (Comp. St. 1913, § 6301), imposing an excise tax on corporations, to be computed on their net income, the interest paid on such obligations cannot be treated as interest paid on deposits which a banking company may, under such section, deduct from its gross income, the transaction in no way being a banking transaction.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 13–28; Dec. Dig. ⊂⊃9.

For other definitions, see Words and Phrases, First and Second Series, Deposit.]

In Error to the District Court of the United States for the District of Connecticut.

Action by the Middlesex Banking Company against Robert O. Eaton, Collector of Internal Revenue. There was a judgment for defendant (221 Fed. 86), and plaintiff brings error. Affirmed.

F. D. Haines, of Middletown, Conn., for plaintiff in error.

Thomas J. Spellacy, U. S. Atty., and F. A. Scott, Sp. Asst. U. S. Atty., both of Hartford, Conn., for defendant in error.

Before COXE, and WARD, Circuit Judges, and LEARNED HAND, District Judge.

WARD, Circuit Judge. This is an action at law by the plaintiff to recover of the defendant, United States Collector of Internal Revenue for the District of Connecticut, taxes paid by it under protest to him, assessed on its net income for the years 1909, 1910, 1911, and 1912 under section 38 of the Act of August 5, 1909. The case was tried before Judge Thomas without a jury, and he entered a judgment in favor of the defendant, to which this writ of error is taken.

The plaintiff was incorporated in 1872 as the Middlesex Trust Company under a charter giving it the franchises of a bank, trust company, and safe deposit company. In 1874 the power to receive fiduciary or trust funds and to act as guardian of the property of minors was repealed, and the power to take securities for loans authorized by the

charter and to sell and guarantee payment of the same was conferred. In 1875 the name was changed to the Middlesex Banking Company. In 1889 the charter was amended by repealing the power to act in a fiduciary capacity as a trust company and its powers were defined as follows:

"The corporation hereby created shall have power to receive on deposit or in custody for safe-keeping, bonds, plate, jewelry, stocks and other valuable property upon such terms and for such compensation as may be agreed upon by the said corporation and by the depositors of any such property aforesaid; to receive money on deposit and to allow and pay interest on said money, and to loan the same at interest; to borrow money and issue its obligations negotiable or otherwise therefor, in which obligations, if secured by first liens upon real estate worth at least double the face thereof, holders of trust funds may invest such funds."

This gives the company the powers of a safe deposit company, of a bank of deposit, and of a company to sell securities. Practically the whole of the business done by the plaintiff during the years in question was the sale of its own obligations, called debenture bonds, secured by mortgages on property in the South and West, deposited with the Columbia Trust Company as trustee for the bondholders and of the obligations of borrowers to the plaintiff secured by mortgages which accompanied by its own interest coupons for a less rate of interest than it receives from the borrowers, it guarantees as to both principal and interest and sells to purchasers. These latter are called guaranteed real estate securities.

Both these forms of securities the plaintiff sells throughout the East by means of agents and its profit in each case is represented by the difference between the rate of interest it receives from its Southern and Western borrowers and the interest which it pays to the Eastern purchasers of the obligations. The company's gross income for the four years in question was:

1909	$401,846.31
1910	405,335.46
1911	364,663.72
1912	341,376.04

And it claims the right to deduct therefrom interest paid on its debenture bonds and guaranteed real estate securities as follows:

1909	$240,819.47
1910	241,497.20
1911	220,777.51
1912	212,436.47

The theory is that the plaintiff is a bank or banking association, and that the interest in question is paid upon money deposited with it as such, and is deductible under the provisions of subdivision 3 of paragraph 2 of section 38 of the Act of 1909 (36 Stat. p. 112). Section 38 (sections 6300, 6301) reads:

"That every corporation, joint stock company or association, organized for profit and having a capital stock represented by shares, * * * now or hereafter organized under the laws of the United States or of any state or territory of the United States or under the acts of Congress applicable to Alaska or the District of Columbia * * * shall be subject to pay annually a special excise tax with respect to the carrying on or doing business

by such corporation, joint stock company or association, * * * equivalent to one per centum upon the entire net income over and above five thousand dollars received by it from all sources during such year, exclusive of amounts received by it as dividends upon stock of other corporations, joint stock companies or associations * * * subject to the tax hereby imposed. * * *

"Second. Such net income shall be ascertained by deducting from the gross amount of the income of such corporation, joint stock company or association, * * * received within the year from all sources (first) all the ordinary and necessary expenses actually paid within the year out of income in the maintenance and operation of its business and properties; * * * (second) all losses actually sustained within the year and not compensated by insurance or otherwise; * * * (third) interest actually paid within the year on its bonded or other indebtedness not exceeding the paid-up capital stock of such corporation, joint stock company or association, * * * outstanding at the close of the year, and in the case of a bank, banking association or trust company, all interest actually paid by it within the year on deposits. * * *"

Without stopping to analyze the charter powers of the plaintiff and to determine whether it is or is not a bank or banking association and whether if so it has not also other and different powers, we think it perfectly clear that the interest in question is not interest upon money deposited with it, but is interest paid on its own obligations or on the obligations of others guaranteed by it, which it has sold to the investing public. The purchase price is no more money deposited with the plaintiff at interest than is money paid to a railroad company for the purchase of its bonds. The transaction is not a banking transaction at all like the giving of a passbook or a certificate of deposit to a depositor, but a business of selling securities to investors. Selden v. Equitable Trust Co., 94 U. S. 419, 24 L. Ed. 249. We attach no importance to the contention that, even if the foregoing be true, still the interest in question is deductible as an ordinary and necessary expense actually paid out of the income in the maintenance and operation of the business provided for under the first subdivision of paragraph 2, because the whole subject of the deduction of interest is specifically regulated in subdivision 3.

The judgment is affirmed.

GEORGIA CASUALTY CO. v. BOWRON.

(Circuit Court of Appeals, Fifth Circuit. May 8, 1916.)

No. 2844.

INSURANCE ⊂=435—INDEMNITY INSURANCE—LIABILITY.

Defendant issued a policy insuring the trustee, carrying on a bankrupt's business, against loss from injuries to employés. The policy declared that no action should lie against defendant under the indemnity clause, unless brought in the name of the insured for loss actually sustained and paid in money by insured in satisfaction of a judgment after trial of the issue. Pending the case of an injured employé against the trustee, the bankrupt's property was sold, the purchaser obligating itself to hold the trustee harmless against any and all liability for damages to persons or property resulting from the carrying on of the business

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

of the bankrupt, and the judgment finally recovered by the injured servant was paid by the vendee of the purchaser, which assumed its obligation. The decree under which the property was sold expressly provided that the sale and conveyance should be subject to the condition that the court might take and resell the property in case the purchaser should fail to pay any part of the purchase price. *Held* that, as the sale was conditional and as the purchase price was necessarily diminished by the amount of the judgment recovered against the trustee by the injured servant, the trustee suffered a loss for which the insurer was liable.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1144; Dec. Dig. ⟸435.]

In Error to the District Court of the United States for the Northern District of Alabama; William I. Grubb, Judge.

Action by James Bowron, trustee in bankruptcy of the Southern Iron & Steel Company, against the Georgia Casualty Company. There was a judgment for plaintiff (223 Fed. 673), and defendant brings error. Affirmed.

E. H. Cabaniss, of Birmingham, Ala., for plaintiff in error.

Augustus Benners, of Birmingham, Ala., for defendant in error.

Before PARDEE and WALKER, Circuit Judges, and MAXEY, District Judge.

WALKER, Circuit Judge. This was an action on an employer's liability insurance policy issued to James Bowron as receiver in bankruptcy of the Southern Iron & Steel Company, which, upon his appointment as trustee of the bankrupt's estate, was by indorsement made payable to him as such trustee. After the date of a decree ordering the sale of the bankrupt's property, but before the sale under that decree, and while the bankrupt's property was in possession of and operated by the trustee, Carl Sibert, an employé of the trustee, sustained personal injuries. Against loss arising or resulting from a claim upon the assured for damages on account of those injuries the insurer, by the policy, undertook to indemnify the assured. A judgment in favor of Sibert was rendered against the assured in a suit brought to recover such damages, the defense of which suit was conducted by the insurer, as provided for in the policy, and that judgment has been paid. But it is contended in behalf of the insurer, the plaintiff in error here, that the payment was not made by the assured, and that the satisfaction of the judgment was so brought about that the accrual of a right of action in favor of the assured on the policy was prevented by the following provision thereof:

"No action shall lie against the company under the indemnity clause herein unless brought by and in the name of the assured for loss actually sustained and paid in money by the assured in satisfaction of the judgment after trial of the issue."

Emphasis is laid upon the policy being one of indemnity, not against liability, though it is adjudged to exist, but against "loss actually sustained and paid in money by the assured in satisfaction of the judgment after trial of the issue."

The contention urged is based upon the circumstances that the purchaser of the bankrupt's property, in compliance with the requirements

of the decree for its sale, obligated itself to hold the trustee "harmless against any and all liability for damages to persons or property resulting from the carrying on of the business of the bankrupt by him, and for all costs and legal expenses incident thereto not paid or discharged from the proceeds of sale," and that the judgment in favor of Sibert was paid by the vendee of such purchaser, which had assumed its obligations, giving its check, payable to the order of the trustee in bankruptcy, for an amount recited in a statement attached to the check to be "in full payment of judgment and costs of court in the suit of" Sibert against the trustee, and by the trustee by indorsement making that check payable to the order of the clerk of the court, who collected the amount and applied it to the satisfaction of the judgment and costs in the Sibert case. The circumstances just mentioned, upon which the plaintiff in error relies, are not the only ones which are to be looked to in determining whether, within the meaning of the above-quoted provision of the policy, the assured did or did not actually sustain a loss in consequence of Sibert's injury, and did or did not in reality satisfy the judgment recovered by Sibert. The decree under which the bankrupt's property was sold expressly provided that the sale and conveyance of it should "be subject to the condition that the court may retake and resell the property in case the purchaser or purchasers or assigns shall fail to pay any part of the purchase price remaining unpaid, or to comply with any order duly made by this court with respect to the making of any payment which it is herein provided the purchaser or purchasers shall make, or to perform and discharge any contract or liability of the trustee which by the terms of this order the purchaser shall assume." And a decree, which, with exceptions therein stated, closed the administration of the bankrupt estate, made in the bankruptcy proceeding after Sibert had recovered his judgment against the trustee, but before the affirmance of that judgment by this court, contained the following provision:

"There is pending against the trustee the matter of the claim of J. Carl Sibert for personal injuries, as against which the trustee holds a policy of the Georgia Life Insurance Company, and also the undertaking of the purchaser of the property of this estate to hold him harmless against the same, which said matter and all things material, pertinent, or incident thereto are excepted, and this proceeding, so far as the same are concerned, is not closed, but remains open until finally disposed of and settled."

It resulted from the court's action that the sale of the bankrupt's property was a conditional one, that the amount of the judgment recovered by Sibert was a part of the purchase price required to be paid, was made a charge on the property in the hands of the purchaser or a subvendee, and that the property remained under the control of the court and subject to administration as assets of the estate in bankruptcy so far as that charge upon it was concerned.

The policy sued on inured to the benefit, not of James Bowron, the individual, but of the bankrupt estate which the court was administering, and which was in his charge as the court's agent and trustee. It well may be inferred that the net amount realized from that estate was lessened—in other words, that the estate was subjected to a loss—by selling it conditionally and subject to the charge against it of the

amount to be recovered as damages for a personal injury that had been sustained before the sale was made, instead of selling it unconditionally and free of any incumbrance. But, aside from that consideration, a vendor who brings about the payment of a demand of a third party against him by making it a charge upon the thing sold, which is worth greatly more than the amount of the demand so provided for, may well be regarded as in reality the payer of that demand, though the money used in making the payment is supplied by the conditional owner of the thing sold, who is practically coerced into making the payment for the vendor to save himself. In such a case it is at last the vendor who supplies the means of bringing about the payment. A result of the orders of the court above referred to and what was done under them was to put the bankrupt estate, represented by the assured, its trustee, in the position of such a vendor. The evidence as a whole was such as to require the conclusions that the bankrupt estate, while it was subject to administration under the orders of the court by the trustee, to whom the policy was payable, sustained a loss measured by the amount of the judgment recovered by Sibert, and that that judgment in reality was satisfied out of the bankrupt estate while it was still within the court's grasp. A contrary conclusion would be the result of considering only the form which the transaction assumed, and losing sight of the real nature and effect of it. We are of opinion that, as applicable to the evidence, the charge which the court gave was a proper one, and the judgment is affirmed.

MAXEY, District Judge, was prevented by illness from participating in the decision of this case.

CALEDONIAN INS. CO. et al. v. LEVY.

(Circuit Court of Appeals, Ninth Circuit. May 1, 1916. Rehearing Denied June 2, 1916.)

No. 2634.

APPEAL AND ERROR ⊂⇒1099(6)—REVIEW—LAW OF CASE.

In an action on a contract, where upon former trial the appellate court decided that plaintiff was not entitled to recover for defendant's breach, a count of the complaint cannot on retrial be treated as stating a cause of action not arising out of contract, because it sought to excuse plaintiff's own breach, precluding recovery on the ground of defendant's previous repudiation, and so the prior holding that there could be no recovery for breach of contract applies, and is the law of the case on second trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4375; Dec. Dig. ⊂⇒1099(6).]

In Error to the District Court of the United States for the Second Division of the Northern District of California; William C. Van Fleet, Judge.

Action by S. W. Levy against the Caledonian Insurance Company and others. There was a judgment for plaintiff, and defendants bring error. Reversed.

See, also, 226 Fed. 336.

T. C. Van Ness and Otto Irving Wise, both of San Francisco, Cal., for plaintiffs in error.

Goodfellow, Eells, Moore & Orrick, of San Francisco, Cal., for defendant in error.

Before GILBERT and ROSS, Circuit Judges, and RUDKIN, District Judge.

ROSS, Circuit Judge. This case is here for the second time. The first trial was had in the court below with a jury, and, there having been a verdict and judgment in favor of the plaintiff in the action, it was brought here by the defendants thereto, where the judgment was reversed and the cause remanded for a new trial. 199 Fed. 407, 118 C. C. A. 91. The second trial was before the court without a jury, and again resulted in a judgment for the plaintiff. It is undisputed that the evidence on both trials was substantially the same—indeed, it is so stated by the trial court in its opinion, from which we quote as follows in order to show the grounds of the judgment given:

"The material question upon which judgment principally turns is whether the cause of action stated in the second count of the complaint, upon which plaintiff now relies, is one 'upon the contract'—that is, based upon the theory of performance of the contract, as contended by the defendants—or is one to recover damages for the defendants' breach in its repudiation of the contract, as contended by plaintiff. If the former, plaintiff's right to recover is concluded by the law of the case as announced by the Circuit Court of Appeals in the appeal from the former judgment (199 Fed. 407, 118 C. C. A. 91); since the evidence as to what was done by the parties tending to establish performance was substantially the same on this trial as on the former. If the latter, then the law of the case does not apply, since the theory upon which plaintiff is now proceeding was not involved in the judgment of the appellate court. That a party is entitled to plead his cause of action in different forms and in varied and inconsistent counts there is no question, and that a failure to make a cause under one count will not preclude recovery under another and different count, although involving an entirely distinct and different theory, is equally true. It cannot always be definitely known what theory as represented by the different forms of pleading the evidence in its legal effect will sustain, and a party is not required to hazard his right to recover upon a single cast. As to the main cause of action alleged, it is asserted in two forms, the one alleging and based upon the theory of a full performance of the contract and a right to recover thereunder, which was the count relied upon on the former trial; the other, under which plaintiff now seeks recovery, alleging the facts fully as to what was done by the parties to the contract and seeking damage as for its repudiation or breach by defendant. I am of opinion that the latter count cannot be said in its legal aspects to 'count upon the contract' in the sense insisted by defendants —that is, it does not proceed upon the theory of performance, but is to be regarded as stating a cause of action arising upon defendants' breach. This being so, does the evidence sustain that theory and entitle plaintiff to recover under that count? There is no material conflict in the evidence as to what was done, and the facts need not be recited in detail."

Turning to the complaint, it is seen that it contains four counts—the second count referring to and making a part of it the preceding

15 subdivisions thereof, the third count referring to and making a part of it the preceding 17 subdivisions, and the fourth count referring to and making a part of it the first 20 subdivisions of the complaint. The allegations thus referred to and made a part of the second, third, and fourth counts show, as does the first one of the complaint, that the fundamental basis of this action was the contract between the parties which was the subject of consideration and decision by this court when the case was first here (Caledonian Ins. Co. et al. v. Levy, 199 Fed. 407, 118 C. C. A. 91), where the facts of the case are stated, and where it was distinctly adjudged that the retention by the plaintiff in the action of 15 per cent. of the insurance premiums during the second year of the contract—the rights of the respective parties under the contract for the first year having been elsewhere adjudicated—constituted a breach of the contract by the plaintiff, and precluded him from recovering the contract compensation for the second year. The gravamen of the action as alleged in each count of the complaint being its alleged breach, it is manifest, we think, that the particular form of such breach could not amount to a change in the nature of the action, which all the time remains an action on contract, the rights of the parties to which—the facts remaining the same—were conclusively and finally determined by this court in its former decision above referred to.

That became the law of the case, and the judgment now under consideration must therefore be, as it is, reversed, with costs to the plaintiff in error.

WINTERMOTE v. MacLAFFERTY.

(Circuit Court of Appeals, Ninth Circuit. May 1, 1916.)

No. 2718.

BANKRUPTCY ⊂=348—WAGES—PRIORITY—"LABORER."

Rem. & Bal. Code Wash. §§ 1149, 1150, 1153, respectively, provide that every person performing labor in the operation of any sawmill, or lumber or timber company, shall have a prior lien upon the property of the company for labor performed within six months, that the lien may be perfected by notice, and that whenever a receiver assignee is appointed the court shall require such laborers' claims to be first paid. Claimant, who was secretary, general manager, and superintendent of a lumber company, performed services consisting of supervision and direction of the operation of the office and mill, and also repaired machinery. *Held*, that he was not a "laborer" within the statute, and so was not entitled to priority on bankruptcy of the company.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 536; Dec. Dig. ⊂=348.

For other definitions, see Words and Phrases, First and Second Series, Laborer.]

Appeal from the District Court of the United States for the Western Division of the Western District of Washington; Edward E. Cushman, Judge.

In the matter of the bankruptcy of the Blumauer Lumber Company, a corporation. T. H. MacLafferty filed a claim asserting priority, to which E. V. Wintermote, as trustee in bankruptcy, objected. The referee overruled the trustee's objections, and, on review, his action was affirmed, and the trustee appeals. Order of District Court reversed.

Raymond J. McMillan and Ernest K. Murray, both of Tacoma, Wash., for appellant.

Van M. Dowd, of Tacoma, Wash., for appellee.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge. Blumauer Lumber Company was declared a voluntary bankrupt on October 3, 1914. At that time there was owing to MacLafferty, the appellee, $1,477.78, balance of salary for six months next prior to October 3, 1914. He filed his claim, asserting a lien and priority under the laws of the state of Washington.

Sections 1149, 1150, and 1153, Remington & Ballinger's Annotated Codes and Statutes of Washington (Laws 1897, c. 43, §§ 1, 2, 5). The trustee objected, but the referee overruled the objections and allowed the claim. On review the action of the referee was affirmed, and thereafter appeal was taken to this court.

The evidence in support of the finding of the referee is that the bankrupt was a lumber manufacturing company doing an extensive business; that claimant was secretary, general manager, and superintendent thereof, with a salary of $300 a month; that although he was secretary of the bankrupt company, and had been a shareholder,

he was not a stockholder during the time for which he claimed a priority of payment; that his services extended to supervision, including much detail in overseeing and directing the operations of the office work and of the mill, repairing and adjusting machinery, and to the employing of workers and directing sales; that claimant in performing his duties at times made repairs of machinery, and in doing so worked as would a master mechanic.

There being no decision of the Supreme Court of the state of Washington which brings appellee within the meaning of persons who perform labor, and whose claims are therefore entitled to priority over general creditors, we think the case is fairly within the general rules of construction discussed in Blessing v. Blanchard, 223 Fed. 35, 138 C. C. A. 399, Keyes, Trustee, v. Davie, 231 Fed. 688, —— C. C. A. ——, and In re Greenberger (D. C.) 203 Fed. 583. Flagstaff Silver Mining Co. of Utah v. Cullins, 104 U. S. 176, 26 L. Ed. 704, is to be distinguished, in that the claimant there was not the general manager, but actually directed the work in the mine in the capacity of overseer and foreman of the body of miners, with duties like those of the foreman of a gang of track hands upon a railroad or of a force of mechanics engaged in building a house.

The order of the District Court is reversed.

GENERAL ELECTRIC CO. v. LACO-PHILIPS CO.

(Circuit Court of Appeals, Second Circuit. June 7, 1916.)

1. PATENTS ⇐328—VALIDITY AND INFRINGEMENT—INCANDESCENT LAMP.
The Just & Hanaman patent, No. 1,018,502, for incandescent bodies for electric lamps, consisting of a filament of substantially pure tungsten, was not anticipated and in view of the great superiority of the tungsten lamp over those of the prior art, which results from the use of tungsten, instead of carbon, as the filament material, must be accorded invention of a high order, and given a construction which will fully protect the invention; also *held* infringed.

2. PATENTS ⇐21—ANTICIPATION.
In view of the fact that each chemical element differs in some of its properties from all others, a patent for the use of one as a material does not necessarily anticipate a later patent for the use of another for the same purpose, even though the two elements are classified in the same group.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 23; Dec. Dig. ⇐21.]

3. PATENTS ⇐176—VALIDITY AND INFRINGEMENT—NEW METHOD OF MANUFACTURING PRODUCT.
A patent for a new product of great utility, which also describes operative means for obtaining it, is not invalidated by the fact that later another and better way of manufacturing it is found, nor is infringement avoided by the use of the new way.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 250⅔–252; Dec. Dig. ⇐176.]

Appeal from the District Court of the United States for the Southern District of New York.

Suit in equity by the General Electric Company against the Laco-Philips Company for infringement of claims 1, 2, and 3 of letters patent No. 1,018,502, for incandescent bodies for electric lamps, granted February 27, 1912, to Just & Hanaman. Decree for complainant, and defendant appeals. Affirmed.

The following is the opinion of Mayer, District Judge, on final hearing in the District Court:

[1] The inventors state their object and their claims in language characterized by clearness and simplicity. They say:

"The present invention has for its object incandescing filaments for incandescent electric lights or lamps composed of substantially pure tungsten."

And they claim:

"1. A filament for incandescent lights consisting of tungsten in a coherent metallic state and homogeneous throughout.

"2. A filament for incandescent lights consisting throughout of substantially pure metallic tungsten of high fusing point and electrically conductive, the light emitting properties of the filament being due to the coherent, homogeneous metallic nature of the tungsten.

"3. A filament for electric incandescent lights comprising dense, coherent tungsten metal, having its fusing point approximately 3200° C, and capable of incandescent efficiency at the rate of less than 1 watt per candle power and substantially free from perceptible disintegration at that efficiency."

The result thus attained "may be manufactured" in accordance with either of two processes described in the specification, and either of which produces "substantially pure tungsten." One of these processes is known as the "squirting" or "sintering" process.

Defendant is an importer of lamps, and has sold two kinds, known in the case as "A" and "B" lamps. The filaments of lamps "A" were made by the "squirting" process, but since 1912 the importations and sales of lamps by defendant have been of those known as "B," which are provided with drawn-wire filaments. The filaments of "A" and "B" read unequivocally on the claims in controversy, and "A" is made according to the "squirting" process described in the patent in suit, but "B" is not so made. On the contrary, the "B" filament is produced pursuant to the process now in vogue and worked out by William D. Coolidge, one of plaintiff's staff of experts, and in respect of which the Patent Office has found invention, as evidenced by the issue of letters patent No. 1,082,933.

Defendant, commendably brushing aside immaterial contentions, presents in clean-cut and understandable fashion two defenses: First, that the patent in suit was anticipated by the prior patents of de Lodyguine and Welsbach; and, second, that it is not infringed by the drawn-wire filament exemplified in defendant's "B" lamp.

The effective date of invention is concededly November 4, 1904, and at the outset it becomes necessary to understand the state of the art as of that time. In October, 1892, the Circuit Court of Appeals for the Second Circuit rendered its decision in Edison Electric Supply Co. v. United States Electric Lighting Co., 52 Fed. 300, 3 C. C. A.

83. At page 302 of 52 Fed., and page 85 of 3 C. C. A., Judge Lacombe said:

"In an incandescent lamp there is no break in the circuit, but there is introduced into it a piece of poorly conducting material, which is so arranged that its resistance to the passage of the current will develop heat sufficient to bring it to a state of incandescence. The wires which conduct the current to the place where it is thus developed by resistance are so devised as to present but small resistance to its passage. The effective resistance begins where the piece of poorly conducting material (the burner or illuminant) is placed, and the lamp expires when the burner is consumed, breaks or wears away. The longer the life of the burner the longer the life of the lamp, and the more available it becomes for practical electric lighting. The selection of materials for the various parts of the circuit thus formed, their manipulation, arrangement, and operation, have for many years occupied the attention of experimenters, and the results of their labors, made public from time to time, constitute the state of the art of incandescent electric lighting."

So far as this art is concerned, the decision supra settled the proposition that the material of which the filament is composed may be the subject of invention. This decision was, of course, of great commercial advantage to the successful party, and justly gave control to the owners of an invention of great merit and world-wide usefulness. There were thus two motives which actuated scientific men and their financial backers in endeavoring to find an effective departure from the carbon filament: (1) The natural and important desire to discover some material, new for this purpose, which would open up fresh fields of commercial success; and (2) the hope of avoiding the Edison patent, with its resultant requirement of tribute.

The dominance of the carbon filament lamp can best be illustrated by the fact that over 99 per cent. of the incandescent electric light lamps sold in the United States as late as 1907 were of that type. In 1901, John W. Howell, a distinguished lamp engineer, read a paper at a meeting of the Association of Edison Illuminating Companies. He began:

"This is the twentieth year of the commercial use of incandescent lamps, and it is also the twentieth year of my connection with the Edison Lamp Works. The object of this paper is to review the development of the lamp during this time, to note its present condition, and to indulge in some theoretical considerations of its possible future. * * * You will observe that each and every lamp in this case contains all these essential parts, and that no lamp in the case contains any part in addition to these. The lamp of 20 years ago was essentially the same as the lamp of to-day. Mr. Edison's invention was a complete one, and all the work which has been done on the lamp since has made no radical change in Mr. Edison's lamp. Even Mr. Edison himself has not been able to add an element to his lamp of 20 years ago, nor has he been able to omit one of the original elements."

He pointed out that the incandescent lamp offered "a very attractive field of work for the inventor," and that the General Electric Company wanted every good invention in this line, and was ready to investigate anything and encourage inventors to complete their efforts. He stated that:

"Improvements so far made have been of one of the two classes mentioned—either the filament has been made capable of remaining stable at a higher temperature, or it has been made capable of maintaining a given temperature

with a less supply of energy. * * * Any radical or considerable improvement will, I believe, be made by a change of the first class."

And, then, not in the language of watts and filaments, but in terms of simple lay expression, he concluded with an observation which may well be a signpost on the judicial pathway:

"When such an improvement is made it will be an invention or discovery. and no one can predict what its nature or amount will be, any more than we can predict the thing itself. *To predict it would be to make the invention or discovery, and most inventions are the result of work, and not of prediction.*"

The same thought had been expressed, in substance, in an article by Dr. L. K. Bohm, in the Electrical World of January 13, 1894, where the author, inter alia, observed:

"Notwithstanding the fact that numerous improvements in incandescent lighting have been patented since the invention of the commercial lamp in 1879, yet there is a vast field for inventors in this line. Quite recently experimenters have taken up the subject again with renewed vigor, since Edison's fundamental patent of January 27, 1880, was sustained by the Circuit Court of Appeals on October 4, 1892. As a consequence of this decision, a number of lamp-manufacturing companies closed their factories by order of the court, and as they possessed the facilities for the manufacture of lamps they were certainly very anxious to adopt new lamps which would at least stand a fair fighting chance in the courts, if they were not entirely independent. * * * The greatest chance for improvement is and will be in the future in the filaments. Inventions in this line will be of great value, even after the Edison patent has expired. * * * However, for one reason or another, these lamps have never replaced the carbon filament lamp. There is still in this direction a great field for inventors. Some experimenter may discover a composition which is a sufficient conductor of electricity and allows the manufacture of high-resistance filaments for incandescent lamps, which do not volatilize so much as carbon and maintain their candle power for a longer time than the present lamps, even when burned at a higher economy. If such compositions for filaments are discovered, which will give incandescents of greater durability, then they certainly can be made of higher efficiency, say of at least 2½ watts per candle.'

Plaintiff's Exhibit Book is full of issued letters patent, notable only for their record as failures, and in that list of patentees are men of great distinction in an art, which by its very nature calls for men of marked equipment. Powerful business organizations, such as the Westinghouse Company here and Siemens & Halske in Germany, were leaving no stone unturned and sparing no expense to solve the problem.

In 1902 Just and Hanaman were assistants to Professor Vortmann of the Technical "Hochschule" in Vienna, and in August of that year Just, who was spending his spare time attempting to develop a boron incandescent lamp, engaged Hanaman as a chemist for that work. The work continued until the latter part of 1904, when the laboratory in which they were working was closed and the experimenting ended in failure. Meantime, however, these men conceived the idea of making an incandescent electric lamp with a filament of tungsten. Their means were limited, the income of one being a trifle under and of the other a trifle over the equivalent of $50 per month. But they persevered, and, although one of their early attempts failed (German Patent of 1903, No. 154,262), they finally succeeded in producing pure tung-

sten filaments, and filed their application for a British patent, No. 23,899, on November 4, 1904, and on the same day their application for a French patent, No. 347,661.

In this country, the application which resulted in the patent in suit was filed July 6, 1905. The revolution in the art has been striking. The carbon filament has almost disappeared. The Osmium, Nernst, and Tantalum lamps made no impression on the art. The Gem, which gave promise of a brilliant future, is on the retrograde. The tungsten lamp represents a commercial use expressed in figures which are dazzling, even in this day, when we are no longer astounded by mention of millions of men or money.

From practically zero per cent. of sales in 1907 in the American market the per cent. in 1914 by consistent upward movement was 71. Carbon, over 93 per cent. in 1907, had been reduced in 1914 to less than 10 per cent. Tantalum, about 10 per cent. in 1907, was reduced in 1914 to zero. The Gem, rising from about 6 per cent. in 1907 to over 33 per cent. in 1912, was down to 22 per cent. in 1914, and the claim is made that the difference in cost of incandescent lighting between the use of the tungsten lamp and that of the Gem would represent a saving to the American public of over $203,000,000 annually.

Prior to the introduction of the tungsten lamp here, Just & Hanaman in 1905 succeeded in having their invention taken up by a Hungarian factory, and in the spring of 1906 the German rights were sold to a German corporation, and later the rights in the United States were sold to the plaintiff for $400,000, of which half was paid to Just & Hanaman and half to a rival inventor, Kuzel, by virtue of a pooling arrangement between the parties. The issue of the patent in the United States was delayed, however, by an unusual situation. There was a Patent Office interference between four different parties, one of whom was a man named Heany, and it was charged that Heany or his attorney, with the connivance of one of the Patent Office examiners, had fraudulently introduced into the specification of one of his applications subject-matter derived from the Just & Hanaman application.

An extended investigation was made by the Patent Office and Deputy Commissioner Billings handed down, on July 7, 1911, a thorough and comprehensive decision holding that the frauds charged were proved. 171 O. G. 983. Heany's application was stricken from the files of the Patent Office, and his attorney and the examiner were convicted of crime; the interference being suspended pending the determination of the criminal proceeding. The plaintiff owned the remaining three applications which were involved in the interference in the Patent Office, namely, those of von Bolton, Kuzel, and Just & Hanaman, but offered evidence on behalf of Just & Hanaman only.

The situation was that the plaintiff had paid large sums of money for these applications and naturally was interested in securing a valid patent. It was, of course, a matter of indifference to plaintiff which application was successful, provided that the patent was rightly issued to the first and real inventor. Thus a heavy responsibility was laid

upon the attorneys for plaintiff, and, as a result, a thorough investigation was made by them, and, after cautious and thoughtful consideration, plaintiff was advised that the patent should issue in favor of the Just & Hanaman application. The fact that the plaintiff, under the advice of careful and experienced counsel, thus decided for itself upon which patent to stand, is evidence of an open and frank manner of dealing with a difficult problem, and ipso facto relieved the proceeding of any suggestion of collusion, which might have followed had different counsel been engaged by plaintiff to urge the merits of the respective applications then pending.

The Kuzel application may be dismissed from consideration without further comment, because it is neither pleaded nor relied upon, nor has it the slightest merit. The von Bolton application (serial No. 232,262, dated November 10, 1904—see also Siemens & Halske patents in Great Britain, No. 20,277, dated September 20 ,1904; in Belgium, No. 179,-628, dated September 22, 1904; and in Germany, No. 169,928, dated July 30, 1904) was insufficient in disclosure and inoperative, and, in addition to what the experts say, the course of Siemens & Halske in relation to the von Bolton patent is the best proof of its lack of utility. Siemens & Halske were never able to use the von Bolton process, and in 1908 announced the view that tungsten was not ductile (British patent, No. 5,387, of 1908), although von Bolton thought it was. Siemens & Halske were, of course, anxious that they should own and control a lamp which would take the place of the carbon filament lamp, and they developed a nickel binder process—important here only as showing lack of faith in von Bolton's efforts—and as late as 1913 Alexander Siemens, their London representative, read a paper in which he briefly reviewed the art, and told of the work of Siemens & Halske, and in this article there is not a suggestion that von Bolton was an inventor of the tungsten lamp.

Space will not permit a more extended discussion of von Bolton's alleged invention, and those interested will find that subject clearly discussed in the briefs submitted on behalf of the parties to this litigation. It was, of course, fortunate that an invention of such real service to the world, came into the hands of a business institution, possessed of abundant capital to contest to a finish, rights which men of slim means, for lack of capital, might have been unable to push to security. Thus it was that an invention made in 1904 was finally officially recognized in the United States by the issuance of a patent in 1912.

Tungsten is an elementary metal known long before the Edison invention. The problem with which the inventors were grappling was to discover a metal capable of practical use from the scientific and commercial standpoint which would have the attributes necessary for the filament of an incandescent electric lamp. Scientists had experimented with many methods and materials, and although tungsten was thus well known, its properties had not been fully discovered and understood until Just & Hanaman. These properties are concisely summarized in plaintiff's brief as follows:

"1. Its melting point is very high, substantially 3200° C.

"2. It has a low vapor tension, so that it does not disintegrate—i. e., evaporate rapidly—even at the exceedingly high temperatures corresponding to a lamp's efficiency of one watt per candle.

"3. It has the extraordinary property that its electrical resistance at running temperature is substantially 13 times its electrical resistance at room temperature.

"4. And of course, most important of all, it is, as the patentees put it, 'capable of incandescent efficiency at the rate of less than one watt per candle power,' and 'substantially free from perceptible disintegration at that efficiency.' "

Dr. Irving Langmuir, a graduate of Columbia University, a post-graduate student at Goettingen, afterwards an instructor at Stevens Institute, and then a research chemist with plaintiff, thus describes the characteristics of tungsten:

"In general, when a substance is placed in a vacuum, it tends to give off vapor; some substances much more than others. For example, water gives off vapor so readily in a vacuum that even at room temperature water will boil if placed in a vacuum. Most metals, however, have very little tendency at room temperature to give off vapors. Mercury, however, gives off very perceptible quantities of vapor, so much so, in fact, that even in the air the vapors from large quantities of mercury are apt to have poisonous effects on those who breathe such air. Zinc begins to give off such vapors at a temperature of 200° or 300° C., and at a temperature of approximately 900° C. it will boil, even at atmospheric pressure. At higher temperatures, all metals give off vapors, when heated in a vacuum, and distill from the surface of the hot metal to any cooler surfaces on which they become condensed. Tungsten is very remarkable, in that it has an extremely small tendency to give off vapors, so that it can be heated to over 3000° C. before it begins to lose weight very rapidly when heated in a vacuum. It is largely due to this property of tungsten that it is possible to run tungsten filaments at the extremely high temperature at which they are run in practice (in the neighborhood of one watt per candlepower), without having such a large quantity of metal distilled from the filament to the bulb as to reduce the strength of the filament and to cause a deposit on the bulb, which would absorb a seriously large proportion of the light."

Having in mind these characteristics of tungsten now understood by scientists, and the persistent search for a substitute for the carbon filament, let us see how von Welsbach and de Lodyguine approached the problem. The attempt of von Welsbach can be simply and briefly stated. That distinguished man thought that osmium was the desired metal, and described the osmium incandescent lamp in a series of American and foreign patents. The price of osmium metal is at the rate of $500 per pound, and it is one of the rarest metals in the world. The price of tungsten is $1.25 per pound.

[2] If it be assumed that the Welsbach process or processes, if applied to tungsten, would produce the Just & Hanaman pure tungsten filament, the argument leads us nowhere. As Dr. Liebmann points out:

"Osmium belongs to the platinum group. The grouping of the elements primarily does not indicate that even the members belonging to one group have all the same properties and answer to the same reactions. If that were so, chemical science would be at an end. * * * According to the periodic system, which is the theory of classification dominant to-day, tungsten forms one of four metals, chromium, molybdenum, tungsten, and uranium.

Osmium is still a member of the platinum group, viz., platinum, iridium, osmium, palladium, rhodium, and ruthenium. The grouping of the elements in these classes does not involve the sameness of properties or of susceptibility to reactions. The grouping is effected on certain principles and certain facts which are known. If all members of one group had the same properties, there would be only one member possible. Conclusions as to new and unknown reactions cannot be drawn, even if two elements belong to the same group."

And as the same expert truly says:

"Chemistry is essentially an experimental science, and chemical prevision is as impossible to-day, in spite of the accumulation of the great knowledge, as it was in former times. What I said about members belonging to one group I say more emphatically of members belonging to different groups. No conclusions can be drawn from the behavior of an element belonging to one group as to the behavior of an element belonging to another group."

See Naylor v. Alsop Process Co., 168 Fed. 911, 919, 94 C. C. A. 315; Badische v. Levenstein, 12 App. Cas. 710; Celluloid Mfg. Co. v. American Zylonite Co. (C. C.) 35 Fed. 301.

In other words, von Welsbach, who had made valuable contributions to the lighting art, both practically and theoretically, did not see tungsten, a cheap metal right at his door, as it were, but departed into distant chemical lands on a vain journey of exploration, at the end of which the osmium lamp was a wreck abandoned to its fate.

The two de Lodyguine patents become important because of the elaborate experiments calculated to prove as matter of fact that, pursuant to their teachings, a pure tungsten filament can be produced. The first patent, No. 575,002, was issued January 12, 1897, on application filed January 4, 1893.

"I have discovered," said de Lodyguine, "that the following metals possess all the essential qualities for forming a practical, commercially efficient metallic illuminant for incandescent electric lamps, namely, molybdenum and tungsten, rhodium and iridium, ruthenium and osmium, and chromium, and I have also discovered means whereby they may be formed into an attenuated threadlike wire in an economical and successful manner All these metals are infusible at such temperatures as are necessary to render them brilliantly incandescent, and are very efficient as light-producing mediums. They are, however, almost absolutely nonductible, and are extremely hard and brittle. They therefore cannot be drawn out into wires in the manner employed in operating upon ductile metals. While there are other metals known to science having fusing points sufficiently high for use in this art, and processes are known whereby they may be separated from their compounds, yet those above enumerated are found particularly desirable for the purposes of my invention, although such other metals, when prepared in the manner herein described by me, will fall within the scope of this patent."

He concluded his specification:

"I fully appreciate the fact that other processes than those above mentioned and detailed may be employed in carrying out my method of making metallic illuminants, and I do not limit myself to any one or all of those enumerated herein. I look upon it as a novel method of making metallic illuminants to build them up around a fillet having no permanent function, but merely serving as a support during manufacture, much as a mold supports a casting."

He made 12 claims. It is enough to quote claim 1:

"1. An incandescing illuminant for electric lamps composed of an incandescing metallic body and containing a conducting fillet of different material, substantially as described."

De Lodyguine did not describe any particular method of subsequent removal of the fillet. De Lodyguine says that his coating is formed either by electrochemically depositing the metal on the fillet in an electroplating bath or by hanging the fillet in a proper atmosphere and chemically depositing the coating upon it while it is heated by electric current or otherwise. If the coating is to be of molybdenum or tungsten, the atmosphere is "chloride or chlorate," or the fillet is, alternatively, electroplated in a bath of the fused chloride.

This is the whole disclosure, as far as it relates to tungsten, and the result, if there is any result, is a composite filament which has never gone into use. The rest of the patent deals with the alleged methods of depositing rhodium, iridium, ruthenium, osmium, and chromium.

The second patent, No. 575,668, was issued January 19, 1897, on an application filed April 10, 1894. Here, after referring to his first patent, de Lodyguine said:

"My present invention also includes the illuminant for incandescent lamps composed of such a metal, and the metals which I have hitherto found best adapted for use in this process in the manufacture of this product are molybdenum and tungsten."

Wherever, in his claims, a particular metal is named, that metal is molybdenum, and not tungsten. Claims Nos. 1 to 5, inclusive, are method claims. The product claims are Nos. 6 and 7, as follows:

"6. An illuminant for electric lamps composed exclusively of an incandescent body of molybdenum, substantially as described.

"7. An illuminant for electric lamps composed of an incandescent body of molybdenum, and containing a platinum fillet, substantially as described."

What de Lodyguine disclosed was a high-resistance metal coating on a carbon or platinum base, not a pure tungsten filament. In thus stating my conclusion, I may add that it is useless to attempt a description or analysis of the experiments made in Holland by defendant or the further tests made by J. A. Orange, a chemist attached to the research laboratory of plaintiff. It is equally useless to try to summarize the testimony and arguments of experts of such attainments and high repute as Professors Thomson and Main, because there are so many points to be considered that the only satisfactory way for any one interested is to read the briefs as fortified by the record, and less than that will not do justice to the respective contentions. But there are some entirely human, and as I think safe, guides for a lay court to follow in presuming to decide difficult questions of chemistry in respect of which skilled men of real and deserved repute so sharply differ.

The men who conducted the Holland experiments were of the remarkable younger type produced by the thorough technical schools and universities of continental Europe. How much of the modern art did they import into their demonstrations, let us say, subconsciously? How

can a court in this very practical age be convinced of the absolute accuracy of experiments post, when the alleged anticipation ante died in its infancy, and the present invention captured the commercial art almost instantaneously? But more than that. The Westinghouse Company was vitally interested in getting away from the Edison patent. Its resources were placed at de Lodyguine's disposal. He had carte blanche in every sense. No one would have been quicker to see and know whether he had succeeded than his employers.

What they wanted was a lamp which would compete with, if not displace, the Edison. They were not concerned with learned theses nor pleasing laboratory exhibitions. De Lodyguine produced nothing. What he did was futile, and he will be remembered on this subject only because his name is in this record. Experiments made, some 20 years later, strike the stone wall of practical history and there lie demolished; and by the same token the prior art fails to negative invention by Just & Hanaman.

[3] There is, however, a question of first magnitude relating to the alleged infringement of lamps B. These are made by substantially the Coolidge drawn-wire, and not by the Just & Hanaman "squirting," process. The former is the process of the modern art, because the lamps are stronger, and are made more cheaply and with greater uniformity. On this branch, defendant has two main contentions: (1) That the file wrapper history discloses that Just & Hanaman renounced the drawn-wire process; and (2) that, in view of the prior art, the patent in controversy must be limited to a product produced by the processes therein described. In a sense these contentions come down to one inquiry, and that is: What is the law of the case as applied to this product patent?

It is, I think, well recognized that there are two schools of thought in relation to this subject. Some hold the view that, if the product is novel, subsequent new processes must be tributary. Others believe that such a doctrine tends to arrest invention, and more especially where the process, as in the case at bar, practically revolutionizes the commercial manufacturing art. There is much to be said for each view, but courts must follow the law as it is.

I think the invention here in suit is of great merit, entitled to firm support, and second only to Edison's. Edison found a dim pathway and transformed it into an illuminated road. Just & Hanaman have broadened that road into a boulevard, alive with blazing lights. It is not hyperbole to say that the tungsten lamp has made millions happier for its greater comfort and its better cheer. We accept so readily as old what was new yesterday that our senses sometimes become dull to the real accomplishments of our own time. We have almost forgotten the Edison lamp, and as we read or ride, watch the play, or sit patiently while men of the hour in public places speak in happy or ponderous phrases, as we travel by land or water, as we labor on an overcast day in the courtroom, the schoolhouse, at the counter, or in the heights edging on the modern canyons of a metropolis, we find we have a better attitude and a more hopeful temperament because literally the tungsten lamp has made our physical surroundings brighter and more

inspiring. To such an accomplishment that tribute should be paid which our laws contemplate.

The views expressed in Electric Smelting & Aluminum Co. v. Pittsburgh Reduction Co., 125 Fed. 926, 933, 60 C. C. A. 636, 643, seem peculiarly applicable to the case at bar:

"Hall's achievement should be considered in the light of an improvement upon Bradley's fundamental discovery. There can be little doubt that the defendant's process is a valuable one and that to it is largely due the cheap aluminum of the present day. There is not the least disposition to detract from the merits of Hall or minimize his contribution to the art. Indeed, it may be conceded that, if the novel features so introduced be secured by a valid patent, he can hold the monopoly against all, Bradley included. This concession does not permit him, however, to appropriate the broad invention. He does not acquire the right to use the Bradley process simply because he has improved that process. He is entitled to enjoy what is his, but in so doing he cannot appropriate the property of another. The record discloses nothing unusual in this regard. It is rarely that an invention develops ultimate perfection in the hands of the inventor. The test of actual use discovers defects to be remedied and suggests improvements to be made. If the inventor produces a new and useful result, he does not lose his reward because he, or some one else, subsequently renders it more useful." Rubber Co. v. Goodyear, 9 Wall. 788, 796, 19 L. Ed. 566; Maurer v. Dickerson, 115 Fed. 870, 874, 51 C. C. A. 494

The file wrapper might seriously embarrass plaintiff, if the invention were for a process; but it was for a product. This is one of those cases where, by very virtue of the fact that the result was new and meritorious, not too much emphasis is to be placed on the fencing with the Patent Office. Westinghouse Electric & Mfg. Co. v. Condit Electrical Mfg. Co., 194 Fed. 427, 430, 114 C. C. A. 389. Here Just & Hanaman's attorney at one period had claims for a sintered tungsten filament only, and presented arguments discriminating the von Bolton British patent or other references upon the ground that they assumed without warrant a drawn filament and that pure tungsten could not be drawn. After Just & Hanaman's proposed product claim had been limited, the Patent Office put Just & Hanaman into interference with von Bolton, Kuzel, and Heany—the processes being: (1) Just & Hanaman, carbon-binder squirting and sintering process; (2) Kuzel, colloidal squirting and sintering process; (3) Heany, squirting process; and (4) von Bolton, a wire-drawing process. Kinnan, the Patent Office examiner, in a careful review, pointed out that:

"The object sought to be attained by each party is a pure tungsten filament. Each alleges under oath that such a filament is produced by his process."

Finally, after all the arguments and difficulties, the patent was issued with the present product claims, having been preceded by a final amendment dated January 26, 1912, and received January 27, 1912, offered by the attorneys for Just & Hanaman, in which they set forth under the head of "Remarks":

"Claim 1, canceled by this amendment, has been objected to on the ground that it attempts to describe an article of manufacture by the process of making. As claims 5, 6, and 7, now recopied as 1, 2, and 3, forming the subject of the interference with Kuzel and von Bolton, decided in our favor, describe the applicants' invention without reference to the process of manufacture, the invention is sufficiently protected, and claim 1 is therefore can-

celed in view of the formal objection thus raised." Reed Mfg. Co. v. Smith & Winchester Co., 123 Fed. 878, 881, 59 C. C. A. 366.

The most, therefore, that the file wrapper shows adversely against the plaintiff is that the inventors, who pointed out the desired product and showed two ways in which to produce it, failed to appreciate that there was still another way in which the same result might be attained. The fact that later some one found another and better way to manufacture the product does not, in this case, affect the validity of the patent, which originally disclosed the product and at the same time described operative means for obtaining it.

The patent is valid, all claims are infringed by lamps A and B, and a decree, with costs, may pass accordingly. Settle decree on five days' notice.

Thomas B. Kerr, A. Parker Smith, and John C. Kerr, all of New York City, for appellant.

Frederick P. Fish, of Boston, Mass., Hubert Howson, of New York City, W. K. Richardson, of Boston, Mass., and Albert G. Davis and Alexander D. Lunt, both of Schenectady, N. Y., for appellee.

Before COXE, WARD, and ROGERS, Circuit Judges.

PER CURIAM. Decree affirmed, on the opinion of Judge Mayer.

MICHIGAN ENGINE VALVE CO. v. MONARCH MFG. CO.

(Circuit Court of Appeals, Sixth Circuit. June 6, 1916.)

No. 2759.

1. PATENTS ⊂⊃328—INFRINGEMENT—SASH CENTER.
   The Golden patent, No. 659,144, for a sash center or hinge, as limited by the prior art and the proceedings in the Patent Office, *held* not infringed.
2. PATENTS ⊂⊃168(2)—CONSTRUCTION—SELF-IMPOSED LIMITATION.
   An intentional limitation of a claim by the patentee by amendment is none the less effective because it was not necessary to patentability.
   [Ed. Note.—For other cases, see Patents, Cent. Dig. § 244; Dec. Dig. ⊂⊃168(2).]

Appeal from the District Court of the United States for the Eastern District of Michigan; Arthur J. Tuttle, Judge.

Suit in equity by the Michigan Engine Valve Company against the Monarch Manufacturing Company. From the decree, complainant appeals. Affirmed.

C. R. Stickney, of Detroit, Mich., for appellant.

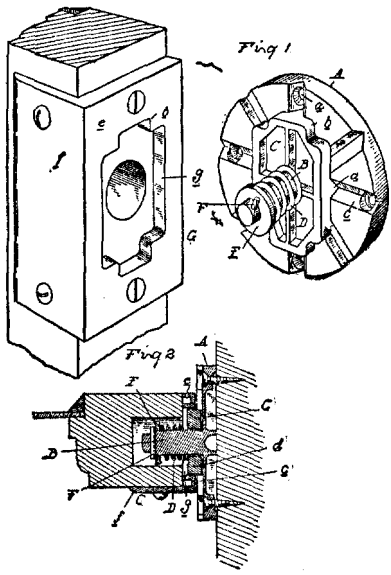
Wm. M. Swan, of Detroit, Mich., for appellee.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

KNAPPEN, Circuit Judge. [1] Suit for infringement of United States patent No. 659,144 to Golden, October 2, 1900, and for unfair

competition. Upon hearing on pleadings and proofs, the District Court held the patent not infringed, but found that defendant had committed acts of unfair competition. Plaintiff alone appeals.

The patent relates to sash "centers" or hinges. As described in the patent and illustrated by its drawings, shown (reduced) below, the device consists of a frame-member *A*, preferably in the form of a circular plate of greater diameter than the thickness of the sash; projecting centrally from this plate is the pivot-pin *B*; sleeved upon the pin is a "holding-plate" *C*, shown in substantially rectangular form, with its corners cut away. Upon the pivot-pin is sleeved a coiled spring *D*, one end bearing against the holding-plate *C*, the other against a shoulder *E* (on the pivot-pin), shown as a washer detachably secured by a pin. The tension of the spring thus holds the plate *C* against the frame-plate *A*, and the ribs or projections *d* upon the former in engagement with radial grooves or notches *C* on the latter plate. To the edge of the sash is secured (through screw openings) a plate *G*, having an aperture *g* in form corresponding to the form of the holding-plate *C*. The sash-plate being fixed in position the pivot-pin on the frame-member *A* (which member carries in unitary and permanently assembled form not only the pin and its coiled spring, but the holding-plate *C*) is inserted in a recess centrally of the aperture *g* in the sash-plate *G*, the opposite plate *A* being then secured upon the frame. As the plate *C*, secured to the frame-plate, exactly fits the aperture *g* in the sash-plate, it "forms in effect" (as said in the specification) "a portion of the sash-member *G* and the bearing upon the pivot *b*"; and as it is not attached to the sash-member it is free to slide in the aperture *g* thereof as its ribs engage or disengage from the notches in the frame-plate.



The patent has three claims, each of which is in issue. We print the first claim in the margin.[1] The second claim differs from the first, so far as here material, (a) in that the holding-plate is described as in "notched engagement with said securing plate" instead of "bearing against it," as in the first claim; and (b) the sash-plate is stated as "recessed to receive" the holding-plate instead of being in "detachable

[1] "1. A sash-center comprising a member consisting of a securing-plate having an integral centrally-projecting pin, a holding-plate sleeved upon said pin and bearing against said securing-plate, a spring sleeved upon said pin and bearing against said holding-plate, an abutment for said spring secured to said pin and a securing member having a detachable engagement with said holding-plate preventing independent rotation thereof."

engagement therewith," as in the first claim. The third claim will be mentioned later.

Defendant's structure is specially adapted to windows having a hanging stile, although it can be adapted to the ordinary sash and frame construction; and, for the purposes of this opinion, we shall treat it as a sash and frame device. It consists of two plates, one rectangular in form, the other substantially so, one plate having on its face radially extending grooves; through a slot in the other plate there projects from the opposite side a ribbed member, or holding-plate, for engaging the grooves of the opposite plate; the two plates are tied together by a pivot-pin nonintegral in construction and not permanently attached to either plate; on this pin is sleeved a coiled spring which tends to force the two plates into engagement. The structure can be mounted only when its several parts (including the sash and frame plates) are so tied together.

Whether defendant infringes depends upon how broadly the claims are to be construed in view of the prior art, and the limitations, if any, imposed by the Patent Office history of the application. When Golden entered the field there was nothing new in the idea of a hinge or "center" for or adaptable to window sashes, comprising two plates with juxtaposed faces notched, or with opposite depressions and projections, connected by a hinge-pin carrying a spring automatically holding the plates in locked engagement with each other, and permitting their movement relatively to each other. It is enough to refer in this connection to the patent to Musser, No. 220,303 (1879), on self-locking door and shutter hinge; No. 514,890, to Heilman (1894), on satchel or bag frame (readily adaptable to use as a sash-center); No. 498,551 (1893), to Howarth, on transom pivots or window-sash centers; and No. 246,410 (1881), to Morgan, for automatic sash pivot.

The application as presented contains neither of the claims as finally allowed. The first claim, as applied for, and which was the broadest, is printed in the margin.[2] The second claim differed from the first, so far as here pertinent, only in that the holding-plate was made to *slidingly engage* the recess in the sash-plate; the third claim differed from the first in that the frame-plate (*A*) was described as "radially notched" and the holding-plate (*C*) as having a rib "for engaging with said radial notches."

All three of these claims were rejected by the patent office on reference to Morgan. Thereupon the present claims were substituted and allowed without discussion. Morgan disclosed a sash-center having a plate attached to the sash, to which plate was clamped a pivot-pin projecting therefrom into the frame, through a face plate attached thereto and sleeved upon the pin. This pin carried, within the frame-member, a holding-plate likewise sleeved upon the pin, bearing upon and in notched engagement with a disk-plate formed integrally with the pin; one end of a coiled spring sleeved upon the pin bore against

[2] "1. A sash center, comprising a sash and a frame member, a pin on the one projecting into a recess in the other, a holding member engaging with said recess and held from rotation therein being also sleeved upon said pin and a spring secured upon said pin adapted to press said holding member against said member supporting the pin."

the holding-plate, the other end against a cylindrical case forming the frame securing-member, which latter member not only was not integral with the pin, but was connected therewith only by being itself attached to the frame face-plate sleeved upon the pin.

In comparing Morgan and Golden it is to be observed that the latter distinguishes his two members as the "securing plate" and "securing member," while Morgan does not use distinguishing terms for his parts attached respectively to the casing and the sash. Morgan's and Golden's elements are so different in relative position that it is impossible to say with certainty which of Morgan's members (the cylindrical case forming the securing member attached to the frame face-plate or the plate to which the squared end of the pivot-pin was clamped) is the more analogous to Golden's "securing plate having an integral centrally-projecting pin." If the one view be taken then Morgan's centrally-projecting pin is not integral with its member either in construction or operation, because the member revolves freely upon the pin; if the other view be taken we find that the pin is constructed entirely separate from its member, and is attached thereto only by screw clamps when the parts are all put together for complete operation. In such case the pin and member are in one sense integral—that is, after being assembled they are in rigid relation to each other—but they are not integral in construction. True, Morgan's "disk-plate" before referred to was integral with the pivot-pin, but it seems a reasonable presumption that when Golden, upon his reference to Morgan, inserted the limiting requirement that the securing plate should have an integral centrally-projecting pin, he intended to distinguish from Morgan in that respect.

[2] We think it clear that claims 1 and 2 of the patent in suit must be construed as limiting the pin centrally-projecting from the securing plate as formed integral therewith; for, conceding that there was nothing in the patent office rejection of the claims on reference to Morgan which made it necessary to limit the claims to a pin formed integral with the plate, and that such limitation was not necessary to patentability, yet an intentional limitation is none the less effective because unnecessary or self-imposed. McClain v. Ortmayer, 141 U. S. 419, 425, 12 Sup. Ct. 76, 35 L. Ed. 800; Cimiotti v. American Co., 198 U. S. 399, 415, 25 Sup. Ct. 697, 49 L. Ed. 1100. Whichever view Golden took of the Morgan plate-and-pin relationship, he must have intended to use the word "integral" in such a sense as to distinguish his pin from Morgan's pin; and in neither view can it be said that Morgan's pin is *not* integral, but that both Golden's pin and defendant's pin *are* respectively integral with their securing members. Adopting that general view of defendant's device which would classify it with Golden rather than with Morgan, and giving to "integral" in Golden's device the meaning which will distinguish it from Morgan, it distinguishes also from defendant. The intention to limit to an integral construction seems the more obvious from the facts that the specification states that the pin is "preferably formed integral with the plate," and that the original claims made no mention of integral construction—the use of the word "integral" in the substituted claims thus raising the natural inference that the word was intended in the

same sense as used in the specification, viz.: "*formed* integral with the plate."

In our opinion, the first and second claims are not infringed by defendant's device, which does not employ a pin formed integral with the plate, even though (as is not entirely clear) the pin would be equally effective if so formed.

The third claim will be found in the margin.[3] Defendant insists that its device has not the "angle-plate" of the Golden patent (not appearing by that name in the original claims), and which is described in the patent as "secured to the edge of the sash, and preferably provided with the angle flange *f* adapted to be secured to the *face* of the sash rail." As described in the specification and shown in the drawings, the sash member, if an "angle-plate," is to be fastened on not only the edge, but on the "face" of the rail, as distinguished from the "edge"; and while defendant's plate has a very slight projection at one edge, presumably for the purpose of preventing the sliding of the plate, it has no means of securing the "flange" to the face of the sash. But, in the view we take of the case, we need not determine whether infringement is thus avoided.

Claim 3 contains as an element a "sash member * * * having a recess *g* adapted to receive the plate *C*, substantially as and for the purpose described." Of this engagement the specification says:

"As the plate *C* exactly fits the aperture, it forms, in effect, a portion of the sash member *G* and the bearing upon the pivot *b*. At the same time it is free to slide in the aperture *g*, so as to permit the lugs or ribs *d* to engage or disengage from the notches *c*, and thereby to allow the sash to turn on its pivot."

This construction permits the sliding of the holding-plate in the aperture of the sash-plate without altering the tension of the spring. As the pivot-pin extends beyond the holding-plate and its outer end has no bearing, and the spring is entirely outside the plate, the sliding connection of the holding-plate with the sash face-plate permits compensation for space between the sash and the frame (due to shrinking of the sash or otherwise) to the extent of the thickness of the "recess" in the sash-plate (which in the exhibit shown is about three-eighths of an inch), and without affecting the tension of the spring or the effectiveness of the device.

Defendant's device does not embody the substance of this organization; even when we treat defendant's sash member and frame member as so interchanged that the claim might, in a general way, be applied, we find that the sash-plate and the frame-plate are not detachably connected, but are tied together; that, while the holding-plate is permitted to slide in the sash-plate as it rises and falls while its projecting rib passes from one notch to another in the frame-plate, yet this motion is limited

[3] "3. A sash-center comprising the frame member consisting of a plate, *A*, having radial notches, *c*, thereon and a centrally-projecting pin, *B*, the plate *C* pivoted upon said pin and having the ribs *d*, the spring *D* sleeved upon the pin and the collar *E* forming an abutment therefor; and a sash member comprising an angle-plate adapted to be secured to the side rail of the sash and having a recess *g* adapted to receive the plate *C*, substantially as and for the purpose described."

and does not allow the holding-plate to become detached from the sash-plate; that the frame-plate and the sash-plate are normally held tightly against each other by the tension of the spring, and that the two plates cannot move to and from each other as the sash and frame shrink or swell, except as such motion is permitted by and affects the tension of the spring. While, in a broad sense, the sash member has a "recess adapted to receive" the holding-plate, yet this recess and its adaption are such as to prohibit, instead of to permit, that detachability and that change of relative position, without affecting the spring tension, which are characteristic of plaintiff's invention.

Defendant's device does not, we think, contain in form, substance or spirit the equivalent of the conspicuous and characteristic feature of the patent embraced by the element under consideration (and which Golden seems to have been the first to disclose), by which the frame-plate, holding-plate, pivot-pin and coiled spring are organized into a unit and, so organized, brought into recessed, yielding and freely detachable engagement with the sash member. It need scarcely be said that the fact that plaintiff makes a structure similar to defendant's, which it claims is manufactured under the patent, has no tendency to show that defendant's construction infringes.

For the reasons stated, if for no other, we think neither of the claims infringed.

The judgment of the District Court is accordingly affirmed.

CHAMPION SPARK PLUG CO. v. A. R. MOSLER & CO.

SAME v. BENFORD MFG. CO.

(District Court, S. D. New York. May 24, 1916. On Motion to Settle Decree, June 12, 1916.)

1. TRADE-MARKS AND TRADE-NAMES ⊜75—UNFAIR COMPETITION—EVIDENCE.
Where a manufacturer copies the product of a manufacturer with an established reputation, so that confusion amongst buyers is likely to result, evidence of successful deception is unnecessary to entitle the injured manufacturer to relief.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 86; Dec. Dig. ⊜75.]

2. TRADE-MARKS AND TRADE-NAMES ⊜70(1)—UNFAIR COMPETITION—WHAT CONSTITUTES.
Complainant sold spark plugs to the Ford Motor Company practically at cost, making its profit out of new plugs necessarily purchased by car owners. Defendant manufactured spark plugs so closely copying complainant's plugs that buyers might well be deceived. *Held*, that complainant was entitled to relief against such unfair competition.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 81; Dec. Dig. ⊜70(1).]

3. TRADE-MARKS AND TRADE-NAMES ⊜100—UNFAIR COMPETITION—RELIEF.
In such case, as the buyers of cars which would ordinarily be equipped with complainant's plugs would not be familiar with the cartons in which the plugs were sold, dissimilarity as to such cartons is no ground for denying relief, and defendant will be required, where the change

could be made at a trifling cost, to color its plugs, and so distinguish them from the plugs of complainant.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 114; Dec. Dig. ⚖100.]

4. TRADE-MARKS AND TRADE-NAMES ⚖70(1)—UNFAIR COMPETITION.

The mere copying of a design is not unfair trade. The imitation must include elements which do not affect the buyer's choice by their inherent attraction, and which have come in fact to signify the plaintiff's make.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 81; Dec. Dig. ⚖70(1).]

5. TRADE-MARKS AND TRADE-NAMES ⚖101—COSTS—ALLOWANCE—RIGHT TO ALLOWANCE.

Where, in a suit for unfair competition, the questions involved were honest trade differences, complainant, though granted relief, is not entitled to costs and disbursements.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 115; Dec. Dig. ⚖101.]

6. TRADE-MARKS AND TRADE-NAMES ⚖100—UNFAIR COMPETITION—RIGHT TO ADVERTISE DECREE.

Where complainant secured a decree enjoining defendant from continuing to manufacture spark plugs in appearance almost identical with its own, but it appeared that the questions involved were honest trade differences, complainant should not be allowed to advertise the decree.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 114; Dec. Dig. ⚖100.]

In Equity. Bill by the Champion Spark Plug Company against A. R. Mosler & Co. Decree for complainant. Rehearing in the above case, together with the rehearing in the suit by the same complainant against the Benford Manufacturing Company.

This is a bill in equity, dependent on diverse citizenship, to procure an injunction against the defendant for unfair competition in the sale of spark plugs to be used in the Ford motor car. The plaintiff is a Massachusetts corporation, and the defendant a New York corporation, each concerned in the manufacture of spark plugs for motors. On the 22d of February, 1911, the plaintiff procured a contract from the Ford Motor Car Company for the manufacture and sale of 10,000 of a plug which was designed to fit the engine of that car and which they called the "Champion X." Later in that year they sold 239,500 more plugs to the same company. During the year 1912, and for all subsequent years down to the present, the Ford Motor Car Company has used the plaintiff's "Champion X" plug for the factory equipment of its cars, except for a few contracts hereafter mentioned, which were procured by the defendant. In all, the plaintiff has sold to the Ford Motor Car Company a total of more than 4,000,000 of said plugs, which were in some respects different from those theretofore manufactured by the plaintiff and from those used by the Ford Motor Car Company. They are known as the open type, in which the two electrodes, between which the spark leaps, consist of pieces of wire, one straight and the other bent up at an acute angle. The steel shell of the plug is of a black finish, with the hexagonal part, for the wrench to engage, extending above the top of the engine of a predetermined size and length. Above the shell there is a bushing nut, designed to hold in place an insulating porcelain, which in turn holds the straight electrode. This porcelain has concealed within the shell a lower extension, known as the petticoat, and only the upper part projects above the bushing nut, showing a white cylindrical surface of somewhat more than half an inch. Above the white porcelain there is a brass nut, and above the brass nut a brass screw. Between the brass nut and the screw is held the wire from the magneto, which carries the current down the straight electrode.

On the face of the part of the porcelain above the bushing nut are printed the words, "Champion X" in red letters.

It has always been the custom of the plaintiff to sell these plugs to the Ford Motor Car Company at substantially their cost, relying for its profits upon the replacements which users of the car must buy as the plugs wear out. These replacement plugs the plaintiff sells to jobbers at anywhere from 25 cents to 30 cents apiece, and the jobbers and repair men retail them to the trade at a list price of 75 cents, which in practice is reduced to 50 cents or less. In the Ford Manual, which is issued to all buyers of the Ford car, the Ford Motor Car Company recommends the replacement of these plugs by the same equipment with which the car is sold, and the plaintiff, both through this recommendation and the fact of the use of them in the car itself, has established a large sale of its plugs in replacement, with much profit. Besides this, the plaintiff has spent large sums of money in advertising its plug and in exploiting it through traveling salesmen.

Until the year 1913 the defendant advertised and recommended for use upon Ford cars a plug of its own manufacture, which it called the "Spitfire." This was of a different type from the "Champion X," having a closed bottom and nickeled shell. The porcelain which extended above the bushing was also of a somewhat different size, and bore the legend, "Mosler's Spitfire." In the year 1913 the plaintiff procured from the Ford Motor Car Company an order for 10,000 plugs to be made after a blueprint submitted at the time, which was in turn made exactly after the plaintiff's plug. This order the defendant filled, and later got further orders from the Ford Company, amounting in all to about 100,000 plugs, both in this country and Canada. Having made the plug, which was nearly indistinguishable from the plaintiff's, it continued, however, to supply it to jobbers and repair men for use as replacement of the Ford equipment, and has established a substantial business itself. The "hex" of the defendant's plug is slightly longer than the plaintiff's, and the porcelain is thicker in diameter and slightly shorter in length; the nut above the porcelain is knurled, instead of hexagonal, and the name "Mosler Superior" is printed on all the porcelains. Nevertheless, it is not disputed that the two plugs, unless placed side by side, are not distinguishable to an inexpert eye, except by the substitution of the words "Mosler Superior" for "Champion X." Each has the shell and bushing nut finished in a dull black color, each has a white porcelain, and each a brass top nut. The replacement plugs are sold in separate cartons, and the general appearance of the plaintiff's carton is absolutely dissimilar from the defendant's. No claim of unfair competition is made of the cartons.

The plaintiff's position is that the change in the defendant's plug, from its former easily distinguishable "Spitfire" to the absolute copy of the plaintiff's "Champion X," results in substitution of the one for the other to buyers who seek replacement plugs. It proved some instances of such substitution by retail dealers, without the connivance of the defendant. It also proved that nine other kinds of plugs had in the past been sold for use in Ford cars, all readily distinguishable from its own and all suitable for the purpose.

The defendant replied by asserting that all parts of its plug, and the proportion of those parts, were functional in its plug, and that none could be changed without affecting either its cost or its value in use. It appeared that all the parts were necessary, but there was some dispute as to the form of the electrodes, the length of the "hex," and that of the porcelain above the bushing nut.

Livingston Gifford, of New York City, and Wilber Owen, of Toledo, Ohio, for plaintiff.

William A. Redding and Ambrose O'Shea, both of New York City, for defendant A. R. Mosler & Co.

C. A. Weed, of New York City, for defendant Benford Mfg. Co.

LEARNED HAND, District Judge (after stating the facts as above). [1,2] In cases of this character the question is always in the nature of a compromise between the plaintiff's security in his trade and the annoyance and expense imposed upon the defendant by im-

posing conditions upon him. Where it is equally easy for the defendant to adopt a new make-up, and the plaintiff is in real danger of losing future customers, courts do not hesitate; even when the change is somewhat burdensome to the defendant, they will at times intervene. That the plaintiff's trade in replacement plugs is imperiled by the "Mosler Superior" seems to me quite possible, and, though no evidence of successful deception is produced, it is not necessary to do so. Collinsplatt v. Finlayson (C. C.) 88 Fed. 693. The plugs were confessedly originally made in exact accordance with the Ford blueprint, and are now structurally distinguishable only by such slight differences as would inevitably escape the eye, unless they are placed side by side. They are in color precisely like the plaintiff's plugs, except for the name upon them, and dealers have attempted to pass them off as such. It seems to me, therefore, that there is a substantial danger to the plaintiff's business in selling replacement plugs. A Ford owner, asking for a Ford plug, and wanting to get the kind he had got with his car, might well be guided altogether by its general appearance. It is true that, if he observed the name, "Champion X," he would not be misled; but he might well not look at the name. Nor are the circumstances such that the color of the cartons counts. If the original plugs came in cartons, I should think that distinction enough, without more; but they do not. Therefore the buyer cannot distinguish between the defendant's cartons, and the plaintiff's he has never seen. It seems to me, therefore, that the plaintiff is entitled to some relief against such an absolute copy as is here presented.

[3, 4] In such cases the first question is always whether the points of similarity are essential features of the thing sold. When they are, the right to copy them is necessarily involved in the right to sell that particular thing; if the plaintiff is affected, it is his mischance that his manufacture has not become associated with some arbitrary and unessential feature. Yet even here it is often possible to insist upon the second comer's adding some arbitrary mark, itself not essential, by way of distinction. The case is in essence no different from those of the secondary user of descriptive or geographical names. The plaintiff in both cases finds himself in such a position that his customers have come to associate his make with some feature which in its origin did not represent him at all. It can make no difference that in cases of genuine secondary user the feature is itself a symbol, representative, but representative of something else than the plaintiff's manufacture, while in cases like this the feature was not originally a symbol at all. In each case the feature has become a symbol of the maker, and, when others use it, he runs the chance of losing his customers. There is equal reason in each case to compel the second comer to add some distinguishing mark to the feature to avoid its acquired meaning. Nor does it matter in substance whether the feature lies in the case or container or in the very thing itself. Coca Cola Co. v. Gay-Ola Co., 200 Fed. 720, 119 C. C. A. 164; Id., 211 Fed. 942, 128 C. C. A. 440; Hiram Walker & Sons v. Grubman (D. C.) 222 Fed. 478. The limitation in application must be the feasibility of a mark which shall not be too burdensome.

In cases like Enterprise Mfg. Co. v. Landers, Frary & Clark, 131 Fed. 240, 65 C. C. A. 587, Yale & Towne Mfg. Co. v. Alder, 154 Fed. 37, 83 C. C. A. 149, and Grier Bros. Co. v. Baldwin, 219 Fed. 735, 135 C. C. A. 433, there were features added by the defendant which could have no purpose, and, what is more to the point, no effect, except to mislead the buyer into supposing the goods were of the plaintiff's make. They could be subtracted from the article without affecting those features which controlled the buyer's choice. Such cases as Rushmore v. Manhattan Screw & Stamping Works, 163 Fed. 939, 90 C. C. A. 299, 19 L. R. A. (N. S.) 269, Lovell-McConnell Mfg. Co. v. American Ever-Ready Co., 195 Fed. 931, 115 C. C. A. 619, and Rushmore v. Badger Brass Mfg. Co., 198 Fed. 379, 117 C. C. A. 255, avowedly rest upon the same basis, yet the doctrine was in those cases pressed very far, since the design of a motor lamp or horn may well be a part of the reason why the buyer chooses them. To deny the second comer the right to use that design seems rather to step beyond the principle which protects only such symbols as are representative of the plaintiff's manufacture, nor does it seem an entirely adequate answer to say that the features enjoined are nonfunctional. It is only when the mechanical operativeness of the thing is certainly all that determines the buyer's choice that such a criterion is safe. Margarete Steiff, Inc., v. Bing (D. C.) 215 Fed. 204.

In the case at bar there is no danger of losing sight of the distinction suggested, if the test be applied of nonfunctional features, because a buyer will not choose a spark plug because its appearance pleases his fancy. However, I am not satisfied that any part of the defendant's plug is nonfunctional and could be changed without some sacrifice, or at least some chance of sacrifice, to its real mechanical value. The fact that in earlier plugs the shell electrode was not bent up has some force, yet the bend has some functional plausibility, and I am not prepared to take from the defendant that feature. The lengthening of the porcelain is another feature, possible perhaps, but not certainly without some question, since it adds to the plug's fragility. More may be said for lengthening the hex; but I think there are better and sufficient ways to distinguish the plugs than by imposing this requirement upon the defendant. It seems to me rather that if the defendant be required to change the color of the plug it will be a more certain means of distinction, and will avoid the need of any mechanical change in what is a quite legitimate competition. If, for example, the whole shell and bushing be nickeled, which could be done at the trifling cost of 35 cents per 1,000 and if a quarter-inch band of color be run around the top of the porcelain, which would add little or nothing more to the cost, it seems to me that not even a careless buyer would be misled. If he bought such a plug, I think he would be genuinely indifferent to its maker.

These changes impose some burden upon the defendant, yet the cost is not substantial, and the gain to the plaintiff may be real. To couple these changes with an elongation of both shell and porcelain would, it is true, add something, the appearance being thus wholly reorganized in form and color; but a buyer who was so careless as not to observe

the total change in color would not, I should suppose, be likely to attend to such changes in form. There is not, it must be remembered, any evidence, as is customary in cases of secondary user, that the buyers have in fact got used to associating the plug's structure with the plaintiff's make.

A question was raised at the trial of the kind of nickeling which might serve. It is enough to observe that the time which counts is the moment of purchase. If the plug has a different color then, it is enough, however the color changes thereafter. On this account the defendant will be free to adopt any other distinctive color than nickel on the shell and bushing nut, whether it wears off or not. If it chooses, it may dip the shells in any coloring material.

Furthermore, it must be understood that any protection to which the plaintiff is entitled depends altogether upon its monopoly of the Ford motor factory equipment. In its direct competition for the Ford business the defendant may copy the plaintiff's plugs to the minutest detail, because the Ford Motor Car Company cannot be misled as to the manufacturer with whom it deals. If the defendant or any one else by such competition can secure a substantial part of the equipment of that car, so that any given buyer may get either the plaintiff's or some one else's, it would obviously be unjust to assume that, in seeking to replace his plugs with those which he originally got, he must want the plaintiff's plugs. The decree will be held open at the foot for modification upon proof of such a change.

Courts often decline in decrees in such cases to indicate what features of the defendant's make-up need be changed; but there appears to be no necessity of throwing the parties to a proceeding in contempt, when the matter turns altogether upon the precise distinction which will in the end be accepted. It has been the custom in this district to provide more specifically the conditions upon which the defendant may compete, and I shall follow that custom in this case.

Therefore the decree will provide that the defendant will be enjoined from selling its "Mosler Superior" plug as at present organized, unless it change the color of the shell and bushing nut, and of the porcelain, so as to distinguish their appearance. I will at present go no further than to provide for such changes generally. The color of the shell and porcelain are at the defendant's option, so they be distinctive, and the porcelain be not marked in red in any way. The amount of the color on the porcelain, whether over the whole, or by a band, and, if so, the width of the band, I will also leave open. I have suggested a quarter-inch band at the top, and it rather seems to me that it should be so, but I am not ready finally to tie the defendant quite so closely as that, except that the name "Mosler" must be retained, or, in the case of plugs made for jobbers, the name of the jobber, or some trade-mark, in letters other than red, which shall be unlike "Champion X."

The decree will also provide for application at the foot in case any other maker shall secure a part of the Ford equipment business.

[5] I see no occasion for costs, and each party will bear its own disbursements. The case appears to me one of honest trade differences.

[6] I see no reason why the plaintiff should advertise its decree in any way. There is nothing unfair in the defendant's prior advertising to correct, and, when that is the case, neither side should be allowed to scare off customers by the flourish of a decree. The plaintiff will therefore refrain from any advertisement at the peril of losing its decree.

On Motion to Settle Decree.

A hearing has been had for the settlement of the decree in these cases, in which the plaintiff objects to the limitation of the injunction in respect of my permitting the defendants to furnish the Ford Motor Company with plugs made of a color precisely like their own. They suggest that precisely similar plugs in form and finish furnished to the Ford Motor Company may become a means of confusion. The defendants thereupon accepted the suggestion of the plaintiff that the decree should include sales to the Ford Motor Company, provided that the requirement that the porcelain should be colored with a circular band be omitted. To this the plaintiff has agreed, and therefore the decree will simply require the defendants to color the shell and bushing nut with nickel or in some other appropriate way, and to retain upon the porcelain the name of the dealer or of the maker in some other color than red.

HUGHES v. DELAWARE, L. & W. R. CO.

(District Court, N. D. New York. May 25, 1916.)

1. MASTER AND SERVANT ⟸286(33)—INJURIES TO SERVANT—ACTIONS—FEDERAL EMPLOYERS' LIABILITY ACT.

In an action under the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [Comp. St. 1913, §§ 8657-8665]) for the death of a switchman run down in the yards of defendant railroad company, the question whether the company exercised due care in backing a train at night without placing lights on the rear car, or stationing a brakeman there with a lantern, *held*, under the evidence, for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1020; Dec. Dig. ⟸286(33).]

2. MASTER AND SERVANT ⟸286(33)—INJURIES TO SERVANT—DUTY OF CARE.

While it is the duty of a switchman in a railroad yard to avoid trains, it is the duty of the railroad company to take precaution to avoid running him down.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. ⟸286(33).]

At Law. Action by Esther A. Hughes, as administratrix of the estate of Thomas F. Hughes, against the Delaware, Lackawanna & Western Railroad Company. There was a verdict for plaintiff, and defendant moved to set aside the verdict and for a new trial. Motion denied.

Chas. V. Byrne, of Syracuse, N. Y., for the motion.
Cregg Bros. & Rulison, of Syracuse, N. Y., opposed.

RAY, District Judge. Under the federal Employers' Liability Act the plaintiff Esther A. Hughes as administratrix, etc., obtained a ver-

dict in her favor for $3,710 damages for the death of Thomas F. Hughes, alleged to have been caused by the negligence of the defendant railroad company, and which death occurred in the early morning of the 4th day of August, 1914, in the yards of the defendant at Syracuse, N. Y., where Hughes was employed as switchman by the defendant. The court submitted to the jury the question of defendant's negligence in failing, if it did fail, to give proper and suitable warnings of the approach of its switching engine, backing two cars, to the plaintiff's intestate, Thomas F. Hughes, who must have been close by the side of or upon the tracks upon which said engine and attached cars were moving, or in having a man or lights on the moving cars and engine in such position as due care and circumstances required.

The accident occurred at about 4 o'clock in the morning, just before the break of day, and when it was so dark that the employés could see only a car length ahead and that dimly. At the place where the accident happened the freight track runs parallel with the main passenger track and at a distance of only 8 feet therefrom. Other switch tracks lead off from the freight track forming what is known as a ladder track. A switch post with a colored light, but giving but little light, was at the junction of each of these switch tracks to indicate its position. At the time of the accident a long freight or coal train just coming in from Scranton, Pa., was passing and making the usual noise incident to the passage of such a train. On the other side of this main passenger track and running parallel with it, at a distance of 7½ or 8 feet therefrom, was a "home track," or storage track, filled with cars. The main passenger tracks were 4 feet 8 inches from rail to rail, and hence it was nearly 20 feet from the moving cars on the freight tracks to the cars on the "home track." It was the duty of the deceased, Thomas F. Hughes, to attend these switches and throw them. In doing so he was required as matter of course to move up and down, and sometimes across, the tracks. As this freight train was passing, the switch engine with a refrigerator car attached ran upon the "home track," took on another car, moved back upon the main passenger track, and backed down towards the switchman's shanty at a rate of about 5 miles per hour. No light was attached to either end of these moving cars. A man with a lantern was on top of this rear car, but his position thereon was somewhat uncertain. There was a light attached to the tender of the engine, but of course the light was thrown to one side. The bell on the switch engine was ringing. There were grabirons on one side of this rear car and near the rear end, and also a stirrup for the feet, but none on the other. This yard in which these cars were moving was very badly or imperfectly lighted. It was dark in this canal, so to speak, formed by the cars standing on the home track on the one side and the moving train on the freight track on the other.

[1, 2] When last seen alive, Hughes, the plaintiff's intestate, was somewhere in the neighborhood of 100 feet or more northerly of the switchman's shanty. Here he passed a few words with the conductor of the freight train or engine, and then the conductor moved northerly with his back to Hughes and to the other side of the passenger track, and Hughes moved southerly along this passenger track towards his

shanty with a lighted lantern in his hand. The conductor having passed over the track, caught onto the side of one of these moving cars being backed southerly, and almost immediately felt a jolt and gave a signal to the engineer to stop, which was done, and the body of Hughes was found under this train. He was badly injured and dead. His hat or cap was found upon the coupling apparatus at the southerly end of the car. It is fair to infer that Hughes was moving southerly, either by the side of the passenger track and so close thereto that he was hit by the moving car, and knocked down and run over, or that he was moving southerly upon the track when struck by this moving train. No one saw him after he turned away from the conductor, and the man with the lighted lantern on top of this car which struck Hughes testified that he did not see any one, nor anything upon the track. Indeed, it is quite probable that from where he was, owing to the darkness, he could not have seen Hughes, if there, and he had been looking almost directly at him. The jury could find under the evidence that the noise of the passing train on the freight track completely drowned the noise of this approaching train backing down towards Hughes on the passenger track, and the sound of the bell as well. If Hughes turned and looked, it is by no means certain that he could see the man with the lantern on top of the moving car, or the approaching cars.

It was claimed on the trial, and insisted, and the court submitted the question to the jury, that the defendant was negligent in backing this train on the passenger track, under the circumstances and in view of the surroundings and conditions, without having a light either on the side of the rear car nearest Hughes, or a man there with a light, and the jury found that it was negligence to move that train on the passenger track backward towards the switchman's shanty under the circumstances and surrounding conditions without such precaution, which was perfectly feasible. There was some evidence that this had been done on other occasions, one at least; but it is apparent to any intelligent man that a light could have been attached to one side of the rear end of this moving train—that is, the end nearest Hughes—or that a man taking hold of the grabiron and with his foot in the stirrup and holding a lantern could have seen the track for some little distance in front of the moving train as it proceeded towards the shanty. I think the case was properly submitted to the jury, and that the evidence presented a question of fact for the jury to determine, and that the verdict should not be disturbed.

Southern Railway Co. v. Smith (C. C. A. 6th Circuit) 205 Fed. 360, 123 C. C. A. 488, is a case closely in point. It is there held:

"While it is primarily the duty of a switchman in railroad yards to be on the lookout and keep out of the way of moving engines, there is a concurrent or secondary duty, independent of statute or rule, on the part of those in charge of such moving engines, to keep such lookout as is reasonably necessary to avoid injury to an employé who may neglect to protect himself, and the extent of such duty is measured by the peculiar circumstances of the case.

"While plaintiff's intestate, who was a switchman in defendant's railroad yards, was walking along a track in the yards at night, he was overtaken and killed by an engine which was 'drifting' or moving slowly behind him on the track, making very little noise. Its headlight was dim, and rendered more so by the electric yard lights, and there was a train passing on an adjoining track,

which covered what noise the engine made. It could have been stopped within 10 feet, but the engineer did not see deceased. Held, that the facts tended to show that the engineer was negligent, and his negligence had a causal relation to the injury, and that a verdict for plaintiff was supported by the evidence."

The facts are very similar. It is by no means certain that Hughes was walking upon the tracks. It was very dark. There is no presumption he was upon the track. He could have been struck, and knocked upon the tracks, and run over, if by miscalculation he stepped too close to them. In the instant case, as in the case referred to, the noise of the engine and cars on the passenger track, which struck Hughes, may have been entirely drowned by the noise of the passing train moving on the freight track, only 6 or 7 feet from Hughes. We must take into account the overhang of these cars, the noise of the freight train, and the intense darkness at this point. The jury well may have found that to move these cars by backing down on the passenger track, under such conditions and surroundings, in the darkness, with no light at all at that end of the train, and only a man with a lantern on top of the car, was negligence. It was, of course, the duty of the defendant and of those moving these cars to keep such lookout as was reasonably necessary to avoid doing injury to an employé who under the circumstances might have neglected to fully protect and care for himself. The extent of the duty depended on the circumstances of the case, and the question was in my judgment one for the jury to determine.

The motion to set aside the verdict and for a new trial is denied.

THE MARY.

(District Court, W. D. Washington, N. D. March 6, 1916.)

No. 3133.

1. ADMIRALTY ⊂⊃124—PROCEEDINGS—PROCTOR'S FEES.
Under Rev. St. § 824 (Comp. St. 1913, § 1378), providing that for each deposition taken and admitted in evidence in a cause a fee of $2.50 shall be allowed the libelant's proctor, the libelant's proctor is not entitled to fees for the deposition of a witness whose testimony was immaterial.
[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 836–857; Dec. Dig. ⊂⊃124.]

2. ADMIRALTY ⊂⊃124—PROCEEDINGS—WITNESS FEES—"COURT."
Rev. St. § 848 (Comp. St. 1913, § 1452), provides that witnesses, for each day's attendance in court or before any officer pursuant to law, shall receive $1.50. Act May 27, 1908, c. 200, 35 Stat. 377 (Comp. St. 1913, § 1453), declares that witnesses and jurors in the United States courts of Washington shall be entitled to receive, for actual attendance in any court or courts and for the time necessarily occupied in going to and returning, $3 per day. *Held* that, as at common law costs could not be taxed, statutes providing for taxation of costs should be strictly construed, and therefore, as a court is a place where justice is judicially administered, and includes the judge, jury, and necessary officers, a commissioner before whom testimony was taken is not a "court," and a libelant, whose witnesses were examined before a commissioner, is not

entitled to have his witness fees taxed under Act May 27, 1908, but the fees will be taxed under the old act at $1.50 per day.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 836–857; Dec. Dig. ⟸124.

For other definitions, see Words and Phrases, First and Second Series, Court.]

3. STATUTES ⟸219—CONSTRUCTION.

The construction of a statute given by the heads of the various departments of the government should be considered by the courts.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 296, 297; Dec. Dig. ⟸219.]

In Admiralty. Libel by J. F. McCullough and others against the schooner Mary. On motion to retax costs. Granted in part.

James Kiefer, of Seattle, Wash., for libelants.

Daniel Landon, of Seattle, Wash., for claimant.

NETERER, District Judge. This is a motion to disallow proctor's fees on taking testimony before a court commissioner of 10 witnesses for libelants and cross-examining three witnesses for claimant, at $2.50 each, a total of $32.50, and also to disallow the per diem of witness Christensen, on the ground that his testimony is immaterial, and to reduce the per diem of witnesses examined before the commissioner to $1.50. This cause was referred to the commissioner to take testimony and report findings and conclusions, on motion of libelant, and thereafter came before the court on exceptions to the report, which, after hearing, were denied.

[1] Libelant claims that under section 824, Rev. Stat. U. S. (Comp. St. 1913, § 1378), he is entitled to $2.50 for proctor's fees for each witness produced and examined by him and for each witness produced by the claimant and cross-examined. The section provides that a charge of $2.50 may be made "for each deposition taken and admitted in evidence in a cause. There is not a uniformity of opinion in the courts as to whether an examination before a commissioner shall be treated as a deposition under this act. In re Strauss v. Meyer (C. C.) 22 Fed. 467; The Sallie P. Linderman (D. C.) 22 Fed. 557; Tuck v. Olds (C. C.) 29 Fed. 883; Ingham v. Pierce (C. C.) 37 Fed. 647; Ferguson v. Dent (C. C.) 46 Fed. 88; Kaempfer v. Taylor (C. C.) 78 Fed. 795; Barnardin v. Northall (C. C.) 83 Fed. 241; St. Matthew's Sav. Bank v. Fidelity & Casualty Co. (C. C.) 105 Fed. 161; Kissinger-Ison Co. v. Bradford Belting Co., 123 Fed. 91, 59 C. C. A. 221; Matheson v. Hanna-Schoelkopf Co. (C. C.) 128 Fed. 163; The Oregon, 133 Fed. 609, 68 C. C. A. 603. The Supreme Court, in Missouri v. Illinois, 202 U. S. 598, 26 Sup. Ct. 713, 50 L. Ed. 1160, it seems to me, has disposed of this matter, and upon the authority of that case the tax of $2.50 will be allowed as to all the witnesses except Christensen, as to whom it is disallowed, his testimony being immaterial, while it was stated at the bar that libelant called him in good faith, but had not ascertained that he had little or no knowledge. Parties may not speculate as to the knowledge of witnesses at the expense of the other party, and when they subpœna them they must do so at their peril.

[2] The contention of the claimant as to witness fees, I think, must be sustained. At common law costs could not be taxed. They are creatures of statute, and recovery must therefore be predicated upon the statute, the provisions of which, being in derogation of the common law, must be strictly construed. Section 848 of the Revised Statutes (Comp. St. 1913, § 1452) provides that a witness "for each day's attendance in court or before any officer pursuant to law shall receive $1.50. * * *" In the act approved May 27, 1908, making appropriations for sundry civil expenses (35 Stat. 377), it was enacted that:

"Jurors and witnesses in the United States courts in the states of * * * Washington * * * shall be entitled to receive for actual attendance at any court or courts and for the time necessarily occupied in going to and returning from the same, $3.00 a day. * * *"

The claim is made by the libelant that the witness fees may be charged pursuant to this enactment rather than under section 848, supra. Congress in the last enactment, supra, distinguished between attendance at court and *before other officers pursuant to law.* Blackstone, following Coke, says:

"A court is a place where justice is judicially administered." 3 Comm. 24.

This definition requires, however, to have added the presence of necessary officers—the judge or judges:

"The only common and essential feature of all courts is the judge or judges. So essential, indeed, that they are often called the court." Bouvier.

An English writer (2 Bromm & H. Comm. 21) says:

"In these courts the sovereign is supposed in contemplation of law to be always present, or at least is there represented by the judges whose power is but an emanation of the prerogative."

The court, in Mich. Central, etc., Ry. Co. v. Northern, etc., Ry. Co., 3 Ind. 239, holds that the terms "court" and "judge" are usually synonymous. Webster says:

"An official assemblage legally met together for the transaction of judicial business; a judge or judges sitting for the hearing or trial of causes." "A court is a place where justice is judicially administered; the presence of a sufficient number of members of a body in the government, to which the public administration of justice is delegated, regularly convened in an authorized place."

"In a broad sense the term may include a judge and a jury as well as a judge and a clerk." 11 Cyc. 652, 653.

"Any court which administers justice according to the principles and forms of the common law." Anderson, Law Dictionary.

A commissioner is not a court. Nixon v. U. S. (D. C.) 82 Fed. 23; In re Perkins (D. C.) 100 Fed. 950.

Congress has provided District Courts, Circuit Courts, Supreme Court, Court of Claims, Supreme Court of District of Columbia, territorial courts, Court of Custom Appeals, etc. We have no commissioner's court. District judges are empowered to appoint court commissioners (Act May 28, 1896, c. 252, § 19, 29 Stat. 184); but the powers given do not bring the commissioner's hearing within the legal contemplation of a court. Congress distinguished between *courts* and *officers.* Courts have judicial power vested in them; while of-

ficers have not. A commissioner is at all times subject to the control of the court when acting as an examining magistrate, and the court can assume control of the proceeding whenever justice may require that it should be done. U. S. v. Berry (D. C.) 4 Fed. 779. And in this civil action the reference could have been recalled at any time, and it cannot be said that the taking of testimony before the commissioner is a hearing in court. Todd v. U. S., 158 U. S. 278, 283, 15 Sup. Ct. 889, 890 (39 L. Ed. 982), where Justice Brewer said:

"It cannot be pretended that one of those state officers while conducting a preliminary investigation is holding a court of the United States. * * * The distinction is recognized by the statutes, section 1014, by which sundry judicial officers of the United States * * * are authorized to conduct an examination and imprison or bail the defendant, 'for trial before such court of the United States as by law has cognizance of the offense'; also section 911, which provides that 'all writs and processes issuing from the courts of the United States shall be under the seal of the court from which they issue, and shall be signed by the clerk thereof.' But a commissioner, like a justice of the peace, is not obliged to have a seal, and his warrants may be under his hand alone. Starr v. United States, 153 U. S. 614 [14 Sup. Ct. 919, 38 L. Ed. 841]. * * * And a witness is entitled to fees 'for each day's attendance in court or before any officer pursuant to law.' Section 848. While a preliminary examination may be in the strictest sense of the term a judicial proceeding, yet the language of the statute is not broad enough to include every judicial proceeding held under the laws of the United States. * * * Doubtless it was within the power of Congress to legislate in this direction fully for the protection of every witness called upon by the laws of the United States to give testimony in any place and under any circumstances. Logan v. United States, 144 U. S. 263 [12 Sup. Ct. 617, 36 L. Ed. 429]. But it has not as yet seen fit to do so, and has only provided for his protection when called as a witness in a court of the United States."

This view of the official character of a commissioner is recognized in Ocampo v. U. S., 234 U. S. 100, 34 Sup. Ct. 712, 58 L. Ed. 1231. Congress must, from the language employed in the act, passed long after the decision in Todd v. U. S., supra, have intended witnesses appearing before a court—a court of record—to be distinguished from those attending before other officers.

[3] The Comptroller of the Treasury (1 Comp. Dec. 43) and the Department of Justice (Attorney General's Instructions to United States Marshals, April, 1904, page 122, Instruction No. 774) have each construed the enactment of 1908, supra, as having no application to witnesses appearing before commissioners, and consideration should be given to the construction of statutes by the heads of departments. This being a special officer designated by the court to take certain testimony and report findings and conclusions, libelant cannot, under the provisions of statute, recover more than $1.50 per diem for each witness.

An order may be presented.

UNITED STATES v. RUBIN et al.

(District Court, E. D. Pennsylvania. May 19, 1916.)

No. 3794.

1. PLEADING ⊂=350(3)—MOTIONS—RULE FOR JUDGMENT FOR WANT OF SUFFICIENT AFFIDAVIT OF DEFENSE.
A rule for judgment for want of sufficient affidavit of defense is equivalent to a demurrer.
[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1075, 1077; Dec. Dig. ⊂=350(3).]

2. DAMAGES ⊂=79(1)—LIQUIDATED DAMAGES.
A provision in a bond fixing the amount of forfeiture will be considered as liquidated damages, against which equity will not relieve on breach, where the amount fixed is not unconscionable and the damages are incapable of actual measurement; but, if the amount is unconscionable, equity will grant relief.
[Ed. Note.—For other cases, see Damages, Cent. Dig. § 164; Dec. Dig. ⊂=79(1).]

3. DAMAGES ⊂=80(1)—LIQUIDATED DAMAGES—DECLARATIONS IN CONTRACT.
Though a forfeiture in a bond is termed liquidated damages, equity will grant relief where the amount fixed is unconscionable; but, if the transaction be near the border line between a penalty and liquidated damages, the declaration that it is intended as liquidated damages may govern.
[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 170–172; Dec. Dig. ⊂=80(1).]

4. DAMAGES ⊂=79(1)—LIQUIDATED DAMAGES—INDEMNITY BONDS.
Where the friends of an immigrant, who could not be received in the country, gave a bond so that they could care for him while he was awaiting deportation, and the bond contained several conditions, the single forfeiture prescribed will, in suit for breach of only one of them, be considered as a provision for liquidated damages, where the damages resulting from the breach are real and incapable of measurement, and the amount prescribed may be recovered.
[Ed. Note.—For other cases, see Damages, Cent. Dig. § 164; Dec. Dig. ⊂=79(1).]

At Law. Assumpsit by the United States against Simon Rubin and another. On hearing at trial without a jury. Judgment for plaintiff. See, also, 227 Fed. 938.

Robert J. Sterrett, Asst. U. S. Atty., and Francis Fisher Kane, U. S. Atty., both of Philadelphia, Pa.

William Linton and Harry A. Mackey, both of Philadelphia, Pa., for defendants.

DICKINSON, District Judge. [1] This case is before the court a second time. The question now raised was presented on a rule for judgment for want of a sufficient affidavit of defense. This was the equivalent to all practical intents and purposes of a demurrer, and introduced, together with the legal merits of the question involved, a question of practice. It seemed to be the better practice to refuse judgment, and let the question be raised as a trial question. Such a practice has at least this merit: It saves the possibility of the same question being presented a second time to the appellate court. It also

saves the drawing of the sometimes fine line of distinction between an inference of fact and a conclusion of law. The question can now as a trial question be disposed of finally, and the finding made is both a verdict and a judgment. The evidentiary facts are not in dispute and have been stipulated. The alien concerned belongs to the absolutely excluded class. Negatively stated, he did not belong to the class, members of which might be admitted upon giving bond to indemnify the authorities against the alien becoming a public charge. In the regular order of procedure, and under ordinary conditions, he would have been deported. This was impracticable, because the country from which he came was at war. In consequence it was agreed that he should be placed in an institution for care and treatment. If this had been done, it would have afforded protection against the evils which the enforcement of an order of deportation would have afforded. The bond in suit was given, by which the defendants undertook to pay the United States $1,000 in case of default. Such default is admitted and the United States demands payment of the sum stipulated.

[2, 3] A feature, if not, indeed, the controlling feature, in cases of this kind, is whether the actual damages suffered are capable of admeasurement. If they are, then the payment of a stipulated sum not related to the actual damages partakes of the character of an arbitrary penalty, against the enforcement of which equity will relieve. When the damages are not so capable, and the stipulated sum is not unconscionable, and is within the limits of a fair and reasonable estimate of what the damages may well be, although definite proofs are not within reach, there the stipulated sum may not be regarded as a penalty. In a word, the enforcement of its payment would not be inequitable. Let it always be remembered the legal obligation is complete. Defendant can be relieved only in equity. If there is no equity in the application for relief, none should be accorded. There is sometimes, in these cases, a subsidiary question. There may be the added feature of an express agreement that the stipulated sum is agreed damage. The legal contract with this added feature may be as unconscionable as it would be without it, and obviously a court of equity may grant relief as readily in the one case as the other. No one seeking to secure the power to enforce an inequitable bargain can deprive a court of equity of its power to grant equitable relief. Such a stipulation does, however, enter into the equitable considerations involved. If the transaction were near the border line between arbitrary penalty and agreed liquidation of damages, such an agreement between the parties might become a deciding element in the case.

[4] When a bond has a single condition, the amount of the bond is the equivalent of an agreed liquidated sum. Where there are several conditions, it cannot be so assumed. In the absence of an agreed liquidation, the question of whether the damages can be definitely ascertained and established by proofs becomes a question of fact. On the rule for judgment this fact did not appear. Judgment was therefore, because of this, and for the practical reason before stated, refused. It now appears as a trial fact that damages, although real, are not such as can be admeasured. We are brought, in consequence, face to face

with this question. The plaintiffs agreed to pay the sum of $1,000 for the default which they admit. Should they in equity be relieved of this legal obligation? The conclusion that they should not be so relieved in the case of a bond such as this given to the United States is supported by the following cases: United States v. Lipkis (D. C.) 56 Fed. 427; United States v. Rosenthal (D. C.) 210 Fed. 555; Brooks v. Wichita, 114 Fed. 297, 52 C. C. A. 209; Clark v. Barnard, 108 U. S. 436, 2 Sup. Ct. 878, 27 L. Ed. 780; Illinois Surety Co. v. U. S., 229 Fed. 527, — C. C. A. —; Id., 229 Fed. 533, — C. C. A. —. Of these, the cases of Illinois Surety Co. v. United States, 229 Fed. 227, — C. C. A. —, and 229 Fed. 233, — C. C. A. —, are controlling and forbid further discussion.

The argument earnestly pressed upon our attention by counsel for defendants has for its basis (if, indeed, under the cases above cited, that will support it) the averment that this bond is the statutory bond prescribed by the act of Congress. This feature was discussed in the opinion rendered in disposing of the rule for judgment. To the view then expressed we adhere. It is confirmed by the ruling in the Illinois Surety Co. Cases, handed down since the former ruling in this case.

We have disposed of the case on the understanding that trial by jury has been waived, and that the case was heard by the court sitting without a jury by agreement, in accordance with the Revised Statutes, and that the facts admitted in the argument appear by stipulation. Mention is made of this, because such a stipulation in form is not actually before us.

The conclusion reached is embraced in the finding as a conclusion of law that the plaintiff is entitled to judgment for the sum of $1,000, with costs; and judgment is so rendered.

FRONTIER S. S. CO. v. FRANKLIN S. S. CO. et al.

(District Court, W. D. New York. March 14, 1916.)

No. 1092.

1. CORPORATIONS ⊂=642(1)—PROCESS—SERVICE—"DOING BUSINESS" IN STATE.
A foreign corporation, owning vessels engaged in transporting merchandise on the Great Lakes, is "doing business" in the state of New York, where vessels docked in port of that state, crews were hired, freights collected, and vessels were fitted out, repaired, or laid up for the winter, though at the time of service of the process no vessels happened to be in the New York port.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2520, 2521; Dec. Dig. ⊂=642(1).

For other definitions, see Words and Phrases, First and Second Series, Doing Business.]

2. CORPORATIONS ⊂=668(12)—PROCESS—SERVICE OF PROCESS—DOING BUSINESS IN THE STATE.
Where a foreign corporation is actually doing business in the state, the fact that it has failed to file a certificate required by state laws, showing

that it was doing business in the state, does not preclude service of process upon it within such state.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2619; Dec. Dig. ⊂⊃668(12).]

3. CORPORATIONS ⊂⊃665(2)—PROCESS—SERVICE—VALIDITY.

Where a foreign corporation was not doing business within a state at the time process was served upon it, the fact that, after service and removal to the United States District Court for that part of the state, property and vessels of the corporation came within the district and attachment was issued, does not give the District Court jurisdiction, though the fact that vessels remained in the district is material on the question whether the corporation was doing business in the state.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2571, 2598; Dec. Dig. ⊂⊃665(2).]

At Law. Action by the Frontier Steamship Company against the Franklin Steamship Company and another. On motion to quash service of summons. Motion denied.

Brown, Ely & Richards, of Buffalo, N. Y., for plaintiff.
Stanley & Gidley, of Buffalo, N. Y., for defendants.

HAZEL, District Judge. This is a motion to quash service of summons upon the defendants Franklin Steamship Company and Fremont Steamship Company, corporations and citizens of the state of Minnesota. The action was brought in the Supreme Court of the state of New York by the service of a summons only, and removed to this court after the complaint apprised the defendants that more than $3,000, exclusive of interest and costs, was involved. The summons, without the complaint, was served November 15, 1915, on one Oakes, the general manager, secretary, and treasurer of both defendants. He was not a citizen of this state, but was temporarily within the state at the time of service. A notice of appearance and a demand for a copy of the complaint were duly served by attorneys for defendants, and upon receiving the complaint the petition for removal was at once filed.

It is contended by plaintiff that by reason of such voluntary general appearance, as indicated by the notice of appearance, the defendants are concluded from urging in this court that the summons was improperly served upon them, and that the legal effect of the service of the notice of appearance, according to sections 421 and 424 of the Code of Civil Procedure of the state of New York, was a voluntary submission of the person to the jurisdiction of the court, which could have been avoided by appearing specially for the purpose of raising the question of jurisdiction by motion, or by allowing judgment to be taken by default. Reed v. Chilson et al., 142 N. Y. 152, 36 N. E. 884. But the case of Crown Cotton Mills v. Turner (C. C.) 82 Fed. 337, raises a doubt in my mind as to whether this rule is applicable in this judicial circuit. In that case, an action brought in the federal court, wherein the summons alone was served and the defendant was unadvised until the service of the complaint that the federal court had jurisdiction by reason of diversity of citizenship, Judge Lacombe held that the filing of a general appearance by de-

fendant did not constitute a waiver of his right to move to dismiss for want of jurisdiction of the person. There are, however, numerous federal court adjudications holding squarely that, in order to set aside service of a summons in an action brought in the state court, the appearance of the defendant must have been special, and not general; a general appearance depriving defendant of the right to object that an action within the general jurisdiction of the court was brought in the wrong district. Upon this point it will suffice to direct attention to Interior Construction Co. v. Gibney, 160 U. S. 219, 16 Sup. Ct. 272, 40 L. Ed. 401, Hoyt v. Ogden-Portland Cement Co. (C. C.) 185 Fed. 889, and cases cited therein.

There is much to be said arguendo on both sides, although in Pennsylvania Lumbermen's Mut. Life Ins. Co. v. Meyer, 197 U. S. 407, 25 Sup. Ct. 483, 49 L. Ed. 810, the Supreme Court affirmed this court (108 Fed. 169) in holding that in a removable case, where it was shown that the defendant was engaged in business in this state, and that the cause of action arose within the state, full credit must be accorded the state statute as to the manner of serving process upon a foreign corporation, regardless of whether the officer served was actually representing the corporation at the time of service. This question, however, may be passed by, in view of the conclusion reached by me that the defendant corporations were engaged in business in this state and district at the time of the service of the summons upon their representative, the manager of the companies.

[1] The affidavits show that the defendants during the year 1915, and prior thereto, were the owners of several vessels engaged in transporting merchandise on the Great Lakes, and operated a line of vessels carrying cargoes in interstate commerce to and from Buffalo, coming to this port periodically during the season of navigation, where freights were collected by local agents, crews paid off, and vessels fitted out, repaired, or laid up for the winter, as necessary, within the jurisdiction of this court. In these circumstances, even though none of the vessels happened to be in port at the time of serving the summons, I think that the corporations defendant were at that time transacting business within the Western district of this state, and that service upon an officer was good, and should not be set aside. Conley v. Mathieson Alkali Works, 190 U. S. 406, 23 Sup. Ct. 728, 47 L. Ed. 1113; Pennsylvania Lumbermen's Mut. Life Ins. Co. v. Meyer, supra.

The facts here are essentially different from those of Green v. Chicago, Burlington & Quincy Ry., 205 U. S. 530, 27 Sup. Ct. 595, 51 L. Ed. 916, where the Supreme Court held that a nonresident corporation railroad company, not having tracks within the district and merely transacting the incidental business of soliciting freight and passenger traffic, was not doing business in that district, which would warrant the inference that it was there present through its agent.

[2, 3] Defendants' failure to file a certificate, as ordained by the state laws, that they were transacting business in this state, does not prove that they were not so engaged, and the cases cited by defendants on this point do not apply. I quite agree that it is wholly immaterial that vessels and property of the defendants have come into this

district since the beginning of this action, and that an attachment has been granted thereon, for such facts alone would not give this court jurisdiction of the defendants. (Big Vein Coal Co. v. Read, 229 U. S. 38, 33 Sup. Ct. 694, 57 L. Ed. 1053, citing U. S. v. Brooke, 184 Fed. 341, decided by this court); but the arrival of boats owned by defendants and the keeping of them in this port for storing grain and wheat until navigation is resumed bears materially upon the question of the transaction of business in this district, wherein the summons was served in conformity with the statute of this state.

The motion to quash service of summons is denied.

JACKSON v. WILLIAM KENEFICK CO. et al.

(District Court, S. D. New York. July 21, 1913.)

REMOVAL OF CAUSES ⊂=26—RIGHT TO REMOVAL—REMAND.

An alien sued in the state courts of New York two citizens and residents of Oklahoma. On defendants' petition the cause was removed to the federal court. Judicial Code (Act March 3, 1911, c. 231) § 34, 36 Stat. 1098 (Comp. St. 1913, § 1016), declares that whenever a personal action has been or shall be brought in any state court by an alien against any citizen of a state, who is, or at the time the action was commenced was, a civil officer of the United States, but a nonresident of the state wherein jurisdiction is obtained by the state court by personal service of process, such action may be removed to the District Court for the district in which the defendant shall have been served with process. *Held* that, despite this section, the case could not, over objections of the alien, be removed to the federal District Court for New York.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 60-63; Dec. Dig. ⊂=26.]

At Law. Action by Charles Jackson against the William Kenefick Company and William Kenefick, begun in the Supreme Court of New York, and removed to the United States District Court. On motion to remand. Case remanded.

The plaintiff, an alien, sued two citizens and residents of Oklahoma in the Supreme Court of the state of New York. The defendants removed for diverse citizenship.

Brainard Tolles, of New York City, for the motion.

Wollman & Wollman, of New York City, opposed.

LEARNED HAND, District Judge. Were this question open to me as a fresh matter, I should decide in favor of the removal. I do not regard Ex parte Wisner, 203 U. S. 449, 27 Sup. Ct. 150, 51 L. Ed. 264, especially after In re Moore, 209 U. S. 490, 28 Sup. Ct. 586, 706, 52 L. Ed. 904, 14 Ann. Cas. 1164, as in any sense overturning the preceding authorities which had all settled the rule in favor of removal. Those cases proceeded upon that clause of the section which alone applies to suits between citizens of different states, and which therefore gives to a plaintiff citizen of the United States the right to object to the removal of his suit to a federal court, whose jurisdiction comprises the residence of neither party. It is quite true that in princi-

ple there is no reason why a nonresident defendant should have less reason to fear the prejudice of a state court, when a nonresident citizen of another state sues him, than when an alien; the fact is just the opposite. Yet the result seems to me rather to arise from construing the sentence which affects suits between citizens of different states, as a limitation upon the general provision that a defendant may be sued only where he resides, instead of an amplification of it. If it be construed as a limitation upon that provision, I cannot see any escape from the conclusion that its only possible function is to give the plaintiff a right to object to a removal when the suit is between citizens of different states, and from that it seems to follow that where the plaintiff is an alien the right to object does not exist, for concededly the District Court would have jurisdiction over the subject-matter. It is a strange result, but some very strange results arise in this subject. I also recognize the real difficulty arising from section 34 of the Judiciary Act mentioned by Judge Bourquin in Hall v. Great Northern Ry. (D. C.) 197 Fed. 488; but that, too, does not seem to me conclusive. So on principle I should be for removal.

Furthermore, while I agree with Judge Lewis, in Sagara v. Chicago, etc., Ry. (C. C.) 189 Fed. 220, that we cannot say with certainty that Ex parte Tobin, 214 U. S. 506, 29 Sup. Ct. 702, 53 L. Ed. 1061, and Ex parte Nicola, 218 U. S. 668, 31 Sup. Ct. 228, 54 L. Ed. 1203, settled the matter, and indeed had they been decided after Ex parte Harding, 219 U. S. 363, 31 Sup. Ct. 324, 55 L. Ed. 252, 37 L. R. A. (N. S.) 392, we could say that they settled nothing at all, still at the time both cases were decided, the Supreme Court was passing on such questions on the merits, and I think it a little strange that Ex parte Nicola, supra, should have been decided "on the authority" of Ex parte Tobin, supra, if the meaning only was that in each case mandamus was not the proper remedy. Indeed, I have personally no doubt that the court meant to distinguish each case from Ex parte Wisner, supra, for the reasons I have given, and that the rule has remained unchanged.

Nevertheless, the cases are in the most hopeless conflict. For the removal since Ex parte Wisner, supra, are Barlow v. Chicago & N. W. Ry. (C. C.) 164 Fed. 765, Id. (C. C.) 172 Fed. 513 (on rehearing), Smellie v. Southern Pacific (D. C.) 197 Fed. 641, and Bagenas v. Southern Pacific (C. C.) 180 Fed. 887, by the same judge. Against it are Mahopoulus v. C., R. I. & Pac. Ry. (C. C.) 167 Fed. 165, Sagara v. Chicago, etc., Ry. (C. C.) 189 Fed. 220, Hall v. Great Northern Ry. (D. C.) 197 Fed. 488, and Zerba v. Gilson Asphaltum Company, an unreported decision of Judge Marshall mentioned by Judge Lewis in Sagara v. Chicago, etc., Ry., supra. All these cases are in other circuits, and in our own are the decisions of Judge Lacombe in Kamenickey v. Catterall Printing Co. (C. C.) 188 Fed. 400, and of Judge Coxe in Odhner v. Northern Pac. Ry. Co. (C. C.) 188 Fed. 507. The first was based only upon the general doubtfulness of the right of removal, but the second discussed the merits. It has always been the rule in this district to follow prior decisions upon the same point and treat them as authoritative, and it would be very unwise in a case like this, full

of the greatest confusion, to weaken the force of a rule now twice enforced since Ex parte Wisner, supra. While, therefore, my independent conclusion would be otherwise, both on principle and authority, I shall remand this case under the authority of those decisions.

It is only necessary to allude to the allegation that the assignment was for the purpose of avoiding the jurisdiction of this court. Oakley v. Goodnow, 118 U. S. 43, 6 Sup. Ct. 944, 30 L. Ed. 61.

Case remanded.

DOHERTY et al. v. SMITH.

(District Court, S. D. New York. July 10, 1915.)

REMOVAL OF CAUSES ⊂=26—NONRESIDENT PARTIES.

Where a nonresident citizen plaintiff sues nonresident citizen defendants in a state court, and the case is removed to the federal District Court, it will be remanded on plaintiff's objection.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 60–63; Dec. Dig. ⊂=26.]

At Law. Action by Henry L. Doherty, Frank W. Frueauff, and Charles T. Brown, partners doing business as Henry L. Doherty & Co., against Barton Smith, begun in the state court, and removed to the federal court. On motion to remand. Case remanded.

Frueauff & Robinson, of New York City, for the motion.

Elkus, Gleason & Proskauer, of New York City, opposed.

LEARNED HAND, District Judge. In Jackson v. Wm. Kenefick Co. and Wm. Kenefick, 233 Fed. 130, filed July 21, 1913, I held that an alien might remand a case where he had brought it in the state court against nonresident citizens and they had removed. I followed Judge Lacombe in Kamenickey v. Cattarall Printing Co. (C. C.) 188 Fed. 400, and Judge Coxe in Odhner v. North. Pac. Ry. Co. (C. C.) 188 Fed. 507, against my own judgment. It seems to me probable that Ex parte Tobin, 214 U. S. 506, 29 Sup. Ct. 702, 53 L. Ed. 1061, and Ex parte Nicola, 218 U. S. 668, 31 Sup. Ct. 228, 54 L. Ed. 1203, were intended to overrule Ex parte Wisner, 203 U. S. 449, 27 Sup. Ct. 150, 51 L. Ed. 264, especially after the language of In re Moore, 209 U. S. 490, 28 Sup. Ct. 586, 706, 52 L. Ed. 904, 14 Ann. Cas. 1164; but the matter has given rise to great confusion. Judge Cochran, in Louisville & Nashville R. Co. v. West. Un. Tel. Co. (D. C.) 218 Fed. 91, has written a most admirable opinion, in the reasoning of which I altogether concur, just as I concurred in the same reasoning in Jackson v. Wm. Kenefick et al., supra.

So far as there is any difference between suit by aliens against nonresident citizens and suits by nonresident citizens against nonresident citizens, the right to remand seems more certain to belong to nonresident citizen plaintiffs, as I tried, perhaps not very clearly, to show in Jackson v. Wm. Kenefick et al., supra. Any authority allowing an alien plaintiff to remand, if anything, makes more strongly in favor of a nonresident citizen plaintiff's similar right. Perhaps Judge

Cochran is right in saying that the same considerations govern each. I am aware that under the rule of Ex parte Wisner, supra, no citizen defendant can remove to the federal court anywhere, except in the district of the citizen plaintiff's residence, and, if the plaintiff be an alien, then not at all. I do not feel free to disregard a decision of the Supreme Court for those reasons, till they have more clearly overruled their last expression.

The matter is especially one in which certainty is as important as anything else, there being no essential matter of justice or injustice in it. I shall adhere to the rule which has been laid down until it is otherwise decided by a higher court. It is most undesirable to have rulings on such matters varying with different judges.

Motion granted to remand. The motion to make definite and certain I do not pass upon.

In re GRABOYES.

(District Court, E. D. Pennsylvania. June 6, 1916.)

No. 5340.

BANKRUPTCY ⇐140(1)—SALE OR BAILMENT.

Where personal property was delivered under a contract of sale which fixed the time of payment in the future, but declared that the property should remain that of the seller until fully paid for, the contract was one of sale, and not of bailment, and title passed, so that on the bankruptcy of the purchaser the property could not be reclaimed by the seller.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 198, 199; Dec. Dig. ⇐140(1).]

In Bankruptcy. In the matter of the bankruptcy of Abraham Graboyes. Upon certificate for review of order of referee sur reclamation claim of the Goldberg Display Fixtures. Order reversed, with directions that order be entered dismissing petition for reclamation.

See, also, 228 Fed. 574.

Rearick & Illoway, of Philadelphia, Pa., for claimant.

Carr & Steinmetz, of Philadelphia, Pa., for trustee.

THOMPSON, District Judge. The fixtures in question were delivered to the bankrupt before his bankruptcy under a written agreement in the following form:

"Goldberg Display Fixtures.

"130-34 West 24th Street, New York.

"September 19, 1914.

"Please ship to the undersigned:

Name: A. Graboyes. Address: 1021 N. Front St.

City: Philada. State: Pa.

"One of your display fixtures for which I agree to pay the sum of $241.40, less 2% 30 days, or 60 days net.

"Style: Main frame; square end No. 14—burlap wings; 9 36/78.

"No. of wings: (32) thirty-two—wood filled wings. 9 36/78—14 26/45.

"Size of wings: 18 36/78—14 36/45—wire filled wings.

"Color burlap: Green—wall paper wings.
"Canopy with electric light device. Shelves: 12 shelves 2½".
"Length over all: Square end 10 feet long, No. 14 regular.
"Any special road: Penna. road Shackamaxon St.
"Fixture remains property of Goldberg Display Fixtures until fully paid.
"All shipments f. o. b. New York.
"This contract covers all the agreements between parties hereto, and I have read and understand the above contract and hereby acknowledge receipt of duplicate.
"Salesman: G. A. Loral. Purchaser: A. Graboyes.
"Remarks: ————————. Per H."

The referee decided that under a recent Pennsylvania decision the contract was one of bailment, and granted the prayer of the petition, ordering the return of the fixtures to the claimant. The referee evidently referred to the decision in the case of Sahm v. Bair, 56 Pa. Super. Ct. 108, relied upon by counsel for the claimant. In that case an action of replevin was brought by Sahm against Bair to recover possession of a horse, which Bair had purchased from one Snyder. The question for the jury was whether Snyder had purchased the horse from Sahm, or whether no sale had been consummated. The controversy arose out of negotiations for a horse trade between Sahm and Snyder. There was evidence that Sahm, over the telephone, had agreed to purchase a horse from Snyder for $45 and drove to Snyder's house to get it; that Snyder, being pleased with the horse which Sahm was driving, inquired the price, and Sahm offered to sell it for $145, part in trade for the horse to be bought from Snyder and the balance in cash. Snyder had not the money, and Sahm declined to sell except for cash; but, for the convenience of both parties and upon a statement by Snyder that he would like to give the horse a further trial, it was arranged that it should be left at Snyder's place of abode, but that title was not to pass unless Snyder brought the money to Sahm the following afternoon. Snyder never took the money to Sahm; the trade was never consummated, but Snyder sold the horse to Bair for $75. Bair defended upon the ground that he was an innocent purchaser and that the transaction was a conditional sale. Snyder testified that the sale of his horse to Sahm for $45 had been consummated, and that he had paid $5 on account of the difference for the other. Under the contradictory testimony, the court left it to the jury to determine whether there was a sale, or whether the horse, for the convenience of both parties, had been left with Snyder and title was not to pass until the price was paid. The jury found in favor of the plaintiff and the judgment was affirmed by the Superior Court. Under the evidence, the jury could well find that Snyder was not in possession as a bona fide purchaser, but merely as a bailee, and the case is readily distinguishable from the one at bar.

The agreement before the referee in the present case was for a sale upon credit, with the condition that title should not pass until the money was fully paid. The claimant attempted to retain the title as security, but the transaction does not bear even the prima facie indicia of a bailment as in the case of In re Gehris-Herbine Co., 188 Fed. 502, where the transaction was held a conditional sale. I think the learned referee was in error in holding that the contract was one of bailment, and should have denied the prayer of the petition under the authority

of the Pennsylvania decisions. Farquhar v. McAlevy, 142 Pa. 233, 21 Atl. 811, 24 Am. St. Rep. 497; Kelly Road Roller Co. v. Spyker, 215 Pa. 332, 64 Atl. 546.

The order of the referee is reversed, and it is directed that an order be entered dismissing the petition for reclamation.

ILLINOIS CENT. R. CO. v. W. L. HOOPES & SONS et al.

(District Court, S. D. Iowa, Davenport Division. May 27, 1916.)

CARRIERS ⇐196—CARRIAGE OF GOODS—ACTION FOR FREIGHT—COUNTERCLAIM.

Under Elkins Act Feb. 19, 1903, c. 708, 32 Stat. 847, and amendments thereto Act June 29, 1906, c. 3591, § 2, 34 Stat. 587 (Comp. St. 1913, §§ 8597–8599), which prohibit discriminations in favor of shippers, and in view of the policy of the law as shown by rulings of the courts and the Interstate Commerce Commission, a shipper cannot, on being sued by an interstate railroad company for freight charges, counterclaim for injuries to goods; the railroad company being required to institute such suits, and it opening the door to collusion and discrimination.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 879–887; Dec. Dig. ⇐196.]

At Law. Action by the Illinois Central Railroad Company against W. L. Hoopes & Sons and others, in which defendants counterclaimed. Demurrer to counterclaim sustained.

Helsell & Helsell, of Ft. Dodge, Iowa, and Cook & Balluff, of Davenport, Iowa, for plaintiff.

J. F. Devitt, of Muscatine, Iowa, for defendants.

WADE, District Judge. Plaintiff's action is for unpaid freight charges. The defendant answers, and also files a counterclaim for damages based upon alleged injury to the goods shipped. The plaintiff demurs to the counterclaim:

"For the reason that a claim for loss and damage growing out of a freight shipment does not constitute a lawful offset against the claim of the interstate carrier for unpaid freight charges."

The demurrer is in effect a motion to strike the counterclaim, and the question is fairly presented whether a shipper can, when the freight which he justly owes is demanded, refuse to pay because of a claim for damages to the goods shipped. It simply involves the question of whether, in view of the spirit and purpose of the Elkins Act and amendments thereto, the courts should permit a counterclaim of this kind in an action to enforce the payment of charges for freight.

"The purpose of Congress [in this legislation] was to cut up by the roots every form of discrimination, favoritism, and inequality." L. & N. R. Co. v. Mottley, 219 U. S. 467, 31 Sup. Ct. 265, 55 L. Ed. 297, 34 L. R. A. (N. S.) 671.

The courts and the Interstate Commerce Commission have uniformly frowned upon every device and subterfuge adopted, which in any manner permitted any discrimination whatsoever between shippers.

The railway company cannot accept any compensation other than cash for interstate transportation. C., I. & L. Railway Co. v. United States, 219 U. S. 486, 31 Sup. Ct. 272, 55 L. Ed. 305.

The railway company cannot extend credit to one shipper, while other shippers are compelled to pay promptly. Hocking Valley Ry. Co. v. United States, 210 Fed. 735, 127 C. C. A. 285.

A carrier cannot waive the statute of limitations in defending in an action for damages to freight. Phillips v. Grand Trunk Ry. Co., 236 U. S. 662, 35 Sup. Ct. 444, 59 L. Ed. 774.

A carrier is not liable for damages resulting from a mistake in quoting a rate less than the full published rate. Ill. C. R. Co. v. Henderson Co., 226 U. S. 441, 33 Sup. Ct. 176, 57 L. Ed. 290.

Rule 48 of Conference Rulings of the Interstate Commerce Commission holds:

"A shipper, having a money demand against an interstate carrier, sought to offset it against the amount of a freight bill which he owed the carrier upon a shipment of merchandise. May this be lawfully done? Held, that the two transactions have no relation one to the other, and that such a deduction from the lawful charges on the shipment could not be made."

The question involved in this case came before Judge Munger in C. & N. W. Ry. Co. v. Stein Co., 233 Fed. 716, and in a memorandum opinion he held:

"If a shipper may be permitted to set off, in an action for freight earned by a carrier, claims for damages which the shipper alleges he has sustained, the court must prevent the usual right to make compromise of such suits, and must undertake the impossible task of holding the carrier to diligence and good faith in preparing and presenting its defense, in order to prevent the granting and receiving of rebates by insiduous agreement between the parties with reference to the disposition of the suit. The public policy evinced by the acts of Congress relating to interstate commerce requires the denial of the right to set-off in such cases, leaving the shippers an independent action to enforce any rights that belong to them."

I am in full accord with these views expressed by Judge Munger. It is the duty of the carrier to collect all freight charges, and, where necessary, to commence actions to enforce payment. To perform this duty it is necessary that the carrier shall commence action in the district where the shipper resides. Carriers are often compelled to maintain actions in districts, and even in states, far removed from the district in which suits could be maintained against them. Very often the suits are for small amounts, and if the shipper can, by counterclaim, acquire jurisdiction of the carrier in an action for damages to freight, he can force the carrier to spend much more in prosecuting its action for freight charges than the freight charges amount to.

A few years ago the nation was startled when it was found that favorite shippers were getting rich upon the rebates granted by carriers. One of the devices used in granting such rebates was for the shipper to make a fictitious claim for damages to freight, which was promptly allowed. To permit counterclaims in these actions for freight charges would simply open the door to a renewal of this method of rebate; at least, it would cast suspicion upon the transactions—especially in every case where a compromise was effected. Compromises are favored in law. If the defendant in this action has a valid claim for damages, both parties should be permitted to exercise their right to compromise the action; but, if such compromise were effected in a transaction involving the collection of freight charges, the court would be compelled to supervise it with the utmost care, in order, as

Judge Munger expresses it, "to prevent the granting and receiving of rebates by insiduous agreement between the parties."

So important is it that the collection of freight charges should be uniform as to all shippers, so important is it that it be above suspicion of favoritism, that I feel that it is against public policy to permit a counterclaim of this kind to be pleaded, and the counterclaim will be stricken out.

LUCCHETTI v. PHILADELPHIA & R. RY. CO.

(District Court, E. D. Pennsylvania. May 25, 1916.)

1. COMMERCE ⊂=27—INTERSTATE COMMERCE—ACTIONS—ESSENTIALS.
For a railroad employé to predicate liability under Employers' Liability Act April 22, 1908, c. 149, 35 Stat. 65 (Comp. St. 1913, §§ 8657-8665), he must show, not only that the railroad company was engaged in interstate commerce, but that at the time of the injury he was engaged in interstate commerce work.
[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 25; Dec. Dig. ⊂=27.]

2. PLEADING ⊂=248(12)—AMENDMENTS—RIGHT TO AMEND.
A servant's cause of action resting on violation of statute is entirely distinct from his cause of action under the common law, and he may at his option assert either or both; but where he asserts only one of them, and later the other by amendment, he is introducing a new cause of action.
[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 694; Dec. Dig. ⊂=248(12).]

3. PLEADING ⊂=248(12)—AMENDMENT—RIGHT TO AMEND.
In a personal injury action by a railroad employé, where the statement of claim averred that the company was engaged in interstate commerce, an amendment inserting omitted averments that the servant was engaged in such commerce at the time of the injury, states no new cause of action against which limitations may have run, for, unless the action was brought under the federal Employers' Liability Act, the federal court had no jurisdiction, and therefore it was obviously intended to state a cause of action under such act.
[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 694; Dec. Dig. ⊂=248(12).]

At Law. Action by Francesco Lucchetti against the Philadelphia & Reading Railway Company. Sur motion for leave to amend statement. Amendment granted.

Francis J. Maneely, of Philadelphia, Pa., for plaintiff.
Wm. Clarke Mason, of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. [1] Plaintiff filed a statement of claim March 18, 1914. The cause of action meant to be set forth was one under the acts of Congress relating to employés of railroad common carriers engaged in interstate commerce. It is essential to a case under the statutes of the United States, not only that the defendant was at the time engaged in interstate commerce, but also (as the fact might be the defendant was likewise engaged in transportation within the state) that the plaintiff was, at the time the cause

of action arose, employed in interstate commerce work. This is settled beyond the necessity of the citation of authorities laying down the ruling. The only objection interposed to the allowance of the motion is that by it a new cause of action is introduced. The practical value of the position asserted by the objection lies in this: That if the amendment is allowed the action was instituted in time. If the plaintiff is driven to a new action, the bar of the statute of limitations could be pleaded.

[2] A party may have two causes of action, which, although grow out of the same fact occurrences, are distinct, separate, and different. One of them, for illustration, may arise out of the general principles of the law of negligence, and the other out of the provisions of a statute, state or federal. He may have the right to assert either or both. If he asserts one or both, and makes a slip in pleading his averments of fact, he may amend. If, however, he brings his action for the one cause, and wishes to change to the other, it is clear he is not amending the pleadings in the action brought, but is bringing in a new cause of action.

[3] The statement of claim here with sufficient clearness indicates it to have been for a cause arising under the laws of the United States. This is further indicated by the fact that the action was brought in a court of the United States by a litigant who, for any other cause than one arising under the laws of the United States, could have brought no action. The action brought was therefore either for this cause or the court was without jurisdiction to entertain it. The statement of claim contains an averment of one of the essential facts above stated. This would not be a necessary averment, unless the cause of action was that now asserted. It omits an averment of the other. This omission is shown to have been by mistake. The conclusion (the correctness of which is not in question before us) that the statement is insufficient in law because of the omission does not, in itself, involve the other conclusion, that supplying the omission would be the introduction of a new cause of action. The omission of an averment of damages would likewise render the statement short in necessary averments; but supplying the omission through an amendment would concededly be amending the old statement, not the assertion of a new claim.

The line of distinction may be confidently drawn. It is sometimes easy and sometimes difficult to determine on which side of it a proposed amendment is. We think the present amendment is on the permitted side, and because of this allow it. There is nothing in the case of Garrett v. Louisville, 235 U. S. 308, 35 Sup. Ct. 32, 59 L. Ed. 242, to condemn this view. On the contrary, the implication is otherwise so far as the ruling reflects the views of the District Court and the Circuit Court of Appeals whose judgment was affirmed. Each of them suggested and tendered the offer of allowance of an amendment. There is the further thought in the present case that this amendment was allowed before the statute had closed upon the plaintiff's right.

The delay in acting upon this is unexplained, but the amendment may be now made under the allowance then given.

THE OCEANA.

(District Court, E. D. New York. April 21, 1916.)

1. MARITIME LIENS ⊜29—LIENS FOR REPAIRS AND SUPPLIES—FEDERAL STATUTE.

Under Act June 23, 1910, c. 373, 36 Stat. 604 (Comp. St. 1913, §§ 7783–7787), one furnishing repairs, supplies, or necessaries to a vessel on order of any person to whom the management by the vessel has been intrusted by the owner in the port of supply is under no duty to inquire as to the authority of such person to bind the ship, and is entitled to a lien, unless something comes to his knowledge to put him on inquiry, in which case his right to a lien is affected by such facts as he knows or by the exercise of reasonable diligence could have ascertained. If he has knowledge that he is dealing with a charterer or an agreed purchaser in possession, he is put upon inquiry as to the terms of the charter or contract of sale and is bound thereby.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. § 48; Dec. Dig. ⊜29.]

2. MARITIME LIENS ⊜30—LIENS FOR REPAIRS AND SUPPLIES—CONSTRUCTIVE NOTICE OF CONTRACT OF SALE.

Under such statute, the filing in a county office under state laws of a contract of conditional sale of a vessel does not operate as constructive notice to one furnishing repairs, supplies, or necessaries to such vessel.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. §§ 37, 38; Dec. Dig. ⊜30.]

3. MARITIME LIENS ⊜29—LIENS FOR REPAIRS AND SUPPLIES—FEDERAL STATUTE.

While under act June 23, 1910, any person intrusted by the owner with the management of a vessel is presumed to be his agent who may create liens for repairs, supplies, and necessaries, an agreed owner can appoint such an agent only when he is in possession of the ship, either actually or constructively.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. § 48; Dec. Dig. ⊜29.]

4. MARITIME LIENS ⊜31—LIENS FOR REPAIRS AND SUPPLIES—PURCHASES BY PERSONS INTRUSTED WITH MANAGEMENT OF VESSEL.

The owner of a steamship made a contract for its conditional sale, to go into immediate service on its delivery, which was to be as soon as certain preliminaries could be arranged. Within a very few days, and before formal delivery, agents of the purchaser, including the chief steward and commissary, went on board and took actual charge for the purpose of repairing, equipping, and supplying the vessel for sailing. Such agents ordered and received repairs, supplies, and other necessaries with the knowledge of the seller, which also knew that the bills therefor were not paid, but took no steps to notify the persons furnishing the same that they could not look to the vessel for payment. More than a month after delivery, the seller exacted a second payment on the purchase price with knowledge that a large sum was then due and unpaid for such supplies, etc., in violation of the terms of the contract of sale, which required the purchaser to promptly pay all such bills, to keep the vessel free from liens, and to at once procure the release of any liens filed or claimed, and provided that on failure to comply with such requirements the seller might terminate the contract and retake possession. *Held*, that all persons so furnishing repairs, supplies, and other necessaries both befor and after formal delivery of the vessel, without knowledge or notice of the contract of sale, were entitled to liens as against the seller which had retaken possession under the contract.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. § 40; Dec. Dig. ⊜31.]

In Admiralty. Consolidated suits to enforce maritime liens against the Steamship Oceana; the Morse Dry Dock Company, claimant. On exceptions to report of special commissioner. Exceptions sustained in part, and case returned for further findings.

Charles F. Kelly, of New York City, for Conron Bros. Co. (1).

Robinson Leech, of New York City, for Maryland Coal & Coke Co. (2) and W. A. Fletcher Co. (3).

Carter & Carter, of New York City, for Campbell & Stewart (4).

Burlingham, Montgomery & Beecher, of New York City, for Samuel E. Hunter (5), Isaac M. Burnap (21), Caleb V. Smith (22), and F. B. Dalzell & Co. (25).

Yankauer & Davidson, of New York City, for J. T. Smith, Inc. (6), Jacques & Co. (50), and Pabst Brewing Co. (51).

Ralph J. M. Bullowa, of New York City, for Kniffen & Demarest Co. (7), James Y. Watkins & Son (8), Suskind & Tilbor (9), Davies & Sullivan (18), First Vienna Bakery (19), Christian J. Jetter (20), Specification Soap & Oil Co. (54), Van Dyck Gravure Co. (55), Albany Baking Powder Co. (61), Hygenia Antiseptic Toothpick Co. (66), and Wendell Towel Supply Co. (67).

Julius Offenbach, of New York City, for A. Silz Inc. (10), John W. Butler, Inc. (11), Blackfords, Inc. (12), Knapp & Van Nostrand (13), and Steinhardt & Kelley (24).

Foley & Martin, of New York City, for Andrew Mills & Son (14), W. S. Pendleton, Jr. (15), and Columbian Rope Co. (16).

J. Chester Johnson, of Brooklyn, N. Y., for John Wanamaker (17).

Spitz & Bromberger, of New York City, for Beech Nut Packing Co. (23).

Arnon L. Squiers, of New York City, for John L. Bliss (26).

Harrington, Bigham & Englar, of New York City, for R. F. Downing & Co. (27).

Edward Ward McMahon, of New York City, for Hunter & Trimm (28) and William M. Schwenker (29).

Rollins & Rollins, of New York City, for Cornell & Underhill (30).

Edgar R. Mead, of New York City, for M. K. Bowman-Edson Co. (31).

MacFarland, Taylor & Costello, of New York City, for McQuade Stevedoring Co. (32).

Henry W. Goodrich, of New York City, for R. G. Williams & Co. (33).

Louis Halle, of New York City, for E. S. Alpaugh & Co. (34).

Samuel Bernstein, of New York City, for Crandall Packing Co. (35).

Elfers & Abberley, of New York City, for Charles R. Nolte (36).

House, Grossman & Vorhaus, of New York City, for J. J. Eager Co. (37).

Carpenter & Park, of New York City, for W. Brewer (38), W. Huus (39), H. A. Miller (40), E. C. Winters (41), F. W. Miller (42), J. W. Sullivan (43), J. J. Adler (44), J. E. J. Kiernan (45), F. Hopkins (46), W. Earle (47), J. W. Ackerman (48), and W. A. Mitchell (49).

James W. Prendergast, of New York City, for F. W. Devoe & C. T. Raynolds Co. (52).

Blumenstiel & Blumenstiel, of New York City, for Anheuser Busch Agency (53).

Alexander & Ash, of New York City, for Frank W. McKee (56), Burns Bros. (57), and Mutual Steam Laundry Co. (58).

Greene, Hurd & Stowell, of New York City, for Western Electric Co. (59).

Samuel D. Jones, of New York City, for Francis H. Leggett & Co. (60).

Oscar A. Campbell, of New York City, for Liquid Carbonic Co. (62).

Henry A. Blumenthal, of New York City, for H. C. Reese Co. (63).

Abbott & Coyne, of New York City, for Gilbert & Morse (64).

Herman Goldman, of New York City, for New York Belting & Packing Co. (65).

VanIderstine, Duncan & Barker, of New York City, for Kroeschell Ice Mach. Co. (68).

E. G. Budington, of New York City, for A. B. Sands & Son Co. (69).

Armstrong, Brown & Purdy, of New York City (Pierre M. Brown and Wm. F. Purdy, both of New York City, of counsel), for claimant.

VEEDER, District Judge. This is a consolidated action embracing 69 libels asserting maritime liens aggregating $43,289.93 against the steamship Oceana, of which the Morse Dry Dock & Repair Company appears as claimant. For convenience of reference the number given each lien claim in the special commissioner's report is added to the lienor's name in the list of appearances of counsel, and the various lienors are hereafter referred to by number. All the claims are for repairs, supplies, or other necessaries, within the meaning of the Act of June 23, 1910 (36 Stat. 604), relating to liens on vessels, save (3), which is in part for two booms and for repairing and carting a coal chute; (25), which is for towage; (27), which is for brokerage and tonnage dues and fees; (32), which is for stevedoring; and (38 to 49), inclusive, which are for pilotage. The consolidated action was referred to James K. Symmers, Esq., as special commissioner. His report was duly filed, and now comes before the court upon exceptions filed by the claimant and by various libelants. The issues with respect to the claims for repairs, supplies, or other necessaries are confined substantially to the construction and application of the act of Congress of June 23, 1910. The special commissioner allows in full 21 of the claims for repairs, supplies, or other necessaries, aggregating $11,698.36, viz., Nos. (1), (4), (9), (11), (12), (16), (18), (19), (20), (21), (28), (29), (30), (31), (33), (34), (55), (57), (58), (64), and (69). He allows in part 25 of such claims aggregating $21,459.12, to the extent of $10,681.46, viz., Nos. (2), (3), (5), (6), (8), (10), (13), (14), (15), (17), (22), (23), (24), (37), (50), (51), (52), (53), (54), (59), (60), (62), (63), (65), and (66). That is to say, he disallows all repairs and supplies ordered or delivered to the vessel prior to the

date upon which he finds that the vessel was formally delivered to the purchaser under an agreement theretofore executed. He disallows in full eight of such claims, aggregating $6,934.28, viz., Nos. (7), (26), (35), (36), (56), (61), (67), and (68), on the ground either that the supplies were ordered or delivered prior to the date of formal delivery of the vessel, or that the libelants were put upon inquiry concerning the authority of the agreed purchaser to bind the vessel. With respect to the claims for liens other than for repairs and supplies he disallows all, that is, (3 in part), (25), (27), and (32), save the claims for pilotage, (38–49) which are allowed. The commissioner also found, at the claimant's request, that the Oceana had her port of registry, New York, painted on her stern; that inquiry, even by telephone, of the proper officials of the New York Custom House, would have disclosed that the Morse Company was the registered owner of the Oceana; that such inquiry of the Morse Company, at either its Brooklyn or Manhattan office, would have elicited correct information concerning the title to the vessel and the provisions of the conditional bill of sale relating to liens; and that inquiry of the master of the vessel would have resulted in the ascertainment of the situation, or at least enough to necessitate further inquiry. The claimant has filed exceptions to every allowance made by the special commissioner, save only in the case of pilotage (38–49). Of the eight libelants whose claims for repairs, supplies, or other necessaries were disallowed in full, only five have filed exceptions, viz., (7), (36), (56), (61), and (67). Of the twenty-five libelants whose claims for repairs or supplies were disallowed in part, only sixteen have filed exceptions, viz., (2), (3), (5), (8), (14), (15), (17), (22), (37), (52), (54), (59), (60), (63), (65), and (66). All the libelants asserting liens other than for repairs and supplies have filed exceptions.

As appears by a bill of sale filed in the office of the collector of customs at the port of New York the Oceana was purchased at marshal's sale March 13, 1914, by the Morse Dry Dock & Repair Company, a New York corporation having its principal place of business in the borough of Brooklyn. On December 5, 1914, while the vessel was lying at its yard at the foot of Fifty-Sixth street, Brooklyn, the Morse Company contracted with the Bermuda-American Steamship Company, Limited, a Bermuda corporation, for her sale for $255,000 upon conditions set forth in the contract. The purchase price was to be paid, $30,000 on account on the date of execution of the contract, the balance in monthly installments of $25,000 each on February 1st, March 1st, and thereafter as specified. Title to the vessel was to remain in the Morse Company until the entire purchase price was paid. The contract further provided that before delivery the purchaser should deliver to the seller certain insurance policies; also, that at the time of delivery the steamer should hold British Lloyds A-1 classification and inspection required for United States registry. The seller was required to provide before delivery certain specified equipment. It was further stipulated that the vessel should be delivered to and accepted by the purchaser not later than December 19th; that in the event of any contingency arising, not with-

in the control of the seller, which should prevent delivery of the vessel on that date, the seller should not be liable for damages for such delay, but in case of delay for more than 14 days thereafter the purchaser should have the option to cancel the contract, and the bill of sale (which the contract provided should meanwhile be executed contemporaneously therewith and delivered to the Columbia Trust Company in escrow) was, in the event that the purchaser exercised such option, to be returned to the seller, and the installment paid on the purchase price was to be repaid to the purchaser. Upon compliance with the terms of the contract, the bill of sale was to be delivered to the purchaser or its assigns. The purchaser was given the right to organize an American corporation to take title to the vessel, and in that event, at the purchaser's option, the bill of sale was to be made to the American corporation, which should, however, be equally bound with the purchaser by all the terms and conditions of the contract. Until the ship should be fully paid for the purchaser covenanted, among other things:

"(a) To keep said ship clear of any liens from any cause, and if any lien or libel is filed or asserted the same shall be immediately bonded by the purchaser. The purchaser agrees to promptly pay current bills, for supplies and repairs to said ship and exhibit at reasonable times the ship's accounts and bills to seller's representatives.

"(b) To keep said ship and equipment in good repair."

Pursuant to this agreement, the purchaser paid $30,000 down, and the seller executed an absolute bill of sale of the vessel, which, together with a duplicate copy of the agreement, was deposited in escrow with the Columbia Trust Company. On December 9th the contract was filed in the office of the register of the county of Kings. At the same time it was offered for filing in the register's office of the county of New York, but was rejected because the vessel was not in that county. Counsel for the Morse Company at the same time sought to file the contract, or a copy thereof, for record in the office of the collector of customs of the port of New York, but it was refused for record on the alleged ground no law authorized the filing there of such an instrument.

In order to operate the Oceana under American registry, the Bermuda Company caused to be organized a New York corporation called the Bermuda-American Steamship Company of New York. C. V. Frith, who was a director in both companies, was president of the Bermuda Company. C. W. Morse was president of the New York Company. Crosby, one of the directors of the company, then or formerly purchasing agent of the Hudson Navigation Company, in which C. W. Morse was also interested, was employed as purchasing agent, and the purchaser went forward with its preparations to operate the Oceana in the Bermuda trade. Almost all the repairs and supplies thereafter furnished and here involved were ordered for the Oceana by Crosby, with whom many of the libelants had dealt as purchasing agent under his former employment. In most instances the libelants made no further inquiries; those who did were assured by Crosby that the ship was responsible. Most of the bills for supplies were made to the Oceana, either alone or with the addition of

"owners" or "Bermuda-American Steamship Company"; in a few instances they were directed to the company alone. The Bermuda-American Company began at once to advertise extensively its operation of the Oceana in the Bermuda trade. About December 10th, Saunders, the chief steward and commissary, went aboard and took charge. He gives the date variously as the 8th, 10th, 14th, and 15th. But he does say unequivocally that he "was there all the time from the 10th," "fitting out the whole ship." He made up a list of supplies required and discussed it with Crosby and the Morses. He had 35 men at work on board. Coal had been ordered almost immediately upon the execution of the contract. Soap was ordered on December 9th, and paint and varnish at about the same time. On December 14th requisition blanks, order books, etc., were purchased. Arrangements were made on December 15th for supplying the crew with linen coats, and other supplies were ordered on the same day. Certain fittings of the vessel were removed by the purchaser on December 16th for replating. The captain, engaged by the purchaser, went aboard early in December. The crew were aboard and were measured for uniforms between December 15th and 20th. Capt. Pendlebury signed a receipt for a delivery on the 16th, and all were delivered on board before the vessel left the claimant's yard. Cleaners removed blankets and returned them on December 18th. An order was given to the ship chandler on the 19th. Wanamaker's representative went aboard and measured for bed spreads on December 20th. Certain steam packing, which had been ordered theretofore by the chief engineer, was put aboard on December 22d. Various other supplies were ordered and delivered to the vessel between the 22d and the 24th. The Oceana left the claimant's yard on December 25th for Pier 32, North River, from which she was to sail. She sailed on her first voyage on the 26th.

E. P. Morse, treasurer and general manager of the claimant company, was often aboard the Oceana while she was in the claimant's yard, and saw deliveries made on board, and was fully informed. He says he asked to see the purchaser's accounts within a week after the vessel began to run. He knew early in January that the purchaser owed $10,000 in bills; the latter part of the month he was told by C. W. Morse that the amount was $25,000. About the middle of January (or on January 24th), knowing that liens were being created, he sent auditors to examine the purchaser's books. The auditors were told that the books had not been written up, and access to the purchaser's accounts was only obtained upon threats to seize the vessel The auditors reported informally on January 30th that there were bills against the ship of $30,000. The auditors' formal report, dated January 26th, and received by the claimant on February 1st, disclosed bills payable by the purchaser amounting to more than $38,000. The claimant, through E. P. Morse, at once began negotiations with C. W. Morse about the payment of these bills, but neither then nor at any other time did the claimant communicate with the supply men. The purchaser's first installment of $25,000 on the purchase price due February 1st was paid under pressure on February 8th. Through Capt. Pendlebury, who had formerly been in the claimant's employ,

E. P. Morse knew that the vessel was not carrying half her capacity; and he forced payment of insurance premiums just before the vessel sailed on her last trip at the end of February by threats of seizure. The second installment of the purchase price due March 1st not having been paid, the claimant demanded the bill of sale of the Columbia Trust Company, and on March 8th, upon the Oceana's return from Bermuda, took possession in accordance with the terms of the contract.

[1] The issue raised by the claimant's exception to all the allowances appears in the following extract from the special commissioner's report:

"Claimant contends that the various libelants were obliged to make inquiry as to the ownership of the Oceana. As will be seen, some of them did make such inquiry of the agents of the agreed purchaser in possession, and were misled. But claimant says this was not due diligence, and that the inquiry should have been made at the custom house, where the legal ownership was a matter of record. Claimant very ably contends that Congress did not intend to alter the law stated by the Supreme Court in the case of the Valencia, and that the supply men who failed to make any inquiry and 'shut their eyes' as to the ownership of the vessel should be denied liens. Were the question one which I felt free to consider as open for a commissioner, I should hesitate before deciding otherwise, but the federal lien act has already been so frequently interpreted by the courts as to show a marked trend of judicial opinion to the effect that Congress intended to say and has said in effect that a supply man may furnish necessaries to a vessel on the order of the owner, or of any one intrusted by the owner with the management of the vessel at the port of supply, and, unless something is brought to his attention which would suggest the duty of inquiry, he may presume that he has a lien for the necessaries so furnished. If the supply man have notice that he is dealing with a charterer or agreed purchaser in possession, then he is obliged to inquire as to the authority of the person with whom he is dealing to confer a lien (The Eureka [D. C.] 209 Fed. 373), and, in the absence of inquiry, it will be conclusively presumed that, if inquiry had been made, the facts would have been ascertained (The H. C. Grady [D. C.] 87 Fed. 237). This is the purpose of the proviso in the third section of the act to the effect that nothing in the act shall be construed to confer a lien when the furnisher knew, or by the exercise of reasonable diligence could have ascertained, that, because of the terms of a charter party, or agreement for sale of the vessel, or for any other reason, the person ordering the repairs, supplies, or other necessaries was without authority to bind the vessel therefor. But the lawful possession and management of a vessel at the port of supply create a presumption of the right to bind the vessel for supplies there furnished. To defeat the lien it must appear that something has been brought to the attention of the supply man which put him upon inquiry as to the right of the person in possession of and operating the vessel to bind her for repairs, supplies, or other necessaries. The Thomas W. Rogers [D. C.] 197 Fed. 772, affirmed 207 Fed. 69 [124 C. C. A. 629]; The City of Milford [D. C.] 199 Fed. 956; The Iola [D. C.] 189 Fed. 979; The Ha Ha [D. C.] 195 Fed. 1013; N. Y. Trust Co. v. Bermuda, etc., Co. [D. C.] 211 Fed. 989."

I agree with the special commissioner's conclusion, without hesitation. The purpose of the act was to remove by a plain and simple course of procedure the confusion into which the subject had become involved. Therefore it did away with the artificial distinction between foreign and domestic vessels; it removed the presumption of credit to the owner; it superseded the state statutes conferring liens for necessaries; and it resolved the conflict of authority over the distinction between charterers and agreed purchasers in possession. Accordingly, the act gives a lien when supplies are furnished to a vessel upon the

order of the owner or of any one authorized by him. It specifies that any person to whom the management of the vessel at the port of supply shall have been intrusted shall be presumed to have been so authorized. If the materialman knows nothing about the authority of the person in possession of the ship, except that he is managing it, he may furnish the supplies, and the ship will be bound for them. But he may know more. Consequently the proviso. But before this proviso can have any application something must have occurred to put the furnisher of the supplies upon inquiry. As Judge Rose pointed out in The City of Milford (D. C.) 199 Fed. 956:

"It is to be understood in such sense as will harmonize it with the general purpose of the act. That purpose was to make the management of a vessel at its port of supply presumptive evidence of the right to bind it for supplies there furnished. That purpose prevails unless it shall be shown that the person so managing the vessel was unlawfully or tortiously in possession or charge of it, or unless something has been brought to the knowledge or attention of the person furnishing the supplies which in honesty and good conscience puts upon him the duty of inquiry as to whether the person who has the management of the ship has the right to pledge its credit."

The act does not mean that the furnisher shall not have the right to rely upon the authority to bind the vessel presumed to exist in the officers and agents specified in the second section. It is only when he knows that such officers or agents do not have the requisite authority, or under the circumstances is put upon inquiry as to their powers, that the presumption becomes inoperative. There must be an actual restriction of authority by the owner in the first place, and in the absence of affirmative knowledge of such restriction, or of circumstances which ought to raise a doubt in his mind, the furnisher is entitled to rely upon the presumption and will acquire a lien, even if the officer or agent in fact has no authority. The phrase, "knew, or by the exercise of reasonable diligence could have ascertained," was adopted from The Kate, 164 U. S. 470, 17 Sup. Ct. 135, 41 L. Ed. 512, and was used in the act of Congress to make it clear that, if the furnisher know of the existence of a charter party or of an agreement for the sale of the vessel, he is put upon inquiry as to its terms, and cannot excuse himself by denying ignorance of the terms, should it turn out that the charterer or agreed purchaser had undertaken to furnish the vessel at his own cost.

[2] There was, of course, no constructive notice by virtue of the filing of the contract of conditional sale in conformity with the state statute. The act of June 23, 1910, expressly supersedes state statutes conferring liens on vessels, and under Rev. St. § 4192 (Comp. St. 1913, § 7778), there is no constructive notice to anybody unless the bill of sale or conveyance is recorded in the office of the collector of the customs where such vessel is registered or enrolled. Since this conveyance was not so recorded, we have to deal, under the proviso of the third section of the act, not with constructive but with actual knowledge on the part of lienors, or the actual bringing to their attention of some circumstances that would naturally put them upon inquiry.

Turning now to the issues raised by exceptions filed by various lienors, it is contended, in the first place, that the contract provision upon

which the claimant relies fails to show that the purchaser was "without authority to bind the vessel" for necessaries. The libelants' argument that the covenant in question is a mere personal covenant between the parties to the contract, and as such not binding upon the libelants, is obviously untenable. The only way in which a limitation of authority can be imposed under such circumstances is by a provision of the contract. But it is argued, further, that the covenant by its terms does not purport to withhold authority to bind the vessel. It is simply an agreement on the part of the purchaser to pay all bills promptly in order to protect the interest of the vendor under the terms of the conditional sale. The agreed purchaser is not deprived of authority to bind the vessel by reason of the fact that he is obligated to pay for supplies. The requirement that if any lien is filed it shall be immediately bonded is an implied admission that the credit of the vessel may be pledged. Attention is called to the use of the term "ship's accounts and bills" in the covenant, and it is pointed out that this is the construction put upon the covenant by the claimant in practice. E. P. Morse testified that he considered payment within 30 days "prompt payment" as required by the contract. Hence, although he protested against the purchaser's default in payment of bills, upon the purchaser's promise to pay them he was advised by his counsel that the claimant could not take back the vessel as for a breach of the contract. In other words, the incurring of bills against the ship was not regarded as a breach. This, too, apart from the fact that such advice from counsel was given on February 8th, after the first installment on the purchase price was extracted from the purchaser by threats of seizure, and when many of the ship's accounts now in suit were, to Morse's knowledge (through his auditors' report), more than 30 days past due. The contract provision in question seems to me to have been drawn with a view to providing against just such emergencies as arose. While the claimant could bind the purchaser by contractual obligation, it could not in reality deprive the purchaser of power to bind the vessel for supplies. If the purchaser did not pay for supplies furnished, the materialman furnishing them in good faith could assert a lien against the vessel by virtue of the statute, whatever the contract might say. In other words, it was clearly within the contemplation of the parties that liens might be incurred, but that in such event the purchaser would procure their discharge. I am of opinion, however, that notice of the contract would suffice to put persons dealing with the vessel upon inquiry.

An issue of more serious import arises out of the lienors' exception to the conclusion reached by the special commissioner that the Oceana did not actually pass into possession and under the management of the purchaser until December 25th, in consequence of which all necessaries ordered prior to that date were disallowed. The special commissioner's report on this branch of the case is substantially this: While the New York company, of which Crosby was the purchasing agent, may be considered the agent of the Bermuda company, the agreed purchaser, prior to December 25th, neither Crosby nor the New York company was such an agent, to wit, an agent "appointed by an agreed purchaser in possession of the vessel," as by the terms

of the statute might be presumed to have authority to bind the vessel. The statute gives the lien when the supplies have been ordered by "any person to whom the management of the vessel at the port of supply is intrusted," or rather such person is presumed to have authority from the owner to procure supplies for the vessel. The word "management" is used in the act in its primary sense of physical or manual control. Congress intended to make the basis of the presumptive authority from the owner such visible control in some authorized person as would probably influence materialmen to the opinion that they were dealing with one having authority over the vessel. The special commissioner points out that the terms of the contract (clauses 3, 4, 9, and 10) requiring certain things to be done in advance by both parties constituted a postponed delivery, and he finds that the vessel was not delivered into the purchaser's possession until she left the claimant's yard on December 25th.

[3] I am unable to agree with this ruling by the special commissioner. It is unfortunate that section 2 of the Lien Act employs the terms "managing owner, ship's husband, master or any person to whom the management of the vessel is intrusted," to enumerate the functionaries who are readily reducible to and are described in section 3 as "officers and agents." It is clear, however, that under the act any person to whom an owner intrusts the management of his ship may create liens, but that an agreed purchaser of a ship can only appoint such an agent when he is in possession of the ship. Where there is nothing to limit the term, possession may be either actual or constructive; and I incline to the opinion that it is so employed in this act. From this point of view, and with respect to the matter of supplies and equipment here involved, it would be quite in accord with the evidence to regard the vessel as having been legally in the possession of the vendee from the date of the first payment on the purchase price. That is, possession might well be construed to mean the intended right to enjoy the property.

[4] But it is sufficient for the purpose of this case to decide that even upon the principle of visible control in some authorized person, which the special commissioner adopts as his guide, the evidence shows that the agreed purchaser was in possession of the vessel as early as December 10th, when the chief steward came aboard and took charge. The commissioner has expressly found that no ulterior significance is to be attached to the fact that the vessel was in the claimant's yard, inasmuch as the claimant was well known to be a repair, not an operating, company. The purchase was known to have been made for immediate use of the vessel in the Bermuda trade. To insure operation it was obviously the purpose of the contracting parties that the purchaser should be empowered to do everything necessary to prepare the vessel for operation, and the purchaser was intrusted with her management for the attainment of that object. The various acts of the purchaser from December 10th, which have been set forth in the statement of facts, were acts of possession. They were the acts necessary on the part of a purchaser coming into possession to put the thing to use. Having regard to the situation which existed from the 10th to the 25th of December, who save the agreed purchaser was in

apparent possession and management of this vessel? Certainly not the claimant. The only person on board who could be said to represent it was the chief engineer, who, by the terms of the contract of sale, was appointed by the seller until a certain amount of the purchase price was paid. But the persons visibly in possession and management during this period were the agents of the agreed purchaser, beginning with Crosby, the purchasing agent, and Saunders, the chief steward and commissary. Crosby ordered the supplies, and Saunders received them on board, checked them up, and receipted for them. This was the usual procedure, and they were the customary agents through which and by whom shipowners purchased supplies, and the supply men, dealing with them in the ordinary course of business, were justified in believing them to be what they usually were and then appeared to be.

The claimant's course of conduct in the premises is a consideration which should not be overlooked. All the cases dwell upon the importance of good faith. The proviso of the act is designed to protect the owner only if he has tried to protect himself. New York Trust Co. v. Bermuda-Atlantic Steamship Co. (D. C.) 211 Fed. 989. The conduct of the complainant may be such as to convey the implication that he consents. The Thomas W. Rogers (D. C.) 197 Fed. 772; Id., 207 Fed. 69, 124 C. C. A. 629. Here the seller had not only clothed the purchaser with the insignia of possession and management, but, with knowledge of what was transpiring, had permitted the agreed purchaser to hold itself out as having possession and management. Although E. P. Morse knew early in January that there were bills against the ship for supplies to the extent of $10,000, and by February 1st had all the details of indebtedness aggregating $38,000, neither he nor anybody else on the claimant's behalf took any steps to warn people who had furnished and were continuing to furnish supplies to the ship that they could not look to the credit of the vessel. He says the purchaser assured him that the bills were being paid. But he knew that they were not. The only inference to be drawn from the evidence is that the claimant's policy was to keep the vessel running in order to produce the revenue from which the installment payments due under the contract could be secured. When the first installment, due February 1st, was finally paid on the 8th upon threats of seizure, the claimant was content to accept the purchaser's stale assurance that the outstanding supply bills amounting to more than $38,000 would be paid; and it was only because the purchaser failed to make the second payment on the purchase price that the claimant on March 8th took possession of the vessel. Yet the contract provided that in case of breach of any of its covenants the seller should have the right to take possession of the vessel immediately. The first express covenant required the purchaser to pay promptly current bills for supplies and repairs, and to exhibit the ship's accounts and bills to the seller. Even the claimant's excuse that prompt payment meant 30 days' time is no justification, for, although the auditors' report received by the claimant on February 1st does not state when the bills therein listed accrued, the auditors had the bills before them, and that information, if not

chargeable to the claimant, was at least available to it; indeed, in some instances was actually known by it. Creditors were lulled into security, instead of being warned. The purchaser used the income from operation to pay the claimant, while the supply men who made operation possible were put off with promises.

Other exceptions to the special commissioner's report are overruled. The report is accordingly confirmed; save in so far as it disallows a lien for repairs, supplies, or other necessaries furnished prior to December 25, 1914, in which respect it is disapproved, and a lien is allowed for all necessaries furnished on and after December 10, 1914, irrespective of the date of the order. Accordingly, the account of all libelants who have filed exceptions to the disallowance of a lien for their account, in whole or in part, on that ground, namely, (2), (3), (5), (8), (14), (15), (17), (22), (37), (52), (54), (56), (59), (60), (61), (63), (65), (66), and (67), will be restated by the special commissioner, to whom the case is returned for that purpose.

RUBBER & CELLULOID HARNESS TRIMMING CO. v. F. W. DEVOE & C. T. REYNOLDS CO.

(District Court, D. New Jersey. June 8, 1916.)

1. TRADE-MARKS AND TRADE-NAMES ⟸3(4)—UNFAIR COMPETITION—WHAT CONSTITUTES TRADE-MARK.

Where manufacturers of brushes had previously used the terms "glue set" or "cement set" to indicate the substance in which the bristles were set, a manufacturer, the bristles of whose brushes were set in rubber, cannot, by adopting the phrase "rubberset," acquire a trade-mark in that expression, for it is descriptive only.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 7; Dec. Dig. ⟸3(4).]

2. TRADE-MARKS AND TRADE-NAMES ⟸71—UNFAIR COMPETITION.

Where an expression used by a manufacturer in connection with his goods, although descriptive only, acquires a secondary signification, indicating that particular manufacturer's goods, other manufacturers will be restrained from using such terms in such a manner as to palm off their goods as those of the original appropriator, though he had no trade-mark therein.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 82; Dec. Dig. ⟸71.]

3. TRADE-MARKS AND TRADE-NAMES ⟸93(3)—UNFAIR COMPETITION—EVIDENCE—BURDEN OF PROOF.

In such cases it is not necessary that actual intent to defraud be shown; but, if the expression which has acquired the secondary meaning, indicating a particular manufacturer's goods, or one similar thereto, is used by another in such a way as would be likely to deceive the public in believing that the former's goods are those of the latter, it will be conclusively presumed that it was intended to defraud.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 106; Dec. Dig. ⟸93(3).]

4. TRADE-MARKS AND TRADE-NAMES ⟸71—UNFAIR COMPETITION—WHAT CONSTITUTES.

Complainant acquired the patent for making brushes in which the bristles were set in rubber. After the time of the expiration of the

patent, complainant adopted the name "rubberset" for its brushes and extensively advertised them. Some time after expiration of the patent, defendants began to manufacture similar brushes, and sold them under the name "set in rubber—Devoe." The name "Devoe" was part of the name of the defendant corporation. The name given by defendant to its brushes was placed on the ferrule of the brushes, the same place that complainant used for the word "rubberset." Defendant's catalogue advertised that its brushes were set in rubber and its advertising placards bore the legend "set in rubber," and below "Devoe." *Held* that, though complainant did not have a trade-mark in the name "rubberset," yet, as its brushes had become known to the public as "rubberset," defendant should not be allowed to use similar expressions in such a way as would tend to mislead the public, and to place the words "set in rubber" on the ferrule of its brushes, though it might use that expression on the handles, accompanied by its corporate name, showing that the brushes were not made by complainant, while similar restrictions must be imposed on its advertising placards, though not on statements made in the catalogue issued under its own name.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 82; Dec. Dig. ⊂⊃71.]

5. TRADE-MARKS AND TRADE-NAMES ⊂⊃98—UNFAIR COMPETITION—DAMAGES. Where defendant's unfair competition did not appear willful and fraudulent, complainant, though entitled to an injunction, with damages and compensation, is not entitled to any accounting for profits obtained by defendant through its unfair methods.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 112; Dec. Dig. ⊂⊃98.]

In Equity. Suit by the Rubber & Celluloid Harness Trimming Company against the F. W. Devoe & C. T. Reynolds Company. Decree for complainant.

Pitney, Hardin & Skinner, of Newark, N. J., and Charles C. Gill, of New York City, for plaintiff.

Chauncey G. Parker, of Newark, N. J., for defendant.

HAIGHT, District Judge. This suit was originally brought in the Court of Chancery of New Jersey, and was removed to this court because of the diversity of the citizenship of the parties. It is based on alleged unfair competition. Both parties are, and have been for many years, engaged in the manufacture and sale of brushes; the plaintiff in brushes generally, and the defendant in paint brushes. The unfair competition is claimed to exist in the way in which the defendant designates, marks, and advertises certain kinds of its brushes. Prior to 1887 brushes had been made by setting or holding the bristles in cement, glue, pitch, or rosin, and binding them to the handle by means of a metal ferrule. In that year there was issued to the plaintiff, as assignor of one James A. Read, a patent for a new process of making brushes, that of holding or setting the bristles in rubber and binding the same to the handle by a belt of rubber, or rubber and metal combined; and in 1889 another patent was issued to it for the product of the process of the previous patent. Thereafter the plaintiff began the manufacture of brushes according to the patented process, and has ever since continued to do so. For a number of years it designated and advertised the brushes so made as "Hard Rubber Set and Bound"

and "Hard Rubber Set"; and in 1906 it procured the registration of each of those phrases as trade-marks, alleging that the former had been continuously used by it since March 1, 1890, and the latter since January 1, 1895. It had long been the custom in the trade to describe brushes according to the manner in which their bristles were set, as "cement set," "glue set," "set in cement," etc., for the purpose of distinguishing them and the uses to which they could be put. Some could be used in solvents; others could not.

Prior to 1905 the plaintiff had done very little, if any, advertising of its products, except in the ordinary way, through the medium of trade journals. In the spring of that year, and some time after the patents had expired (they having expired before the usual 17 years limitation, because patents for the same product and process had been granted to Read in Great Britain and France in 1885; see section 4887 of Revised Statutes, before amendment of March 3, 1897 [29 Stat. L. 693, c. 391, § 3]) the plaintiff inaugurated an extensive advertising campaign, and then adopted and caused to be registered as a trade-mark in the Patent Office the word "Rubberset." This word had been suggested by one of its employés, as the result of the offering of a prize for the best name to be applied to its brushes. Thereafter a very extensive advertising campaign was engaged in, and has since been continued. Many thousands of dollars have been expended therein. The advertising was carried on, not only in the trade journals (which had theretofore been the customary method), but in magazines, newspapers, periodicals, display matter, etc.; the idea being to reach the general public as well as the dealers. For several years after the plaintiff began to advertise thus extensively it had no competitors, as it had none before, in the field of making brushes according to the rubber setting process. Shortly thereafter, however, other brush manufacturers began to make such brushes and to put them upon the market. One of the first to do so was the "Rubber-Bound Brush Company," which at first designated its brushes as "Rubber-Bound," and later, after objection to the former name was made by plaintiff, as "Rubber-Vulc." The use of this designation, as well as its corporate name, was, in 1912, enjoined by a decree of the Court of Chancery of New Jersey, which decree was subsequently affirmed by the Court of Errors and Appeals of New Jersey. Rubber & Celluloid Harness Trimming Company v. Rubber-Bound Brush Company, 81 N. J. Eq. 419, 88 Atl. 210, Ann. Cas. 1915B, 365, affirmed 81 N. J. Eq. 519, 88 Atl. 210, Ann. Cas. 1915B, 365. At the time the plaintiff adopted the word "Rubberset" as its trade-mark, it designated its brush department as the "Rubberset Brush Company," and so notified the trade. This was later changed to the "Rubberset Company." It has used this name on its brushes and in all of its advertisements, catalogues, display matter, bill and letter heads, etc., since that time. Within a short time after the plaintiff adopted the word "Rubberset" it commenced to use, on the majority of its brushes, metal ferrules, on which it caused to be embossed, in large type, the word "Rubberset," and nothing more. On the wooden handle it printed the "Rubberset Company," and an arbitrary name (which was according to the trade custom), which designated the brand

of brush, but not its character, the word "Rubberset" denoting the latter.

There is some dispute in the evidence as to whether other manufacturers had not preceded the plaintiff in so stamping or embossing the character of the brush on the metal ferrule. But I consider it established by the evidence that the plaintiff was the first to do so, except that in a few isolated instances, which by no means established a trade custom, the words "set in glue" and a trade-mark had been theretofore imprinted, as distinguished from embossed, in small type on the ferrules of brushes made according to that process. In 1911 the defendant for the first time began to make and sell brushes, the bristles of which were set or held in rubber, and it proceeded to advertise the fact that it was doing so, in its catalogues and otherwise; not, however, by any means as extensively or in the same way as the plaintiff did, but it featured this particular line of goods. It also embossed on the ferrule the character of the brush, as it had not theretofore done with any other of its products, using the words "Set in Rubber—Devoe." On some brushes the words "Set in Rubber" were in one line and the word "Devoe" underneath, the letters of each word being the same size; and in other brushes the words "Set in" were on one line, "Rubber" on another, and "Devoe" on a third. In each the words "Rubber" and "Set" were prominently featured. It also stamped on the wooden handle "F. W. Devoe & Company" and the arbitrary name which designated the brand of the brush. It is the use by the defendant of the words "Set in Rubber" in its catalogues, on the brushes, and in its advertising and display matter, that the plaintiff claims constitutes the unfair competition, which is the subject-matter of this suit.

The defendant contends that the word "Rubberset" is not a valid trade-mark, because it is merely descriptive of the process of manufacture, of the characteristics, qualities, or ingredients of the brush, and consequently that there can be no infringement of it, and that it has been guilty of no unfair competition, because it has not only not used the word "Rubberset," but has accompanied the words "Set in Rubber," whenever used, with its own name, which it claims clearly indicates that the brushes are not manufactured by the plaintiff, and thus has done all that the rules of law require that it should do. It is not claimed by plaintiff, either in its pleadings or in the arguments of counsel, that there is a technical infringement of a valid trade-mark; but it is insisted that under the facts in this case either the use of the words "Set in Rubber," alone, or the way in which the defendant uses them, constitutes unfair competition, as the latter phrase is now understood in the law.

[1] I think it entirely clear that "Rubberset" is not a valid trade-mark as applied to brushes made according to the Read process, because it does not in itself indicate the origin of manufacture, but is merely descriptive of the process of manufacture—the essential characteristic of the brush—the same as "glue set," "cement set," etc. These latter terms, the evidence shows, had been used by manufacturers to describe the manner in which their brushes were made, long before the plaintiff began to use "Rubberset." The general proposi-

tion upon which the above conclusion rests is, of course, so well settled as to need no citation of authorities; but the correctness of its application to the present case is demonstrated, I think, by the following cases, which are only a very few of those which might be cited: Standard Paint Co. v. Trinidad Asphalt Mfg. Co., 220 U. S. 446, 31 Sup. Ct. 456, 55 L. Ed. 536; cases collected in the opinion of the Circuit Court of Appeals of the Eighth Circuit in the same case, Trinidad Asphalt Mfg. Co. v. Standard Paint Co., 163 Fed. 977, 979, 90 C. C. A. 195; Rice-Stix Dry Goods Co. v. J. A. Scriven Co., 165 Fed. 639, 91 C. C. A. 475 (C. C. A. 8th Cir.); Florence Mfg. Co. v. Dowd, 178 Fed. 73, 101 C. C. A. 565 (C. C. A. 2d Cir.); N. Y. & N. J. Lubricant Co. v. Young, 84 N. J. Eq. 469, 94 Atl. 570; Mississippi Wire Glass Co. v. Continuous Glass Press Co., 79 N. J. Eq. 277, 81 Atl. 374. The decisions of the New Jersey courts in the Rubber-Bound Brush Co. Case, supra, were based on unfair competition, and it seems to have been assumed that the plaintiff's trade-marks were invalid as such.

[2] But, as plaintiff contends, it is also well settled that words which are not in themselves a valid trade-mark may, by association with the goods of a particular manufacturer, acquire a secondary signification differing from their primary meaning and denoting the product of that manufacturer, and when this is made to appear their use in that sense will be protected by restraining the use of the words by others in such a way as to amount to a fraud or deception on the public and to cause injury to those to whose employment of them a special meaning has become attached, upon the principle, which underlies the law pertaining to trade-marks, that the manufacturer of the particular goods is entitled to the reputation or good will which they have acquired, and the public is entitled to the means of distinguishing between them and other goods, or, in other words, to state it concisely, that no one may pass off his goods as and for the goods of another. Lawrence Mfg. Co. v. Tennessee Mfg. Co., 138 U. S. 537, 11 Sup. Ct. 396, 34 L. Ed. 997; Coats v. Merrick Thread Co., 149 U. S. 562, 13 Sup. Ct. 966, 37 L. Ed. 847; Singer Mfg. Co. v. June Mfg. Co., 163 U. S. 169, 16 Sup. Ct. 1002, 41 L. Ed. 118; Elgin Nat. Watch Co. v. Illinois Watch Co., 179 U. S. 665, 21 Sup. Ct. 270, 45 L. Ed. 365; French Republic v. Saratoga Vichy Co., 191 U. S. 427, 24 Sup. Ct. 145, 48 L. Ed. 247; Herring, etc., Safe Co. v. Hall's Safe Co., 208 U. S. 554, 559, 28 Sup. Ct. 350, 52 L. Ed. 616; Standard Paint Co. v. Trinidad Asphalt Co., 220 U. S. 446, 31 Sup. Ct. 456, 55 L. Ed. 536; Davids Co. v. Davids, 233 U. S. 461, 471, 34 Sup. Ct. 648, 58 L. Ed. 1046; Trinidad Asphalt Co. v. Standard Paint Co., 163 Fed. 977, 90 C. C. A. 195 (C. C. A. 8th Cir.); Standard Paint Co. v. Rubberoid Roofing Co., 224 Fed. 695, 140 C. C. A. 235 (C. C. A. 7th Cir.); Samson Cordage Works v. Puritan Cordage Mills, 211 Fed. 603, 128 C. C. A. 203, L. R. A. 1915F, 1107 (C. C. A. 6th Cir.); Vacuum Oil Co. v. Climax Refining Co., 120 Fed. 254, 256, 56 C. C. A. 90 (C. C. A. 6th Cir.); Fuller v. Huff, 104 Fed. 141, 43 C. C. A. 453, 51 L. R. A. 332 (C. C. A. 2d Cir.); Scriven v. North, 134 Fed. 366, 67 C. C. A. 348 (C. C. A. 4th Cir.); Zittlosen Mfg. Co. v. Boss, 219 Fed. 887, 894, 135 C.

C. A. 551 (C. C. A. 8th Cir.); United Lace & Braid Mfg. Co. v. Barthels Mfg. Co., 221 Fed. 456 (D. C. E. D. N. Y.); International Silver Co. v. Rogers Corp'n, 66 N. J. Eq. 119, 57 Atl. 1037, 2 Ann. Cas. 407, affirmed 67 N. J. Eq. 646, 60 Atl. 187, 110 Am. St. Rep. 506, 3 Ann. Cas. 804; Rubber & Celluloid Harness Trimming Co. v. Rubber-Bound Brush Co., 81 N. J. Eq. 419, 88 Atl. 210, Ann. Cas. 1915B, 365, affirmed 81 N. J. Eq. 519, 88 Atl. 210, Ann. Cas. 1915B, 365; Thompson v. Montgomery, 41 Ch. D. 35; Wotherspoon v. Currie, L. R. 5 H. L. 508; Reddaway v. Banham, [1896] A. C. 199, 25 Eng. Rul. Cas. 193.

Nor can I perceive that the rule laid down by the English cases above cited is in any way weakened by the decision of the House of Lords in Cellular Clothing Co. v. Maxton & Murray, [1899] A. C. 326, as defendant seems to contend. No distinction is made in the cases respecting the general applicability of the foregoing principle, and there can be none in reason as is well pointed out in Trinidad Asphalt Co. v. Standard Paint Co., 163 Fed. 982, 90 C. C. A. 195, to words which are unavailable as technical trade-marks because they are geographical, descriptive, generic, or names of individuals; but its specific application in any particular case may vary according to the nature of the word, both because one kind of a word—for instance, a generic one—may more readily acquire a secondary meaning than a descriptive one, as may also its use be more likely to deceive. The difficulty in any given case arises in determining whether a word or words have acquired a secondary meaning, and, if so, what must be shown to entitle one to relief, and the nature of the relief to be given.

[3] The first question to be decided is, therefore, whether the word "Rubberset" has acquired a secondary signification or meaning of origin of manufacture; in other words, whether it has come to mean to the public brushes manufactured by the plaintiff. This is a question of fact. It was found by Vice Chancellor Howell in the Rubber-Bound Brush Co. Case, and his finding was unanimously concurred in by the Court of Errors and Appeals of New Jersey, that it had acquired such a meaning; and while I have not had the benefit of an examination of the evidence which was before him, I think I am safe in assuming that it was of no more probative force than that which was offered in this case. Without attempting to review the evidence (which I think would serve no useful purpose) I unhesitatingly concur in his finding, and conclude, on the facts in this case, that it has acquired such a secondary meaning, not only among manufacturers, but among dealers and the general public. The evidence furnishes many instances to support this conclusion, which, of necessity, are isolated, but nevertheless, I think, representative. In fact, knowing as we do the effect of modern advertising, it would be difficult indeed, when the character and extent of the advertising which the plaintiff has carried on is considered, to escape the conclusion that the word "Rubberset," as applied to brushes, has come to mean brushes manufactured by the plaintiff. I think it proper to state that in reaching this conclusion, as well as any other respecting the facts, I have not been in any way influenced by and have not considered the letters which

were offered by the plaintiff, through the witness McGinn, as I think them incompetent.

The defendant, however, does not use the word "Rubberset," but the words "Set in Rubber." This word and phrase, however, are so similar that I have no difficulty in finding that, if the latter were used alone, it would convey to the ordinary person the same meaning as the former, and thus would lead to deception. The evidence demonstrates this, I think, beyond question. Indeed, the words "Set in Rubber" are more nearly like "Rubberset" than the hyphenated word "Rubber-Vulc," the use of which was enjoined by Vice Chancellor Howell. If, therefore, the word "Rubberset" were a valid trade-mark, the plaintiff would be entitled to have the further use by the defendant of the words "Set in Rubber" restrained, without proof of deception or intent to deceive, because in such circumstances wrongful intent, as well as deception, is presumed. Elgin Nat. Watch Co. v. Illinois Watch Co., supra. But in a case like this something more than the mere similarity, or what would, if there were a valid trade-mark, amount to infringement thereof, must be shown. Standard Paint Co. v. Trinidad Asphalt Co., 220 U. S. 461, 31 Sup. Ct. 456, 55 L. Ed. 536; Elgin Nat. Watch Co. Case, supra. The rule in New Jersey and that prevailing in England is thus stated by Vice Chancellor Howell in the Rubber-Bound Brush Company Case, 81 N. J. Eq. 424, 88 Atl. 212, Ann. Cas. 1915B, 365:

"It is not necessary that the complainant, in order to succeed, should prove misrepresentation or actual fraud by the defendant, or give any evidence that any single person was deceived. It is enough if in the opinion of the judge the symbol or device or get-up used by the defendant is one which so closely resembles the symbol, device or get-up used by the complainant as to be likely to deceive the public."

See, also, International Silver Co. v. Rogers Corp'n, 66 N. J. Eq. 129, 57 Atl. 1037, 2 Ann. Cas. 407 et seq.

This statement of the rule is not, I think, in reality different from that prevailing in the federal courts, although differently expressed. In the Elgin Nat. Watch Co. Case, supra, Mr. Chief Justice Fuller said that in this class of cases (179 U. S. at page 674, 21 Sup. Ct. at page 274 [45 L. Ed. 365]):

"Such circumstances must be made out as will show wrongful intent in fact, or justify that inference from the inevitable consequences of the act complained of."

The Singer Case, among others, is cited for the rule thus stated. In that case it was said (163 U. S. on page 188, 16 Sup. Ct. on page 1009 [41 L. Ed. 118]):

"Where the name is one which has previously thereto come to indicate the source of manufacture of particular devices, the use of such name by another, unaccompanied with any precaution or indication, *in itself amounts to an artifice calculated to produce the deception alluded to in the foregoing adjudications.*"

And again it was said:

"He cannot resort to any artifice or do any act *calculated to mislead the public.*"

In Standard Paint Co. v. Trinidad Asphalt Co., supra, Mr. Justice McKenna said (220 U. S. 461, 31 Sup. Ct. 460 [55 L. Ed. 536]):

"The essence of such a wrong consists in the sale of the goods of one manufacturer or vendor for those of another. * * * It [the defendant] does not use the word 'Rubero' in such a way as to amount to a fraud on the public."

It has been unformly held in the various circuits that it is not necessary that actual intent to defraud be shown. Van Houten v. Hooton Cocoa, etc., Co., 130 Fed. 600 (C. C. N. J.); Samson Cordage Works v. Puritan Cordage Mills, 211 Fed. 603, 128 C. C. A. 203, L. R. A. 1915F, 1107 (C. C. A. 6th Cir.); Florence Mfg. Co. v. Dowd, 178 Fed. 73, 101 C. C. A. 565 (C. C. A. 2d. Cir.); Scriven v. North, 134 Fed. 375, 67 C. C. A. 348 (C. C. A. 4th Cir.); Fuller v. Huff, 104 Fed. 141, 43 C. C. A. 453, 51 L. R. A. 332 (C. C. A. 2d Cir.). The rule, then, as I understand it, is that if one uses a word or words, which have acquired the secondary meaning beforementioned, in *such a way* as would be likely to deceive the public in believing that his goods are those of another, that it will be conclusively presumed that he intended to deceive and injure. If the presumption were rebuttable, and made to depend upon the actual intent of a party, in many cases the courts would be powerless to prevent deception, and to afford a remedy for what, in reality, would be a wrong. In applying the rule it is to be borne in mind that the likelihood of deception is not confined to the dealer (who would likely be able to distinguish); but the rule primarily seeks to protect the ordinary purchaser, or, in other words, the liability of the ultimate consumer to be misled must be reckoned with. Fuller v. Huff, supra; Samson Cordage Works v. Puritan Cordage Mills, supra, 211 Fed. 610, 128 C. C. A. 203, L. R. A. 1915F, 1107, and cases cited; Florence Mfg. Co. v. Dowd, supra; Scriven v. North, supra; Coca Cola Co. v. Gay-Ola Co., 200 Fed. 720, 723, 119 C. C. A. 164; International Silver Co. v. Rogers Corp'n, supra. Indeed, the rule would be of little practical use if it could be avoided by showing that dealers would not be deceived; for then the dealer could unrestrainedly perpetrate deception upon the ultimate consumer. So the courts have wisely required that the manufacturer must, in the first instance, take such precautions as will make it fairly impossible for a dealer to deceive an ordinarily cautious customer.

[4] It remains to consider the facts of this case in the light of these rules. In doing so it must be remembered that the plaintiff has now no exclusive right to use the Read process, or to the reputation for the superiority of the products of that process, whether the same has been acquired by its advertising or not. But it has the exclusive right to the reputation which *it* has acquired for the brushes manufactured by it according to the process. The defendant, as well as others, has the right to describe and advertise its brushes as made according to the rubber set process. The question, then, is: Has it done so in such a way as to mislead the public? In its catalogues it designates its brushes, which are made according to this process, as "Set in Rubber." It seems to me ridiculous to say that a description in a cata-

logue, prepared and distributed by the defendant, of goods as "Set in Rubber," would induce any one who saw that catalogue to believe that the goods therein described were manufactured by the plaintiff, because the catalogue shows, as clearly as it is possible to show anything, that the goods are manufactured by the defendant. To say that a name has acquired a secondary meaning, denoting the origin of manufacture, and at the same time to say that the use of those words in a catalogue of goods of another manufacture, would lead a person reading that catalogue to believe that the goods were manufactured by the first manufacturer, presents a contradiction which must destroy any secondary meaning of the word, because it would show that the secondary meaning was not that of origin, but of process of manufacture. See remarks of Chief Justice White in Singer Case, 163 U. S. 200, 16 Sup. Ct. 1002, 41 L. Ed. 118. The same would seem to apply in respect to billheads, letters, circulars, and advertisements other than display matter, where the full name of the manufacturer is given equal prominence with that of the descriptive words "Set in Rubber." But, when the marking on the brushes is considered, I think quite a different situation is presented. The words "Set in Rubber" are so similar to the word "Rubberset" that, when the former are found by an intending purchaser in the same place and in the same kind of characters on a brush as the latter word, as in this case, the natural result would be extreme liability of deception. The public, through the plaintiff's advertisements of various kinds, has become accustomed to seeing the word "Rubberset" embossed on the ferrule of the brushes advertised as manufactured by the plaintiff. The plaintiff was the first in the field to so mark them. It follows, therefore, that the embossing by the defendant on the ferrule of its brushes of the words "Set in Rubber" is such as would inevitably lead to deception, as the evidence demonstrates that it has, and hence constitutes unfair competition. The words are thus used not descriptively, but as a trade-name.

But it is insisted that, even if this is so, the use of the word "Devoe" on the ferrule of the brushes, in connection with the words "Set in Rubber," together with the marking of the name of the manufacturer on the handle, will prevent misapprehension upon the question of origin. This depends, to some extent, upon the meaning which the word "Devoe" has acquired in the public mind. Although the defendant has long been engaged in the manufacture of brushes, still the evidence shows, I think, that its reputation, so far as the public is concerned, is that of a manufacturer of paints. In addition the word "Devoe" might convey to the ordinary purchaser merely the name of a brand. I think the evidence demonstrates, as well as the probabilities based on common experience, that the word "Devoe," used as it is in connection with the words "Set in Rubber," would not sufficiently prevent misapprehension as to the origin of manufacture on the part of one who wished to buy a "Rubberset" brush manufactured by the plaintiff, and whose inclination to do so was brought about by the plaintiff's advertising. What has just been said applies to display matter furnished by the defendant and used in stores where its brushes are sold. A sign, such as was offered in evidence and

therein referred to as the "White Sign," which has on it only this, "Something New in Devoe Quality—Set in Rubber," and the picture of a brush with the words "Set in Rubber—Devoe" on the ferrule, would be quite as likely to deceive an intending purchaser as the words "Set in Rubber—Devoe" embossed on a brush.

The remaining question is, therefore, what specific relief the plaintiff is entitled to—relief which will protect it from injury, prevent deception of the public, and at the same time preserve the rights of the defendant. To preclude the use altogether of the words "Set in Rubber," because of their resemblance to the word "Rubberset," would be to give to the latter the full effect of a trade-mark, while denying its validity as such. This, so far as the federal courts, at least, are concerned, cannot be done. Herring-Hall-Marvin Safe Co. v. Hall's Safe Co., 208 U. S. 554, 559, 28 Sup. Ct. 350, 52 L. Ed. 616; Standard Paint Co. v. Trinidad Asphalt Co., supra, 200 U. S. 461, 31 Sup. Ct. 456, 55 L. Ed. 536; Yale & Towne Mfg. Co. v. Ford, 203 Fed. 707, 122 C. C. A. 12 (C. C. A. 3d Cir.). Nor was any such relief granted in Reddaway v. Banham, supra, but the defendant was permitted to use the name "Camel Hair Belting" under restrictions which would clearly indicate that the defendant's product was not that of the plaintiff. The rule which must govern the federal courts is that stated by Chief Justice White in the Singer Case, 163 U. S. 200, 16 Sup. Ct. 1002, 41 L. Ed. 118, that the word or words "must be accompanied with such indications that the thing manufactured is the work of the one making it, as will *unmistakably inform the public of that fact.*" This does not mean, of course, that one may "dress up" his goods like another. In order to "unmistakably inform the public" as to the origin, similar "dressing up" of goods may be enjoined, where, if it were permitted, even though accompanied with the name of the manufacturer, it would be likely to deceive.

I doubt not that in a proper case the use of words similar to those which have acquired a secondary meaning may be enjoined, when they in themselves are likely to deceive, even if accompanied by something else to indicate the source of origin, if other words will just as well describe the article. But I think that the words "Set in Rubber," when the former trade custom of describing the process of manufacture, as "cement set," "glue set," etc., is taken into consideration, are so aptly descriptive of the characteristics of a brush made according to that process, that to require the defendant to use other words to describe the character of its goods would be to encroach unduly upon its rights. The decisions of the Circuit Court of Appeals and the Supreme Court in the "Rubberoid" Case furnish an example of the extent to which the federal courts, at least, may not go in this respect. But to permit the defendant to use the words "Set in Rubber" in the manner in which it has used them on its brushes and in its display matter, as before shown, will inevitably lead to deception of the public and injury to the plaintiff. In order to prevent this deception and to "unmistakably inform the public" that its goods are not manufactured by the plaintiff, I think that the defendant must be restrained from the use at all of the words "Set in Rubber," or similar words, on or near the ferrule of any of the brushes which it manufactures,

except on the handle proper, in which latter place the full name of the manufacturer (not Devoe) must accompany them, and from using on any display matter, in its or other stores where brushes are sold, the words "Set in Rubber," or similar words, unless it accompanies such use by a conspicuous positive statement that the brushes are not manufactured by the Rubberset Company. This also applies to labels on boxes or other containers for brushes.

[5] The plaintiff will therefore be awarded an injunction in accordance with the above conclusions. It is also entitled to costs and damages. But, under the rule enunciated by the Circuit Court of Appeals of this Circuit in P. E. Sharpless Co. v. Lawrence, 213 Fed. 423, 130 C. C. A. 59, and which I think finds support in the recent opinion of the Supreme Court in Hamilton Brown Shoe Co. v. Wolf Bros. & Co., 240 U. S. 251, 36 Sup. Ct. 269, 60 L. Ed. 629 (Feb. 21, 1916), I do not think it is entitled to an accounting for profits, because I cannot find that the unfair competition was so "willful and fraudulent" as to justify the imposition of profits as a "punitive addition to the ordinary decree of compensatory damages."

In re ALDEN.

In re REDDINGTON & CO.

(District Court, D. Maine. June 5, 1916.)

No. 11764.

1. CHATTEL MORTGAGES ⟸194—RECORDATION—NECESSITY.

Under Rev. St. Me. c. 93, § 1, declaring that no mortgage of personal property is valid against any person other than the parties, unless possession is delivered to and retained by the mortgagee, or the mortgage is duly recorded, recordation of a chattel mortgage, where possession is not given to the mortgagee, is necessary for the mortgage to be valid as against the mortgagor's creditors.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 426, 427; Dec. Dig. ⟸194.]

2. BANKRUPTCY ⟸161(1)—"PREFERENCES"—WHAT CONSTITUTES.

Under Bankr. Act July 1, 1898, c. 541, §§ 60a, 60b, 30 Stat. 562, as amended by Act Feb. 5, 1903, c. 487, § 13, 32 Stat. 799, and Act June 25, 1910, c. 412, § 11, 36 Stat. 842 (Comp. St. 1913, § 9644), declare that a person shall be deemed to have been given preference, if, being insolvent, he has within four months before the filing of the petition and adjudication, made a transfer of any of his property, the effect of which will be to enable any one of his creditors to obtain a greater percentage of his debt than other creditors of the same class, and that if a bankrupt shall have made a transfer of any of his property, if, at the time of the transfer or registering thereof, if by law recording or registering is required, and being within four months of the filing of the petition in bankruptcy or after the filing and before adjudication, the bankrupt be insolvent, the transfer operates as preference, a chattel mortgagee, whose mortgage was not recorded as required by Rev. St. Me. c. 93, § 1, possession not passing, until a few days before the filing of the mortgagor's petition in bankrupt-

cy, cannot assert his mortgage against other creditors, for it constitutes a preference.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 261, 262; Dec. Dig. ⊂=161(1).

For other definitions, see Words and Phrases, First and Second Series, Preference.]

In Bankruptcy. In the matter of Fred A. Alden. On petition of Reddington & Co., a corporation, to review an order of the referee, disallowing petitioner's chattel mortgage as a secured claim. Order affirmed.

Carl C. Jones, of Waterville, Me., for petitioner.
Charles W. Atchley, of Waterville, Me., for trustee.

HALE, District Judge. Reddington & Co., a corporation, petitions this court for a review of the order of the referee, disallowing its claim as a secured claim, against the bankrupt estate. This claim arises upon a chattel mortgage, dated June 13, 1914, recorded in Oakland town records January 5, 1916. The referee has found that the recording was not made until after the bankrupt had begun to prepare his petition and schedules in bankruptcy, and on the second day before the filing of same. He holds that the recording was essential by statute in this state, for protection of the mortgagee as against the mortgagor's creditors. The referee also holds the mortgage to be a voidable preference under the Bankruptcy Act. He disallows it as a secured claim, but allows it as an unsecured claim to the amount of $558.74, or the face of the note less the discount from January 7, 1916, to the date of the maturity of the note.

[1, 2] The only question arising in this case is whether the mortgage in question constitutes a voidable preference under sections 60a and 60b of the Bankruptcy Act, as amended by the acts of 1903 and 1910. Those sections, as thus amended are:

"Sec. 60a. A person shall be deemed to have given a preference if, being insolvent, he has, within four months before the filing of the petition, or after the filing of the petition and before the adjudication, procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. Where the preference consists in a transfer, such period of four months shall not expire until four months after the date of the recording or registering of the transfer, if by law such recording or registering is required.

"Sec. 60b. If a bankrupt shall have procured or suffered a judgment to be entered against him in favor of any person or have made a transfer of any of his property, and if, at the time of the transfer, or of the entry of the judgment, or of the recording or registering of the transfer if by law recording or registering thereof is required, and being within four months before the filing of the petition in bankruptcy or after the filing thereof and before the adjudication, the bankrupt be insolvent and the judgment or transfer then operate as a preference, and the person receiving it or to be benefited thereby, or his agent acting therein, shall then have reasonable cause to believe that the enforcement of such judgment or transfer would effect a preference, it shall be voidable by the trustee and he may recover the property or its value from such person. * * *"

The mortgage was made in June, 1914. It was not recorded until January, 1916, shortly before the filing of the bankrupt petition. It clearly was a transfer of property. The question, then, is whether, under the sections of the Bankruptcy Act above quoted, the mortgage is one which was "required" to be recorded. The Revised Statutes of Maine (chapter 93, § 1) provide:

"No mortgage of personal property is valid against any other person than the parties thereto, unless possession of such property is delivered to, and retained by the mortgagee, or the mortgage is recorded by the clerk of the city, town or plantation organized for any purpose, in which the mortgagor resides, when the mortgage is given."

In the Marriner Case (D. C.) 220 Fed. 542, 544, the trustee in bankruptcy contended that the mortgage was invalid, first, because it was a preference; and, second, because it was negligently withheld from record, whereby mercantile creditors were deceived and sold goods to the bankrupt in the belief that his stock was not incumbered by a mortgage, so that the mortgagee was estopped from claiming priority over other creditors by virtue of his mortgage. In that case it was clear that no preference was made or intended, so that the question did not arise whether, in view of sections 60a and 60b of the Bankruptcy Act, the mortgage was "required" to be recorded. Under the second point of contention in the case, the court held that, under the statute of Maine, to which I have referred, a mortgage made in good faith when recorded is valid against all parties, who, previous to the date of its record, have not acquired a lien by attachment, levy, or some such proceeding, and that a chattel mortgage is good only between the parties, so long as it is unrecorded, but when recorded it takes effect as against these parties. This decision was distinctly on the question of estoppel, which I have just stated; and no point was raised in reference to a preference, under sections 60a and 60b of the Bankruptcy Act.

In the case at bar, two days prior to the filing of the bankrupt petition the mortgagee recorded his mortgage on advice of the attorney for the bankrupt to record it—the latter advising him to "get it recorded; he is going through bankruptcy." There must be no question, then, but that the mortgagee had reasonable cause to believe that the enforcing of the mortgage lien, in his favor, as of that time, would effect a preference in his favor.

Did the transfer, then, become voidable as a preference, under the sections of the Bankruptcy Act which I have cited, and, especially, under the amendment of 1910? The authorities on the point are not uniform. In Loeser v. Savings Deposit Bank & Trust Company, 148 Fed. 975, 78 C. C. A. 597, 18 L. R. A. (N. S.) 1233, the United States Circuit Court of Appeals for the Sixth Circuit held that a recording statute, which requires a conveyance to be recorded to be effectual against a certain class, or classes, or persons, is a law which required the recording of the transfer in bankruptcy within the meaning of sections 60a and 60b of the Bankruptcy Act, as amended by the act of 1903. This decision was previous to the amendment of 1910. In speaking for the court, and in pointing out

the evil of secret preferences, Judge Lurton, Circuit Judge, afterwards judge of the Supreme Court said:

"If we say that unless the law of the state where the transfer is made makes void all such transfers, as to all the world, that it is not a law which 'requires' the recording, the evil will continue."

Further on, in his opinion, Judge Lurton proceeds:

"We reach the conclusion that the word 'required,' as used in the amendment, refers to the character of the instrument giving the preference or making the transfer, without reference to the fact that, as to certain persons or classes of persons it may be good or bad according to circumstances."

The court held that an unrecorded chattel mortgage, not followed by immediate delivery and actual change in possession of the mortgaged property, though good as against the parties or creditors with notice, yet is "required" by the state statute to be recorded within the meaning of section 60a of the Bankruptcy Act, as amended by the amendment of 1903; and the amendment of 1910 is more strict against the preference of unrecorded conveyances than any previous legislation. In First National Bank of Buchanan County v. Connett, 142 Fed. 33, 37, 41, 73 C. C. A. 219, 227 (5 L. R. A. [N. S.] 148), the Circuit Court of Appeals for the Eighth Circuit, considered the statute of Missouri relating to chattel mortgages. The Missouri statute provides that no mortgage of personal property should be valid against any other person than the parties thereto, unless possession of the mortgaged property be delivered to and retained by the mortgagee, or unless the mortgage be recorded in the county in which the mortgagor resides. That statute was, then, substantially the same as the statute of Maine before us in this proceeding. In speaking for the court, Judge Hook says:

"The clear letter and policy of the Missouri statute have often been referred to by the courts of that state. The withholding of a chattel mortgage from record assists the debtor to practice a false pretense. It enables him to maintain a financial standing to which he is not honestly entitled. That is generally the actuating purpose, and it is invariably the result. It induces prior creditors to forbear and other persons to extend credit. A plain and inexpensive method is prescribed by which a mortgagee may secure a priority of lien, and the evil results that may follow from ignoring it are obvious. The fiction of relation is generally used to prevent wrong or injustice, but we find no warrant in the decisions of the courts of Missouri for its employment to defeat the evident and wholesome policy of the law. There, possession of the property not being taken, a chattel mortgage seems to speak as of the day it is recorded."

In the Beckhaus Case, 177 Fed. 141, 100 C. C. A. 561, the statute of Illinois was considered. That statute is:

"No mortgage, trust deed or other conveyance of personal property having the effect of a mortgage or lien upon such property, shall be valid as against the rights and interests of any third person, unless possession thereof shall be delivered to and remain with the grantee, or the instrument shall provide for the possession of the property to remain with the grantor, and the instrument is acknowledged and recorded as hereinafter directed; and every such instrument shall, for the purpose of this act, be deemed a chattel mortgage." Starr & C. Ann. St. c. 95, § 1.

The Circuit Court of Appeals for the Seventh Circuit held that the above statute required the mortgage to be recorded under the

law of Illinois. In that case the court followed the law of the Loeser Case.

It is true that the decisions of the courts are not uniform upon this subject. The learned counsel for the petitioner has brought to my attention the Boyd Case, 213 Fed. 774, 776, 130 C. C. A. 288. That case sustains the contention of the petitioner; in it are cited certain other cases in accordance with the same view. The Roberts Case, 227 Fed. 177, is a District Court case, in which the learned judge referred to a former decision of his own. Thompson v. Fairbanks, 196 U. S. 516, 25 Sup. Ct. 306, 49 L. Ed. 577, relied upon by the petitioner, was a case in which the bankruptcy petition was filed in 1900, or before the amendment of 1910 or of 1903. Certain other cases are cited by the petitioner; but I think I have referred to those which state the law most clearly. Most of these cases were before the amendment of 1910. In Davis v. Hanover Savings Fund Society, 210 Fed. 768, 773, 127 C. C. A. 318, Judge Connor, for the Court of Appeals for the Fourth Circuit, called attention to the fact that the amendment of 1910 makes a radical change in the law. In the Boyd Case, supra, in speaking for the Circuit Court of Appeals for the Second Circuit, Judge Lacombe says:

"A different conclusion has been reached in the Sixth circuit (Loeser v. Savings Dep. Bank, 148 Fed. 975 [78 C. C. A. 597, 18 L. R. A. (N. S.) 1233]; Carey v. Donohue, 209 Fed. 328 [126 C. C. A. 254]), in the Seventh circuit (In re Beckhaus, 177 Fed. 141 [100 C. C. A. 561]), and in the Eighth circuit (Mattley v. Giesler, 187 Fed. 970 [110 C. C. A. 90]). If this were a mere point of practice, we should follow the weight of authority in Circuit Courts of Appeal; but it involves a question of substantive law, and, in the absence of controlling authority, the petitioner is entitled to our own opinion. It would seem desirable that the question be brought before the Supreme Court."

Judge Lacombe then admits that the weight of authority is in accordance with the cases which I have above cited, but he gives the great weight of his opinion to the contrary. Loveland states that the better rule is in favor of the law stated in the Loeser Case. Loveland (4th Ed.) vol. 1, p. 994. Collier (10th Ed., p. 799) says:

"If a chattel mortgage first comes into existence as against general creditors, under a state statute, when it is recorded, it is 'required' to be recorded under this subdivision (60a) even though it is not absolutely void under all circumstances, because not so recorded"—citing several cases.

In the case at bar it is not claimed that possession of the property was delivered to and retained by the mortgagee. In order to be valid, as against any person other than the parties thereto, it must be recorded. Within the reasoning of the Loeser Case, and other cases taking the same view of the law, I must hold that the mortgage in question was "required" to be recorded, under the statute of Maine then in force. In coming to this conclusion I am not unmindful of the fact that there are authorities, as well as good reasoning, on both sides. I think, however, the weight of authority is in accordance with the view which I take.

So far as relates to the question of fact in regard to a voidable preference, it must be said that the mortgage was recorded two days before the petition in bankruptcy was filed, and with the evident

knowledge on the part of the mortgagee that an advantage would accrue to it by such record. I am constrained to hold that the mortgage, recorded as it was, constitutes a voidable preference, within sections 60a and 60b of the Bankruptcy Act.

The conclusion of the referee is therefore affirmed in disallowing the mortgage as a secured claim, but allowing it as an unsecured claim to the amount of $558.74, or the face of the note less discount from January 1, 1916, to the date of the maturity of the note.

RYAN v. OHMER et al.

(District Court, S. D. New York. April 24, 1916.)

1. COURTS ⇐308—JURISDICTION—FEDERAL COURTS.
Under Judicial Code (Act March 3, 1911, c. 231) § 24, 36 Stat. 1091 (Comp. St. 1913, § 991), declaring that the District Court shall have original jurisdiction of all suits of a civil nature between citizens of different states, or between citizens of a state and foreign states and subjects or citizens, the District Court has jurisdiction of a suit wherein a citizen of one state was plaintiff, and a citizen of another and a subject of a foreign power were defendants.
[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 855, 856; Dec. Dig. ⇐308.]

2. CORPORATIONS ⇐668(7)—PROCESS—SERVICE—NONRESIDENT AGENT.
Where an agent of a foreign corporation was temporarily within the state and federal district upon private business, service upon him is not a binding service upon the corporation.
[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2613; Dec. Dig. ⇐668(7).]

3. CORPORATIONS ⇐668(16)—PROCESS—SERVICE—VALIDITY.
Where an affidavit to quash service of process on the vice president of a foreign corporation, while in the state and district, did not clearly show that the vice president was not within the district on corporate business, or that the corporation was not doing business within the district, those questions will be referred to a master.
[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2627; Dec. Dig. ⇐668(16).]

In Equity. Suit by Thomas J. Ryan against Will I. Ohmer, the Recording & Computing Machines Company, and the Canadian Car & Foundry Company, Limited. Defendants appeared specially moving to dismiss for want of jurisdiction, and the Recording Company and Canadian Company moved to quash the subpœna. Motion to dismiss for want of jurisdiction denied, and motion by the Recording Company to quash the subpœna overruled, while that of Canadian Company referred to a master.

William A. Barber and Joseph D. Fackenthal, both of New York City, for plaintiff.

Walter C. Noyes, of New York City, and H. A. Toulmin, of Dayton, Ohio, for defendants Ohmer and Recording Co.

T. Ludlow Chrystie, of New York City, for defendant Canadian Co.

MAYER, District Judge. [1] First. The most interesting feature of this motion is the fact that, with a wide diversity of opinion outstanding, the question of jurisdiction has never been passed on by the Supreme Court. The first motion is to dismiss for want of jurisdiction because plaintiff is a citizen of New York, two of the defendants citizens of Ohio, and the third defendant an alien corporation; in other words, because a New York plaintiff has sued in New York and joined as defendants two Ohio citizens and a Canadian alien corporation. The question presented arises under section 24 of the Judicial Code of 1912 (Comp. St. 1913, § 991), which reads:

"Sec. 24. The District Courts shall have original jurisdiction as follows:
"First. Of all suits of a civil nature, at common law or in equity * * * (b) * * * between citizens of different states, or (c) * * * between citizens of a state and foreign states, citizens, or subjects."

The same language is found in Act Aug. 13, 1888, c. 866, 25 Stat. 433, and Act March 3, 1887, c. 373, 24 Stat. 552. Defendants' position is that this is not "a controversy between citizens of different states," because one of the parties defendant is not a citizen, but an alien, and that this is not "a controversy between citizens of a state and foreign states, citizens or subjects," because two of the defendants are neither a foreign state, citizen, nor subject, but are citizens of a different state. In support of this view defendants cite from cases and leading text-books.

Hughes, in his work on Federal Procedure (section 119, p. 299), states the situation as follows:

"There is a conflict of decision on the question whether a federal court would have jurisdiction in a case where citizens of a state are plaintiffs and citizens of a different state and aliens are defendants. In Tracy v. Morel (C. C.) 88 Fed. 801, it is held that this latter is a casus omissus in the statute, and that the federal courts would not have jurisdiction. On the other hand, in Roberts v. Pacific & A. R. & Nav. Co. (C. C.) 104 Fed. 577, Judge Hanford, in a well-considered opinion, holds that such a case would fall within the federal jurisdiction. It seems to the author that, however liberally the Removal Act ought to be construed, the line of decisions holding that the case does not fall within the jurisdiction of the federal courts best accords with the statute. If a federal court has jurisdiction, it must be under one of two phrases in the first section of the act of August 13, 1888—either on the language, (1) 'in which there shall be a controversy between citizens of different states'; or (2) 'a controversy between citizens of a state and foreign states, citizens or subjects.' If the rulings of the federal courts in other connections to the effect that a 'controversy between citizens of different states' means a controversy in which all the citizens on one side and all the citizens on the other are citizens of different states, jurisdiction in the case supposed could certainly not be supported upon that, for one of the parties defendant in such case is not a citizen, but an alien. On the other hand, if that same principle of construction is applied to the second class, a controversy in the case supposed is not between citizens of a state and foreign states, citizens, or subjects, for one of the defendants is neither a foreign state, citizen, nor subject, but a citizen of a different state. This would seem to be the necessary construction of the statute, and this is the view taken by the standard work on the subject. Black, Dill. Rem. Causes, § 34."

See Black's Dillon on Removal of Causes, §§ 66–84; Simkins, Federal Suit in Equity, pp. 86, 87; Tracy v. Morel (C. C.) 88 Fed. 801, 803; Hervey v. Railway Co., 7 Biss. 103, Fed. Cas. No. 6,434; King v. Cornell, 106 U. S. 395, 1 Sup. Ct. 312, 27 L. Ed. 60; Pooley

v. Luco (C. C.) 72 Fed. 561; Meyer v. Herrera (C. C.) 41 Fed. 65, 66; Gage v. Riverside Trust Co. (C. C.) 156 Fed. 1002; Sawyer v. Switzerland, 21 Fed. Cas. 589, No. 12,408, 14 Blatchf. 451, also by way of analogy; Smith v. Lyon, 133 U. S. 315, 10 Sup. Ct. 303, 33 L. Ed. 635.

Per contra, plaintiff relies on the following cases: Roberts v. Pacific, etc., Co., 121 Fed. 785, 58 C. C. A. 61 (C. C. A. Ninth Circuit); Ballin v. Lehr (C. C.) 24 Fed. 193; Ladew v. Tennessee Copper Co. (C. C.) 179 Fed. 245, at p. 256; Baker v. Pinkham (D. C.) 211 Fed. 728; Bradshaw v. Bowden (D. C.) 226 Fed. 323. Reference is also made to Ladew v. Tennessee Copper Co., 218 U. S. 367, 31 S. Ct. 81, 54 L. Ed. 1069. Roberts v. Pacific, etc., Co., supra, fully discusses the view urged by plaintiff.

An analysis of the reasoning which has led the various courts and text-book writers to come to their conclusions will not be profitable. The question will continue to be one as to which marked differences of opinion will exist until the Supreme Court has occasion to construe the statute. Of course, the question is close, and, ordinarily, a doubt will be resolved against jurisdiction; but as between the narrow view, well supported by close reasoning, and the broader view, which seeks to escape too fine a distinction, I choose the latter. I do this the more willingly because a reading of the complaint suggests to me that a considerable delay incident to the settlement of the question of jurisdiction might do injustice to plaintiff in denying to him an opportunity to obtain his relief promptly, if he is entitled to it.

The motion to dismiss is denied.

[2] Second. Motion to quash as to Recording Company. There is no dispute as to the law applicable to this motion; for it must be admitted that, if service on this Ohio corporation was attempted to be obtained here by service on one of its officers, who was here only on his own personal business, then the motion must be granted.

Will I. Ohmer, by affidavit verified March 22, 1916, sets forth that he resides and always has resided in Dayton, Ohio, is president of Recording Company, an Ohio corporation, with its factory and offices at Dayton, and with no office, officer, agent, property, nor place of business in New York; that he was served at the Waldorf-Astoria, where he was temporarily stopping in connection solely with personal business, his visit lasting from March 6 to March 8, 1916. Plaintiff meets this affidavit by setting forth, in an affidavit verified March 4, 1916, that he is informed and believes (without stating the source or nature of information) that Ohmer was in New York City on the business of the company. He further states that the contract between the two corporation defendants, referred to in the complaint, was signed in New York City.

Ohmer replies, in an affidavit verified April 15, 1916, that the contract was concluded and signed at Montreal, Canada, on the part of defendant Canadian Company, and at Dayton, Ohio, on the part of the Recording Company, and quotes a clause of the contract in confirmation of his statement. He reiterates that he was in New York City on personal business, and furnishes certain corroborative details,

in which he is supported by the affidavit of E. E. Pierson, secretary of Recording Company, verified April 15, 1916.

I am fully satisfied that the motion must prevail, and I see no occasion for further examination by the court or reference to a special master.

This motion is granted.

[3] Third. Motion to quash as to Canadian Company. The affidavit of Wilson W. Butler, verified April 4, 1916, on behalf of this defendant, sets forth that Butler is vice president of the defendant company, a Canadian corporation, but does not assert that Butler was not in New York City officially representing his company. Butler states that defendant, at the time of service, did not have and does not now have an office in the state of New York, and was not and is not doing business in the state of New York; that in March, 1915, a corporation was organized under the name "Agency of Canadian Car & Foundry Company, Limited," which has been and is doing business at 120 Broadway, Manhattan, New York City, and that Butler is vice president and a director of the "Agency" corporation.

Obviously, the relations, if any, of defendant with the "Agency" corporation are peculiarly within defendant's knowledge, and it is difficult for an outsider to obtain accurate knowledge or information of such relations. The statements of Butler that defendant is not doing business in New York may be mere conclusions and plaintiff's information that defendant is doing business "in the way of refinancing itself, readjusting its securities, * * * and letting contracts and dealing with the performance thereof, and soliciting business either directly or through" the "Agency" corporation, warrants further investigation. I will therefore refer this matter to a special master, and meanwhile, of course, the decision of this motion will remain in abeyance.

Settle orders on notice.

UNITED STATES v. FONG HONG.

(District Court, D. New Jersey. May 15, 1916.)

1. ALIENS ⟸32(8)—CHINESE PERSONS—CERTIFICATES.

Under Act May 6, 1882, c. 126, § 6, 22 Stat. 60, as amended by Act July 5, 1884, c. 220, 23 Stat. 116, and continued by Act May 5, 1892, c. 60, 27 Stat. 25, making the certificate of a Chinese person prima facie evidence of the facts set forth therein, a Chinese person, admitted under a merchant's certificate in due form, is in the exempt class, and cannot be deported for having fraudulently entered the United States, unless there is competent evidence to overcome the effect of the certificate.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 84; Dec. Dig. ⟸32(8).]

2. ALIENS ⟸23(2)—CHINESE PERSONS—DEPORTATION—MERCHANTS.

The treaty of November 17, 1880 (22 Stat. 826), between the United States and China, authorizes the United States to limit, regulate, or suspend the coming of Chinese laborers, but not to absolutely prohibit it, declaring that the limitation or suspension shall apply only to them, no other class being included and that Chinese subjects, whether proceeding to the United States as teachers, students, merchants, or from curiosity, together with their retinue, shall be accorded all the rights, privileges, and exemptions which are accorded to the citizens and subjects of the most favored nation. Const. art. 6, cl. 2, makes such treaty the supreme

law of the land. *Held* that, where a Chinese person duly enters the country as a merchant, the fact that thereafter he becomes a laborer does not warrant his deportation.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 77; Dec. Dig. ⇐23(2).]

Proceeding by the United States for the deportation of Fong Hong, a Chinese person. On appeal from the commissioner's order of deportation. Reversed.

Wm. A. Gray, of Philadelphia, Pa., for Fong Hong.
Joseph L. Bodine, of Trenton, N. J., for the United States.

RELLSTAB, District Judge. Fong Hong, a Chinese subject, was admitted to this country as a Chinese merchant. He had a certificate to that effect issued and viséed according to the United States laws. In compliance with the "Regulations Governing the Admission of Chinese" made by the Secretary of Commerce and Labor, this certificate was taken by the officer in charge of the port of entry (Boston, Mass.), through which he was admitted. In place thereof a certificate of identity was issued to him by said officer on March 22, 1911, which was in Fong Hong's possession at the time of his arrest.

[1] The government concedes that the certificate taken from Fong Hong, at the time of his entry into this country, was regular in form. Under section 6 of the Act of May 6, 1882 (22 Stat. 58, c. 126), as amended by Act July 5, 1884 (23 Stat. 116, c. 220), and continued by Act May 5, 1892 (27 Stat. 25, c. 60), this certificate is made "prima facie evidence of the facts set forth therein, * * * but said certificate may be controverted and the facts there stated disproved by the United States authorities."

The government, while contending that the defendant's certificate was procured by fraud, offered no evidence to establish that fact. The defendant's admission to this country, under a merchant's certificate admittedly in due form, placed him in the exempt class, and "he cannot be deported for having fraudulently entered [the United States], unless there is some competent evidence to overcome the legal effect of the certificate." Liu Hop Fong v. U. S., 209 U. S. 453, 28 Sup. Ct. 576, 52 L. Ed. 888. The uncontradicted evidence shows that the defendant was a merchant in China, that he brought with him about $1,500 in money, $500 of which he subsequently invested in the Hop Wah Company, Chinese grocers of Philadelphia, Pa. This investment he still maintained at the time of his arrest. He was not personally employed in conducting that or any other merchandising. For more than two years he performed no manual labor. Then he began to work in a laundry. These facts, however, are not sufficient evidence of fraud to overcome the prima facie effect of said merchant's certificate, and there is no evidence that would justify the conclusion that the defendant's entry into this country as a merchant was a pretense, or that he then belonged to the excluded class.

The government further contends that, even if the defendant was a merchant at the time of his admission into this country, he subsequently became a laundryman, and therefore a laborer, within section 2 of the Act of November 3, 1893 (28 Stat. 7, c. 14), and that thereupon he became subject to deportation. The defendant's contention is that

such laundry work as he performed was infrequent, and merely to help out some Chinese friends conducting such laundry, and who at that time were too ill to carry on such work. On this question I am constrained to hold that said laundry work was done by the defendant on his own account.

[2] Is he for that reason subject to deportation? By the treaty between China and the United States, dated November 17, 1880 (22 Stat. 826), it is agreed that:

"Whenever in the opinion of the government of the United States, the coming of Chinese laborers to the United States, or their residence therein, affects or threatens to affect the interests of that country, or to endanger the good order of the said country, or of any locality within the territory thereof, the government of China agrees that the government of the United States may regulate, limit, or suspend such coming or residence, but may not absolutely prohibit it. The limitation or suspension shall be reasonable and shall apply only to Chinese who may go to the United States as laborers, other classes not being included in the limitations. Legislation taken in regard to Chinese laborers will be of such a character only as is necessary to enforce the regulation, limitation, or suspension of immigration, and immigrants shall not be subject to personal maltreatment or abuse." Article 1.

And:

"Chinese subjects, whether proceeding to the United States as teachers, students, merchants or from curiosity, together with their body and household servants, and Chinese laborers who are now in the United States shall be allowed to go and come of their own free will and accord, and shall be accorded all the rights, privileges, immunities, and exemptions which are accorded to the citizens and subjects of the most favored nation." Article 2.

This treaty, which is a part of the supreme law of the land (Const. art. 6, cl. 2), it is noted, has for its purpose the protecting of the interests and good order of this country, when affected by "the coming of Chinese laborers to the United States or their residence therein," and authorizes our government to "regulate, limit or suspend such coming or residence," but not to "absolutely prohibit it." By express reference this power of limitation or suspension is to be reasonable, and is made applicable only "to Chinese who may go to the United States as laborers," and the legislation to such end is to be only such as is necessary "to enforce the regulation, limitation, or suspension of immigration." It is to be noted, further, that Chinese subjects of the exempt class (merchants, etc.), when admitted to this country, are to "be accorded all the rights, privileges, immunities and exemptions which are accorded to the citizens and subjects of the most favored nation."

Under this treaty, a Chinese subject of the exempt class, regularly admitted to this country, must be held to have obtained a status the same as is obtained by an immigrant from the most favored nation. This being so, it follows that such status continues with him, so far as his right to remain in this country is concerned, notwithstanding that he may subsequently to his admission, whether through choice or necessity, become a laborer. This conclusion accords with that reached by Judge Lowell in Re Yew Bing Hi (D. C.) 128 Fed. 319, the facts of which are substantially those in the instant case. His analysis and interpretation of the legislative purposes of the Chinese Exclusion Acts are persuasive, and when such enactments are put to the additional

test of squaring with the limitation placed by said treaty upon the power to exclude or remove Chinese subjects from the United States, the conclusions reached by that learned judge, to my mind, are irresistible.

The case of Cheung Him Nin v. U. S., 133 Fed. 391, 66 C. C. A. 453, is cited as an authority for an opposite view. That case, however, discloses no more than the proceedings before the commissioner, the affirmance of his order of deportation by the District Court, and the concurrence by the Circuit Court of Appeals in his finding that the defendant was a laborer. The testimony of the defendant in that case suggested a fraudulent use of a merchant's certificate in entering this country, and a finding that he was a laborer on that basis would not be without rational support, and in the absence of anything in the opinion indicating a different ground, none other will be assumed. So considered, that case is not opposed to the view here taken.

In U. S. v. Foo Duck, 172 Fed. 856, 97 C. C. A. 204, the same court held that a Chinese subject who lawfully entered this country was not subject to deportation, though he subsequently worked as a laborer. See, also, to the same effect, U. S. v. Lim Yuen (D. C.) 211 Fed. 1001, and Ex parte Wong Yee Toon (D. C.) 227 Fed. 247, and cases cited.

In my opinion, the defendant is entitled to remain in this country, and the commissioner's order directing his deportation is therefore set aside.

In re KEYSTONE VULCANIZING CO.

In re GALE.

(District Court, E. D. Pennsylvania. May 17, 1916.)

No. 4517.

BANKRUPTCY ⊂=340—CLAIMS—EVIDENCE—SUFFICIENCY.

Evidence *held* to show that claimant purchased an interest in an existing partnership and made payments on account of the purchase price, and not that he loaned money to the partnership, which after incorporation became bankrupt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 527; Dec. Dig. ⊂=340.]

In Bankruptcy. In the matter of the bankruptcy of the Keystone Vulcanizing Company. Petition by the claimant, one Gale, for review of order of referee rejecting his claim. Order affirmed, and petition dismissed.

Michael A. Maloney, of Philadelphia, Pa., for claimant.

Franklin Spencer Edmonds, of Philadelphia, Pa., for trustee.

DICKINSON, District Judge. The review asked for is of a finding of fact by the referee. If the claimant sought to purchase an interest in an existing partnership and made a payment on account of the purchase price, it is clear that he cannot, if the interest turns out to be worthless, afterwards pose with success as a creditor. If, on the other hand, the claimant loaned money to the partnership, the mere statement of the fact makes clear his status as a creditor. There

is nothing worthy of inquiry except an inquiry into the fact. The fact has been found against the claimant by the referee, and the opinion accompanying the finding vindicates its correctness beyond any occasion for discussion.

The earnestness and fullness with which counsel for the claimant presses the argument in his behalf, and the evident faith and confidence of counsel in the justness of the claim, justify a word more. This confidence and earnestness has led to what, upon reflection, counsel will themselves see is undue emphasis in their complaint of error in the report of the referee. The transactions among all the parties involved present the characteristic features of muddle due to the curious inability of many people to distinguish between the right and power of control of a person over his individual property and the like control of the property of a corporation which the same person has been instrumental in having incorporated. These facts at least cannot be gainsaid. There was a partnership and partnership business in which Prime and Cromer had come to be the partners. The claimant, Gale, was appealed to by Prime, primarily for help, and as a means of granting this to take an interest in the business. Gale was willing to help. With the thought in mind of eventually having an interest in the business Gale advanced Prime, or the partnership, $250. This was February 16, 1912. For this he took a note and was to receive payment in supplies purchased at cost. He received such supplies to the amount of $197.61. On March 2, 1912, Gale offered to buy out Cromer's interest for $1,500 and to put $1,000 into the business. The project was to incorporate the business, half the capital stock of which was to be issued to Gale. Presumably the partnership debts were to be paid. At least a note on which Cromer was indorser was to be taken care of by the corporation. Gale made this offer, understanding that the deficit or debt (whether deficit or debt is not wholly clear) of the partnership was $1,200. He later learned there was a shortage in assets of much more than $1,200. He then declined to pay Cromer $1,500 for the Cromer interest. Cromer was asked to accept stock in the proposed corporation in place of cash. Another corporation was also talked of, the capital of which was to be supplied by Gale and others. The organization of this latter corporation was dropped. Gale went ahead to have the first suggested company incorporated and letters patent were taken out in Delaware. The company had a nominal capital of $10,000, which was increased to $25,000. A certificate for shares to the nominal value of $250 issued to Gale.

There is evidence to justify the finding that additional shares to a like amount were taken by him, a certificate for which was made out, although never delivered. The record does not disclose when the company was incorporated. It was probably in March, or before April 5, 1912. Evidently some one had in mind the project to have the company assume the debts of the partnership. There is no evidence that this was done, however. We understand the corporation to be the bankrupt. The filing date of the petition is not shown. Gale has shown by satisfactory evidence that he advanced to some one, for some purpose, about $1,500, of which he received back in supplies a little less than $200, and in shares of stock at least $250, and perhaps

$500. The finding of the referee that he is not a creditor of the bankrupt has, among other things, the support of these undisputed facts. He offered to acquire an interest in the partnership, and to put into it, among other things he was to do, $1,000. Admitting (in order to get his own viewpoint) that his offer was tentative and conditional, and not binding upon him, he nevertheless did advance the money, and the moneys he is now claiming as a creditor he categorically admits were paid by him in pursuance and in furtherance of his proposition. He seems to have paid in excess of his offer. This he explains partly by the statement that the partnership was hard-pressed and he thought it would turn out all right, and partly by the further statement that some of the money went to pay the expense of taking out the charter. The point is he clearly admits he advanced the money because of his offer to take a $1,000 interest in the business of the firm. During this time he signed leases as a partner. The inference could not be otherwise than that the money was a capital contribution. There is justification for the thought entertained by the referee that the form of debt claim which the transaction was made to take was an afterthought. The claimant cannot with very good grace complain of this in the light of the antedating and expansion of the claim into a $5,000 judgment note.

The finding is approved, the report of the referee affirmed, and the petition for review dismissed.

In re VALECIA CONDENSED MILK CO.

(District Court, W. D. Wisconsin. April 19, 1916.)

1. BANKRUPTCY ⇐212—REFEREE—AUTHORITY OF.

Where the trustee filed petitions to determine the validity of bonds issued by the corporate bankrupt, and the bondholder appeared and contested that issue, the referee, in view of the broad powers of a court of bankruptcy to determine the validity of liens on property coming into its jurisdiction, had power to determine the validity of the bonds.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 236; Dec. Dig. ⇐212.]

2. CORPORATIONS ⇐469—BONDS—VALIDITY—DEFENSES.

As the Negotiable Instruments Act (Laws 1899, c. 356) did not, as between a corporate bond obligor and its obligee, repeal Rev. St. Wis. 1878, § 1753, providing that no corporation shall issue any bonds, except for money or property, estimated at its true money value, actually received by it, equal to 75 per cent. of the par value thereof, and that all bonds issued contrary thereto shall be void, bonds issued in violation of the act are void, regardless of the immediate obligee's lack of knowledge of a violation of the law.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1832; Dec. Dig. ⇐469.]

In Bankruptcy. In the matter of the bankruptcy of the Valecia Condensed Milk Company. On review of proceedings before referee to determine the validity of bonds held by the National Bank of La Crosse. Order of referee affirmed.

⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Frank Winter, of La Crosse, Wis., for petitioners.
Sanborn & Blake, of Madison, Wis., for trustee.
Richmond, Jackman & Swansen, of Madison, Wis., for interveners.

GEIGER, District Judge. [1] That the referee acquired jurisdiction to pass upon the validity of the bonds held by the bank does not, it seems to me, admit of serious controversy. The power to determine the extent, character, or validity of claims or liens asserted against property in the hands of the bankruptcy court is necessarily broad; and when the trustee filed a petition upon which creditors claiming to hold liens were required to come in, to the end that the court determine whether the property be sold subject to or freed from liens, such broad jurisdiction not only attached against the bank, but was acceded to, because a statement of the nature of its claim was thereupon made; and subsequently, when the trustee, doubtless as a foundation for and an aid in discharging its duty to make distribution of the sale proceeds, filed a further petition, the bank again appeared, and throughout litigated with the trustee the one question respecting the validity of the bonds held by it. The determination of that question was therefore properly before the referee.

[2] The one question is: Are the bonds valid? Section 1753 of the Wisconsin Statutes, as construed in the Pfister Case, 83 Wis. 86, 53 N. W. 27, the Waukesha Canning Case, 211 Fed. 927, 128 C. C. A. 305, and the Oconto Water Case (C. C.) 52 Fed. 29, has not been impaired or repealed by the Negotiable Instruments Act (Laws 1899, c. 356), as suggested by counsel for the bank; nor has the recent ruling of the Court of Appeals for this circuit, in connection with the Carey & Guyon bonds, growing out of the present bankruptcy (229 Fed. 698), had any such result; and I know of no authority to justify the contention that, as between a corporation bond obligor and its obligee, full effect must not be given to the requirement that 75 per cent. of par be exacted upon issue.

The facts, practically without dispute, fail to show compliance with the statute; and the order of the referee must be affirmed, unless the rule above can justifiably be departed from. Counsel strongly urge In re Progressive Wall Paper Co. (D. C.) 224 Fed. 143, in support of the suggestion that, because the bank loaned an amount equal to the face of the pledged bonds, or because it has offered in these proceedings to diminish its right to a 75 per cent. basis, the court should validate them accordingly. The lengthy opinion in that case comments on the Waukesha Canning Case thus:

"* * * There was no express contract or agreement by the pledgees that they would accept the bonds as collateral and account therefor at 75 per cent. of their par value, or not dispose of same at a less sum. But the court held that such an agreement was implied from the fact that the pledgees knew that, to validate the issue, they must be taken, if at all, at not less than 75 per cent. of their par value. The court therefore held that this was the understanding of the parties, and that the issue of the bonds * * * was legal and valid."

The opinion then adds:

"In the case at bar it is presumed that the bank knew the law, and that there was no intent or purpose to violate it."

The court then directs:

"It follows that the order of the referee holding the bonds invalid, and void in the hands of the bank, should be reversed, and that the injunction against a sale or disposition thereof should be modified, so as to provide that the bank is enjoined and restrained from disposing of the same at less than their par value. The notice that the bonds will be sold by the bank contains no such limitation or qualification. If the bank will file a stipulation that it will not sell or undertake to sell or dispose of these bonds for less than their par value, and stating that such agreement was a part of the contract of pledge, there may be an order reversing the order of the referee now under review. This will clear the situation and leave the bank free to act in the premises. Should the bank then violate the agreement or contract of pledge as thus made definite and certain, it would be answerable to the referee in bankruptcy for any loss the estate represented by him might sustain."

The Waukesha Canning Case, while it may take an extreme view of the facts there presented, does not, in my judgment, justify doing what was finally done in this Wall Paper Corporation Case, and what the bank now asks in the present case. The violation of this law, or the fact of noncompliance with its provisions, is the only issue. If presumption or proof of a bondholder's knowledge of the law, and like presumption that he did not intend to violate it, will absolve him from the consequences of a violation in fact, then the law becomes inoperative, except as to those who may be shown to have been wholly ignorant of its terms. Irrelevant protestations of knowledge of the law, of honesty of purpose and the absence of intent, override noncompliance and violation in fact, by granting a sort of privilege of nunc pro tunc validation. I am unwilling to adopt the suggestions contained in that case.

The order of the referee is affirmed.

NOTE.—Since preparation and filing of the foregoing memorandum, I observe that the ruling in Re Progressive Wall Paper Corporations, 224 Fed. 143, referred to, has been reversed. See 229 Fed. 489, —— C. C. A. ——.

In re TITONE.

(District Court, E. D. New York. June 2, 1916.)

ALIENS ⊂⊃68—NATURALIZATION—COMPLIANCE WITH LAW.

Naturalization Act June 29, 1906, c. 3592, § 1, 34 Stat. 596 (Comp. St. 1913, § 963), declares that it shall be the duty of the Bureau of Immigration and Naturalization to cause a registration of each alien arriving in the United States, and that it shall be the duty of the Commissioner to cause to be granted to each alien a certificate of such registration. Section 31 declared that this section should go into effect at once, while section 4, subd. 2 (Comp. St. 1913, § 4352), declares that at the time of filing his petition of naturalization there shall be filed with the clerk of the court a certificate giving the date, place, and manner of arrival of the alien, and that the declaration of intention shall be used within seven years after making. An applicant for citizenship, who landed July 25, 1906, filed a declaration of intention November 26, 1906, wherein he stated that his arrival was on June 28, 1906. His petition for final papers was filed November 22, 1913. *Held* that, since, through mistake in the declaration of intention, the clerk did not require the applicant to get and file the certificate, the alien's petition for final papers will not be denied; a certificate of landing being furnished before the hearing on

the petition for final papers, particularly as any other holding would necessitate a new declaration of intention.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 138–145; Dec. Dig. ⊜⇒68.]

In the matter of the application of Vito Titone for admission to citizenship. Applicant admitted to citizenship.

Petitioner, in pro. per.

Melville J. France, U. S. Atty., and Henry W. Beer, Asst. U. S. Atty., both of Brooklyn, N. Y., for the United States.

CHATFIELD, District Judge. The applicant appears to be competent and has produced satisfactory witnesses. He has two sons, the eldest of whom is 15 years of age, who were born in Italy, but are now in the United States. He landed in the United States upon July 25, 1906, on the steamer Francesco. He filed a declaration of intention November 26, 1906, and a petition for final papers on November 22, 1913. He stated in his petition that the date of his arrival in the United States was June 28, 1906, following the date which was shown in his first papers, and which was so given therein through uncertainty as to the actual date of arrival. The clerk accepted the petition without a certificate from the Department of Labor or the Commissioner of Immigration of that Department, as the stated date of arrival preceded the 29th day of June, 1906, upon which the naturalization law was passed.

Section 31 of the law provides that the act shall take effect 90 days after passage, but also provides that section 1 shall go into effect immediately, and by this every alien arriving after the passage of the act must be registered, and is given the right to receive a certificate such as must be used under section 4 when applying for citizenship. Section 4 of the statute (subdivision 2) provides that "at the time of filing his petition there shall be filed with the clerk of the court a certificate" giving the date, place and manner of arrival, etc.; and section 4 of the act (subdivision 2, last paragraph) requires the use of the declaration of intention within seven years after making such declaration.

A denial of the present application, because of failure to comply with the mandatory provision for presenting a certificate of arrival with the petition, would make it impossible for the alien to reapply upon his present declaration of intention, and would require him to take out a new declaration and wait two years. There is nothing to show that the applicant intentionally antedated the date of arrival, and the mistake, if it occurred, was made at the time when the declaration of intention was filed. He could not then have been planning to avoid getting a certificate seven years later.

Under the authority of United States v. Ness, 230 Fed. 950, it would seem that the failure to file a certificate of landing may be cured as an irregularity, and hence in this case the actual presentation and filing of a proper certificate before the original date of hearing would be sufficient.

The applicant may have his papers.

FOLK et al. v. UNITED STATES et al.

(Circuit Court of Appeals, Eighth Circuit. June 5, 1916.)

No. 4464.

(Syllabus by the Court.)

1. APPEAL AND ERROR ⟸954(1), 955—REVIEW—DISCRETION OF COURT—APPOINTMENT OF RECEIVER—INJUNCTION.

Interlocutory orders appointing receivers and issuing injunctions generally rest in the sound judicial discretion of the court of original jurisdiction, guided by the principles and rules of equity jurisprudence, and when the court has not departed therefrom its orders may not be reversed without clear proof of an abuse of its discretion.

But when, in the consideration and decision of the issue, a court has departed from the principles and rules of equity established for the guidance of that court, the order may be reviewable on that ground without proof of abuse of discretion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3818, 3819, 3821, 3822; Dec. Dig. ⟸954(1), 955.]

2. RECEIVERS ⟸27—APPOINTMENT—GENERAL RULES.

It is the general rule that a court of equity will not appoint a receiver of real estate, or of its proceeds, in the possession of defendants holding under a regular title during the pendency of the suit, although it has the power to do so in exceptional cases.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 36; Dec. Dig. ⟸27.]

3. RECEIVERS ⟸27—APPOINTMENT—GROUNDS.

In order to bring a case within the exceptions to this general rule there must be clear proof (1) that there is imminent danger that unless a receiver is appointed the property, or its proceeds, will be materially deteriorated in value or wasted; (2) that the plaintiff will suffer irreparable loss from such deterioration or waste, and he can rarely suffer such loss when the defendants are solvent and abundantly able to respond to any damage they cause, or where they will give a good bond of indemnity against it; (3) that upon the pleadings and preliminary proofs there is a strong probability that the plaintiff will ultimately recover.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 36; Dec. Dig. ⟸27.]

4. INJUNCTION ⟸36(2)—RECEIVERS ⟸27—APPOINTMENT—GROUNDS.

A court of equity is sedulous to prevent the successful invocation of its preliminary injunction or appointment of a receiver to perform the function of a successful action of ejectment, while the plaintiff at the same time avoids the trial of titles indispensable to the success of such an action.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 83; Dec. Dig. ⟸36(2); Receivers, Cent. Dig. § 36; Dec. Dig. ⟸27.]

5. RECEIVERS ⟸27—APPOINTMENT—GROUNDS.

The United States, on behalf of the Creek Tribe of Indians, and that tribe, which owned the land in controversy before it was allotted and patented to Thomas Atkins, who was enrolled by the Dawes Commission a member of the Creek Tribe by blood, brought a suit in equity to avoid the enrollment, allotment, and patent under which the defendants were in possession of the land, upon the ground that there was no information or evidence before the Commission of the qualifications of Atkins to be enrolled, and especially that there was none that he was living on April 1, 1899. Upon voluminous evidence the plaintiff secured, before a trial of the suit, the appointment of a receiver of the land and of all the improvements and property placed thereon by the defendants, as well as of

all the oil the latter had produced at an expense of more than $125,000, while they had received in return only about $8,000, and an injunction against their interference with the property thereafter.

Held, as there was no satisfactory evidence of imminent danger of deterioration, or waste of the property by the defendants, or of probable irreparable loss to the plaintiffs, or of the fact that there was a strong probability that the plaintiffs would ultimately prevail in the suit, while there was proof that the defendants were solvent and able to respond for any loss or damage they caused, and they offered to give a good bond of indemnity for the benefit of all parties which should be ultimately adjudged to be entitled to the land, or its proceeds, the order appointing the receiver could not be sustained.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 36; Dec. Dig. ⟸27.]

6. INDIANS ⟸13, 27(6)—LANDS—CONCLUSIVENESS OF ADJUDICATION.

The adjudications by the Dawes Commission of the enrollment of Indians and the allotment of their lands and the patents issued thereon are conclusive and impervious to collateral attack.

In suits in equity to avoid them by direct attack the burden is on him who attacks them, and he may successfully assail neither of them by doubtful evidence, or a mere preponderance of it. He may succeed only by full proofs, clear, convincing, unambiguous, and entirely satisfactory to the court on every material issue.

[Ed. Note.—For other cases, see Indians, Cent. Dig. §§ 19, 30; Dec. Dig. ⟸13, 27(6).]

7. DEATH ⟸1—INDIANS ⟸13—ENROLLMENT—PRESUMPTION AS TO CONTINUANCE OF LIFE.

The Creek rolls of 1890 and 1895 constituted substantial evidence before the Dawes Commission that those named thereon were qualified for enrollment, that they were living when the rolls were made, and, in the absence of proof that the persons enrolled were, in 1895 or subsequent, in unusual danger of earlier death, that those persons continued to live for seven years after the roll of 1895 was made.

In the absence of proof of earlier death, or of evidence of unusual danger of earlier death, the legal presumption is that a person living at a certain time continues to live for at least seven years thereafter.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 1–3; Dec. Dig. ⟸1; Indians, Cent. Dig. § 30; Dec. Dig. ⟸13.]

8. UNITED STATES ⟸126—ACTIONS—PARTIES—PECUNIARY INTEREST.

Where the United States has no pecuniary interest in the litigation, but brings its suit as the representative of the real party in interest, in this case the Creek Tribe, the equities of the United States are no greater or less than those of the real party in interest. The stream may not rise higher than its source.

[Ed. Note.—For other cases, see United States, Cent. Dig. § 115; Dec. Dig. ⟸126.]

9. INDIANS ⟸3, 27(1)—UNITED STATES ⟸70, 126—ESTOPPEL—ACTIONS.

The equities of the Creek Tribe, or of the United States, appeal to the conscience of a chancellor with the same, but with no greater or less, force than would those of a private individual in like circumstances. The United States and the Creek Tribe are bound and estopped by their contracts, such as the Creek Agreement, to the same extent as private individuals would be.

When the United States, or the Creek Tribe, or a state, submits its rights and claims to a court of equity and prays its relief, those rights and claims, laying aside mere delay, are governed, measured, and adjudicated by legal estoppel, by equitable estoppel, and by the other rules

and principles of equity jurisprudence that would be applicable to like rights and claims of individuals in similar circumstances.

[Ed. Note.—For other cases, see Indians, Cent. Dig. §§ 5–7, 11, 19; Dec. Dig. ⊂⊃3, 27(1); United States, Cent. Dig. §§ 53, 115; Dec. Dig. ⊂⊃70, 126.]

10. ESTOPPEL ⊂⊃87—EQUITABLE ESTOPPEL—ELEMENTS.

In equity no one may successfully deny to the damage of another the truth of his statements or representations by which he has purposely or carelessly induced another to so change his situation that the assertion of the truth will irreparably or seriously injure him.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 230–234; Dec. Dig. ⊂⊃87.]

Appeal from the District Court of the United States for the Eastern District of Oklahoma; Ralph E. Campbell, Judge.

Suit in equity by the United States of America and another against Minnie Folk (née Atkins) and others. From an order appointing a receiver, defendants appeal. Reversed and remanded.

This is an appeal by the defendants below from the order of the District Court appointing a receiver of oil-producing land of which they were in the exclusive possession and which they were operating under these circumstances:

Thomas Atkins was listed for enrollment as a member of the Creek Tribe of Indians by the Dawes Commission on May 23, 1901, was duly enrolled as such a citizen by that Commission, was on March 1, 1902, reported to the Secretary of the Interior to have been regularly listed for enrollment and enrolled by it, to have been one of the Creek citizens "living on the 1st day of April, 1899, or born to citizens so entitled to enrollment up to and including the 1st day of July, 1900, and then living," to have been found upon the 1895 authenticated Creek tribal roll and to have been enrolled by it as No. 7913 on its roll, and a copy of the part of that roll containing his enrollment and the enrollment of some others was submitted with the report which the Commission closed with this statement: "The Commission, after having thoroughly examined the rolls of the Creek Nation, and such evidence as has been submitted touching the identification of the persons on roll herewith submitted, is of the opinion that all are entitled to enrollment as Creek citizens by blood and should be so enrolled." The part of the roll so certified to the Secretary was approved by him, the land in the defendants' possession was allotted to Thomas Atkins, a certificate of allotment thereof to him was issued on June 30, 1902, patents therefor dated April 14, 1903, approved by the Secretary on May 8, 1903, were issued to him and were recorded in the office of the Commission on May 16, 1903. The defendants, Charles Page and R. A. Josey, hold an oil and gas lease from Mr. McNab, the grantee of Minnie Folk, formerly Minnie Atkins, the alleged mother and sole heir of Thomas Atkins. Under this lease and under an order of the district court of Creek county, Okl., dated July 3, 1914, in a suit between Minnie Folk and Page and Josey and others, permitting Page and Josey to possess and operate the leased property for oil and gas, Page and Josey were in exclusive possession of the land in controversy, drilling wells and producing oil, when, on February 15, 1915, the United States, on its own behalf and on behalf of the Creek Tribe of Indians, brought this suit against them to cancel and avoid the enrollment of Thomas Atkins as a Creek citizen, the certificate of allotment and the patents of the land to him, to perpetually enjoin him and all claiming under him from asserting any interest therein, or in the proceeds thereof, and for the appointment of a receiver pending the suit to take possession of the land and to impound and preserve the oil and gas therein for the benefit of the United States and the Creek Tribe. This is a suit in equity, and the only equity pleaded in the complaint was that the Dawes Commission was charged with the duty of determining who were entitled, under the acts of Congress, to be enrolled as citizens of the Creek Nation, that no one was entitled to be so enrolled who was not living on April 1, 1899, that Thomas Atkins was not living on that

day, "that no evidence of any character was produced before, or obtained or had by, said Commission with respect to the right of the alleged Thomas Atkins under said act of Congress to be so enrolled," and that in causing his name to be placed on the roll of Creek citizens by blood the Commission acted arbitrarily and summarily, and without any knowledge, information, or belief that he was in existence or living or dead on April 1, 1899. If the complaint had not contained these allegations it would have stated no ground for the cancellation of the enrollment, the allotment or the patents and hence no ground for any relief by a direct attack in equity, for those muniments of title were conclusive adjudications of Thomas Atkins' right to enrollment and of his title to the land impervious to collateral attack. The complaint contained the further averments, futile to invoke equitable relief unless the averments stated above were established, that the plaintiffs had no knowledge and could not allege whether such a person as Thomas Atkins of Creek Indian blood so enrolled ever existed, but it alleged that if he did he died prior to April 1, 1899, that because there was no evidence or information before the Commission of his qualifications for enrollment the muniments of his title should be swept away, the title to the land should be quieted in the Creek Nation, which owned it before its allotment, and a receiver should be appointed to take possession of the land and to impound and conserve the oil and gas for the benefit of the Creek Tribe during the pendency of the suit.

The answer of Page and Josey denied all the allegations of the complaint tending to disclose any equity in the plaintiffs, alleged that there was evidence of the qualifications of Thomas Atkins for enrollment before the Commission, set forth the defendants' exclusive possession and title, alleged that in reliance upon the enrollment, allotment and patent the defendants in good faith purchased and paid more than $30,000 for their title under Thomas Atkins and had expended more than $200,000 for drilling wells and developing the production of oil from the land without any knowledge or notice of any defect, or claim of defect, in the title of Thomas Atkins under his patents. Nancy Atkins, one of the defendants, who claimed that she was the mother and heir of Thomas Atkins, joined with the plaintiff in the application for the appointment of the receiver. On that application affidavits, testimony, and copies of records occupying more than 400 pages of the printed transcript were submitted to the court. At the close of the evidence Page and Josey offered to give a bond in such amount and with such sureties as the court should approve to account for and pay over to the parties ultimately adjudged entitled thereto, the profits of the oil extracted from the premises during the pendency of the suit, and all damages that might result from their operation, but the court declined to accept any bond and made an order appointing the receiver.

C. B. Stuart, of Oklahoma City, Okl., and E. C. Hanford, of Seattle, Wash., for appellants.

R. C. Allen, of Muskogee, Okl., National Creek Atty., W. P. Z. German, Sp. Asst. U. S. Atty., of Muskogee, Okl. (D. H. Linebaugh, U. S. Atty., and J. C. Davis, Asst. National Creek Atty., both of Muskogee, Okl., on the brief), for appellees.

Malcolm E. Rosser and Napoleon B. Maxey, both of Muskogee, Okl., for appellees Nancy Atkins, Robert L. Rutherford, and James A. Ferguson.

Before SANBORN and CARLAND, Circuit Judges, and TRIEBER, District Judge.

SANBORN, Circuit Judge (after stating the facts as above). [6] In this case there are many defendants, but the defendants in possession of the property and who chiefly contest the appointment of the receiver are Page and Josey, and in this opinion they will be designated as the defendants. These defendants were, and for many months

had been, in the exclusive possession of the land which is the subject of this controversy, exploring it for oil and gas and extracting oil from it under patents and a title fair on their face and adjudged valid, so far as the defect asserted in this case is concerned, the right of Thomas Atkins to enrollment as a Creek citizen by the Dawes Commission, a quasi judicial tribunal, to which, by the Creek Agreement, the Congress and the Creek Tribe intrusted the power and upon which it imposed the duty to decide that question, a tribunal whose jurisdiction of that question and of every other issue it was necessary for it to consider and determine in reaching its decision was conclusive upon all and impervious to collateral attack, either by the Creek Nation, the United States, or any other party in interest. Kimberlin v. Commission of Five Civilized Tribes, 104 Fed. 653, 662, 44 C. C. A. 109, 118; Malone v. Alderdice, 212 Fed. 668, 670, 129 C. C. A. 204, 206. To avoid this incontrovertible rule the Creek Tribe and the United States, for the sole benefit of the Creek Tribe, make this direct attack upon the decision and judgment of the Dawes Commission that Thomas Atkins was entitled to enrollment as a member of the Creek Tribe and upon the patents based on that adjudication by a complaint in equity to avoid and set them all aside on the ground that there was no information or evidence before the Commission to sustain its adjudication.

The claim of the Creek Tribe, the only party plaintiff that has any pecuniary interest in this litigation, is conditioned by the existence of its alleged right to avoid that adjudication and the patents founded on it on the ground that there was no evidence of the qualifications of Thomas Atkins for enrollment before the Commission which adjudged him entitled thereto and no evidence before it that he was living on April 1, 1899. That adjudication, the allotment of this land to Thomas Atkins, and the patents to him were all public records open to the inspection of the Creek Nation from 1903 until the present time, but no attack upon their justice or verity was ever made until this suit was filed in 1915, more than 11 years after the completion of the adjudication, the patents, and the public record thereof. This land was of small value, of but a few dollars an acre, until about 1912 to 1914, when oil was discovered in its vicinity and the defendants purchased their lease, drilled wells in it, and demonstrated its great value for its oil. Wells were being drilled in 1914 and the early part of 1915 on all sides of this land, and to save the oil from being drawn out of the pool beneath by others, the defendants sank four wells in it at a cost of $44,000, were drilling six more at an expense of $11,000 each, had constructed many wooden tanks, had contracted for eight steel tanks at a cost of $11,000 each to hold the oil which the wells were producing much faster than it could be sold or piped away, and had expended and incurred expense in producing and preserving the oil in this land, which amounted in the aggregate to more than $125,000, and had collected in return only about $8,000, when on the application of the plaintiff the court below appointed a receiver of the land, of all the wells, tanks, derricks, piping, casings, and other material of every nature which the defendants owned and had placed upon the land, of all the oil they had produced from and stored upon it, and of all the

uncollected proceeds of the oil they had taken from it and sold. This order was in effect an ejectment of the defendants in possession, not only from the land, but from the improvements which they had made thereon and the oil they had produced therefrom at an expense of more than $125,000 upon a preliminary hearing, and it is difficult to perceive the compelling equity in the Creek Nation requisite to sustain it.

[1] The plaintiffs, however, invoke the familiar rule, applicable alike to the appointment of receivers and to the issue of injunctions, that interlocutory orders on these subjects rest in the sound judicial discretion of the court of original jurisdiction, and that when that court has not departed from the rules and principles of equity established for its guidance its orders in this regard may not be reversed without clear proof that it abused its discretion. American Grain Separator Co. v. Twin City Separator Co., 120 C. C. A. 644, 648, 202 Fed. 202, 206. And they invite discussion of the question whether or not there was any abuse of the discretion of the court in the action it took. But it is only when the trial court has not departed from the rules and principles of equity established for its guidance that the question of abuse of discretion in cases of this character is material. Such a departure renders the action of the court reversible without consideration or decision of the question of abuse of discretion. Now the plaintiffs' ground for this suit is that the Creek Nation has the legal title to this land, but that its title is clouded by the enrollment, the allotment, and the patents, and the equitable relief they seek is the removal of that cloud. The defendants are in possession of the land under a title regular on its face. Counsel for the plaintiffs concede and insist in their brief that they cannot recover in ejectment on their legal title until a decree in equity removes the alleged cloud under which defendants hold a regular title, and yet they have succeeded, by means of an interlocutory order, without any trial of title, in securing in effect a writ of ejectment of the defendants from the land and an injunction against their return.

[2] The possession and use of real estate by those actually in possession has always been jealously protected by English and American courts. Strangers without title may not eject those in possession although the latter have no title. The possessors have the right to a trial of the issue between legal titles by a jury and to continue in possession until the plaintiff by the strength of his own title, not through the weakness of his adversaries', establishes his right thereto. This suit is a confession that the plaintiffs cannot recover possession of this land on the strength of their title. If they could, they would have an adequate remedy at law and their suit must fail. When a plaintiff brings ejectment on a paramount legal title, and the defendant in possession sues in equity on the ground that he has the superior equity, the established rule and general practice is to stay the action at law and hold the defendant in possession until the validity of the defendant's claim in equity is adjudged. And when, as in this case, a plaintiff out of possession brings a suit in equity to avoid the legal title of a defendant in possession which is admittedly superior, it is likewise the general rule and the established practice in equity to refuse to appoint a receiver to deprive the defendant of the possession or of the product

of the property until after a full trial of the equitable claim and the legal titles on their merits.

[3] A court of equity is not without jurisdiction to appoint a receiver of real estate and of its proceeds in the possession of a defendant holding under a title regular on its face. But the cases in which it may exercise that power before a trial of the issues on the merits without a departure from the established principles and practice of equity jurisprudence are exceptions to the general rule, and clear proof of the following necessary facts is indispensable to bring such a case within the exceptions:

First: The fact that there is imminent danger that unless a receiver is appointed the property or its proceeds will be deteriorated in value or wasted during the pendency of the suit. Second: The fact that the plaintiff will suffer irreparable loss from such deterioration or waste. But if the defendant is solvent and abundantly able to respond to any such loss, or if he will give a good bond so to respond, the loss can rarely be irreparable, and the general rule is that a receiver should not be appointed. Third: The fact that on the pleadings and preliminary proofs there is a strong probability that the plaintiff will ultimately prevail on the merits.

[4] But courts of equity are extremely averse to any interference with the possession of a defendant claiming real estate under a legal title. They proceed in such a case with extreme caution and rarely interfere. If it seems doubtful whether or not the plaintiff will recover at the final hearing, or whether or not there is imminent danger that the plaintiff will suffer irreparable loss, the application for a receiver will be denied and in the hearing and decision of such a case all the presumptions are in favor of the defendant in possession under a legal title. A court of equity is sedulous to prevent the successful invocation of its interlocutory injunction, or its appointment of a receiver to perform the function of a successful action of ejectment and at the same time to avoid the trial of titles indispensable to such an action. Kelley v. Boettcher (C. C.) 89 Fed. 125, 129; Lancaster v. Asheville St. Ry. Co. (C. C.) 90 Fed. 129, 133; Sage v. Railroad Co., 125 U. S. 376, 377, 8 Sup. Ct. 887, 31 L. Ed. 694; United States v. American Tobacco Co., 221 U. S. 106, 186, 187, 31 Sup. Ct. 632, 55 L. Ed. 663; Bosworth v. Terminal R. R. Ass'n, 174 U. S. 182, 186, 187, 19 Sup. Ct. 625, 43 L. Ed. 941; Ryder v. Bateman (C. C.) 93 Fed. 16, 28, 29, 31; Trust & Deposit Co. v. Spartanburg Waterworks Co. (C. C.) 91 Fed. 324, 325, 326; Worth Mfg. Co. v. Bingham, 116 Fed. 785, 790, 792, 54 C. C. A. 119, 124, 126; Carson v. Allegany Window Glass Co. (C. C.) 189 Fed. 791, 795, 796, 797, 798, 800; Higginson v. Chicago, B. & Q. R. R. Co., 102 Fed. 197, 199, 42 C. C. A. 254; Moore v. Bank of British Columbia (C. C.) 106 Fed. 574, 579, affirmed 125 Fed. 849, 60 C. C. A. 431; High on Receivers (4th Ed.) §§ 553, 557, 558.

The cases cited by counsel for the plaintiffs neither challenge nor detract from these rules and principles. They either rest on facts so different from those of this case and of other cases which these rules govern that the cases thus cited do not fall under those principles. The cases cited are such as Fink v. Montgomery, 162 Ind. 424, 68 N.

E. 1010, wherein, at the suit of one partner a receiver was appointed of partnership property which another partner was wasting, upon the principle that each partner owns an interest in each and every item of the partnership property; Mead v. Burke, 156 Ind. 577, 60 N. E. 338, wherein a receiver was appointed of property in the hands of a vendor at the suit of a vendee who had completely performed his contract of purchase, upon the principle that in such a case the vendee holds the entire beneficial interest in the property and the vendor holds it simply as trustee for him; and Nevada Sierra Oil Co. v. Home Oil Co. (C. C.) 98 Fed. 674, wherein the plaintiff alleged that he had a valid claim to the property under the public land laws which he had a right to perfect by doing work thereon required by those laws and the defendant in possession was extracting oil from the premises and preventing the plaintiff from doing the work necessary to perfect his title, and the court remarked that if the proof reasonably sustained the plaintiff's claim it would appoint such a receiver, but that the proof was insufficient and the application was denied. That remark was justified because, if the plaintiff had a valid claim to the property and the defendant was unlawfully preventing the doing of the necessary work to perfect it, the claim would be entirely lost unless the court interfered to permit him to comply with the law. Some of the cases cited by eminent counsel are such as Elk Fork Oil & Gas Co. v. Foster, 99 Fed. 496, 39 C. C. A. 615, wherein opposing parties all out of possession had enjoined each other from extracting oil from the premises, but agreed that it was necessary to extract it in order to save it, the court appointed a receiver, there was no appeal from the order appointing him, and the only issue was his compensation, or such as Bettman v. Harness, 42 W. Va. 433, 26 S. E. 271, 274, 278, 36 L. R. A. 566, in which the court, after indulging in a lengthy discussion of the jurisdiction of a court of equity to enjoin the abstraction by the defendant of oil and gas from the land claimed by the defendant, where it is shown the abstraction would result in irreparable loss to him, said, among other things:

"It is true now, as it ever has been, that an injunction will not be granted, where the title is in dispute, previous to the determination of legal rights of the parties unless the threatened act is of such a nature that, should the right to commit it be decided against them, the consequence will be irreparable. * * * Possession is prima facie evidence of title, is sacred, and no court in any form of hearing can take it from him without a hearing without overthrowing the maxim that no man can be condemned in person or deprived of property without a day in court and due process"

—and held that the issue of a preliminary injunction restraining lessees in possession from boring for oil or interfering with the claims of the plaintiff was erroneous. We turn to the facts of the case.

[5] Did the plaintiffs in this case establish the facts that were indispensable to entitle them to the appointment of a receiver to take possession and operate this land that was then in the exclusive possession of the defendants under an apparently regular title? In their complaint they allege that the defendants were wasting the oil they were extracting from the land in controversy, but at the opening of the hearing their counsel announced that they did not expect to be able to prove that there was not a proper management of the property by

the defendants, and they produced no evidence to that effect or to the effect that there was any danger that the defendants would not properly manage it during the pendency of the suit. The evidence on this subject at the close of the hearing was that it was necessary in order to save the oil in this land to drill wells into the stratum in which the oil was found, which was about 2,600 feet below the surface, at least as fast as wells which were being drilled on adjoining lands were sunk, that the defendants had done and were doing this, that in so doing they had sunk four wells, were drilling six more, had produced and were producing so much oil, then 10,000 barrels a day, that it could not be sold and sent away as it came, so that it was necessary to tank it, that they had constructed many wooden tanks, had contracted for eight steel tanks, and had completed three, which had a capacity of 55,000 barrels, and had paid and incurred expenses to the amount of more than $125,000 in producing and saving this oil, while they had collected from the sale of it only about $8,000. There was no evidence that the defendants were insolvent, or that they were not abundantly able to pay and discharge any liability they might incur by their action and the work they had done, and the necessary expenses they had made and incurred, and the testimony in the case established their financial responsibility beyond all doubt or cavil. Not only this, but the defendants offered to the court below, and to this court, to give a bond with sufficient sureties to respond to and discharge any liability they might incur to the parties that should be ultimately adjudged to be entitled to the oil produced by them from this land during the pendency of this suit. There was, therefore, no substantial evidence of any imminent danger of irreparable loss to the plaintiffs by the possession of and the extraction of oil from the premises by the defendants; but the proof was that there was no such danger, and, if there had been, the plaintiffs could have at once removed it by the acceptance of the tendered bond. In view of this fact alone, there was no equity in the appointment of the receiver and the taking of the possession of the wells, tanks, and improvements the defendants had placed upon this land at great expense, of the land itself and its management from them, and turning them over to the officer of the court at the request of plaintiffs, that had done nothing and expended nothing to enhance the value of the land, or to discover, produce, or save the oil. The defendants had the greater equity.

The appointment of a receiver to hold and manage the property and business of owners or claimants necessarily imposes upon the parties in interest the expense of the compensation of the receiver and his counsel and generally other expenses which would be avoided by refusing the appointment. Ordinarily the personal interest of the owners or claimants in possession and their knowledge of and experience with the property and the business enable and cause them to hold and manage the property and the business with less expense and more profit than can a receiver. And where loss to the applicants during the pendency of the suits can be avoided without making such appointments the cases are rare that will warrant them.

Did the plaintiffs establish the fact that there was a strong probabil-

ity that on the merits of this suit they would finally secure the relief they seek? They ask to avoid the deliberate adjudication of the Dawes Commission rendered more than 12 years before their suit was commenced, that Thomas Atkins was entitled in 1901 to enrollment as a Creek Indian, the allotment, and the patents based thereon, upon the ground, not that the Commission was induced by any fraud or misrepresentation to render that judgment, but that there was no information or evidence before the Commission to sustain its conclusion, and especially that there was none to warrant the indispensable preliminary finding (the Creek Agreement, Act March 1, 1901, 31 Stat. 870, c. 676, § 28; Act June 28, 1898, 30 Stat. 502, c. 517, § 21), that Thomas Atkins was living on April 1, 1899. Conceding, but not considering or deciding, that the absence of such information or evidence would be fatal to the judgment of the Commission, a proposition which counsel for the defendants strenuously challenge, was the evidence sufficient to establish that absence? The legal presumption was that there was information and evidence sufficient to sustain the judgment and the patents based upon it. The burden was on the plaintiffs to prove, not that there was insufficient evidence, but that there was no substantial information or evidence, to sustain the judgment. It was a heavy burden, one that could not be borne by the production of a mere preponderance of evidence, for it assails the validity of patents and of the judgment of a quasi judicial tribunal empowered to render it, and neither of them could be successfully challenged without full proofs, clear, convincing, unambiguous, and entirely satisfactory to the court. Maxwell Land Grant Case, 121 U. S. 325, 379, 381, 7 Sup. Ct. 1015, 30 L. Ed. 949; Colorado Coal Co. v. United States, 123 U. S. 307, 317, 8 Sup. Ct. 131, 31 L. Ed. 182.

The only evidence the plaintiffs produced was the affidavit of Mr. Merrick, verified February 25, 1915, more than thirteen years after the event, that in May, 1901, he was a clerk and employé of the Dawes Commission, that on May 23, 1901, he "listed for enrollment as a citizen by blood of the Creek Nation, the name of Thomas Atkins who is enrolled opposite roll number 7913 of the final roll of the Commission and on census card No. 2707, field No. 2774, a true copy of which census card is hereto attached and made a part of this affidavit," that the evidence which induced him to list Thomas Atkins was "the authenticated 1895 roll of Creek citizens, which said roll was used and relied upon by said Commission and by myself as the representative of said Commission in enrolling the name of Thomas Atkins." The census card recorded these facts: That Thomas Atkins was a Creek Indian of half blood 10 years of age, that he was enrolled on the authenticated Creek tribal roll of 1895 as of Euchee township, under the name Thos. Atkins, No. 213, and that on that roll Minnie Atkins was recorded as his mother, and a white man as his father. Mr. Merrick further deposed that he had searched and found in the office of the Dawes Commission, where all such matters are kept, no memorandum or notation indicating that evidence or information was had or received by the Commission on the question whether Thomas Atkins was living or dead on April 1, 1899, and that he had no recollection of

any such evidence or information had or received by himself, although somebody—who it was he said he could not recall—gave him information as to about the time of alleged birth and parentage of the said Thomas Atkins, that the final roll of citizens by blood of the Creek Tribe "was made up from the said census card under my personal supervision and compared and reviewed by some member of the Commission, and the enrollment thus made was approved by the Secretary of the Interior on March 28, 1902."

On the other hand, Mr. Lyons, a witness called on behalf of the defendant, personally appeared before the court and testified that he had a conversation with Mr. Merrick in which the latter called attention to the fact that the census card of Thomas Atkins showed his parentage, his mother and his father, that he could not have got that from the 1895 roll, and Lyons testified that Merrick said that he was satisfied from that fact that there must have been evidence on that question, and that there must also have been evidence or information of some character, which was not made of record, that Thomas Atkins was living on April 1, 1899, and further that he had no independent recollection of the whole matter, except that the enrollment was made in his handwriting. Mr. Lyons was cross-examined by counsel for the plaintiffs and testified that Mr. Merrick said that they must have had information as to the parentage probably from the 1895 roll, and he said also that they must surely have had information as to whether or not he was alive or dead on April 1, 1899, or they would not have enrolled him. Mr. Merrick's testimony was an ex parte affidavit introduced two days before Mr. Lyons testified in open court, and Mr. Merrick was not called to deny that Mr. Lyons' statement of his admissions was correct.

[7] By the act of June 10, 1896, the Dawes Commission was authorized to hear and determine applications for citizenship in any of the Five Civilized Tribes. By that act the rolls of citizenship of those tribes as then existing (and the Creek rolls of 1890 and 1895 were then existing), were confirmed and the Dawes Commission was commanded in determining applications for citizenship to "give due force and effect to the rolls, usages, and customs of each of said nations or tribes." 29 Stat. 339, c. 398, par. 3. By the act of June 7, 1897 (30 Stat. 84, c. 3), the term "rolls of citizenship" as used in the act of June 10, 1896, was construed to mean "the last authenticated rolls of each tribe which have been approved by the council of the nations and the descendants of those appearing on such rolls," and certain other persons specified that had been lawfully added thereto. By the act of June 28, 1898 (30 Stat. 502, c. 517, § 21), the Commission was authorized and directed to take the roll of Cherokee citizens of 1895 and to enroll all those living found on that roll and certain other persons specified, and "to make correct rolls of the citizens by blood of all the other tribes, eliminating from the tribal rolls such names as may have been placed thereon by fraud, or without authority of law, enrolling such only as may have lawful right thereto and their descendants born since such rolls were made." That act further provided that:

"Said Commission shall make such rolls descriptive of the parties thereon, so that they may be thereby identified, and it is authorized to take a census of each of said tribes," (hence the authorized census card in this case) "or to adopt any other means by them deemed necessary to enable them to make such rolls. They shall have access to all rolls and records of the several tribes. * * * The rolls so made when approved by the Secretary of the Interior shall be final and the persons whose names are found thereon, and their descendants thereafter born to them, with such persons as may intermarry according to tribal laws, shall alone constitute the several tribes which they represent."

The act of March 1, 1901 (31 Stat. 869, c. 676, § 28), provided that all citizens who were living on the 1st day of April, 1899, entitled to be enrolled under the act of June 28, 1898, should be placed upon the rolls. The act of June 28, 1898, was not simply an act of Congress. It embodied and ratified the agreement between the Creek Nation and the United States, which was shortly after ratified by the Creek Nation, that the Dawes Commission should make the final roll of the latter's citizens, that for that purpose the Commission should have access to all its rolls and records, and that it might take a census of the nation or adopt any other means by the Commission deemed necessary to enable them to make such rolls. Among the rolls and records of the Creek Tribe, duly authenticated by the approval of the Creek Council, was a roll of citizens made by the tribe in 1890, another made in 1895, the pay roll of that nation for the year 1895, upon which a per capita payment was made to the citizens of the tribe. On the roll of 1890 appeared "Minnie Atkins (Thos. and Mary, 2 children)." On the roll of 1895 appeared the names of Minnie Atkins and Thomas Atkins and the receipt of Minnie Atkins for a payment to herself and also for a payment of a like amount to her as the per capita payment due to her son Thomas Atkins.

The Creek Tribe was a civilized and intelligent people governed by laws made by its own Creek Council which was composed of two bodies, the House of Kings and the House of Warriors, under whose direction the census of its citizens and its rolls of citizenship were made. Noah Gregory testified that in 1889 and 1890, he was town king of Euchee township and a member of the House of Kings, that under the direction of the Creek Council, and as such town king, he made the original census roll of Euchee township, that after he made up this original census roll he reported it to the Creek Council, that the Creek Council appointed a committee of 16 from its membership, which investigated, purged, and corrected that roll and the rolls of the other towns, some 48 in number, then reported the corrected roll to the House of Kings and to the House of Warriors, and that each house separately approved and adopted it, and this roll thus made is the Creek roll of 1890, that he was a member of the House of Warriors when the roll of 1895 was made, and that it was approved by both Houses. Mr. Gregory testified that after he had made up the original census roll of Euchee township for the enrollment of 1890, he called a convention of the people of that township, that the name of each one of those placed upon the original census roll by him was read out in the hearing of this convention, and with the assistance of suggestion and information made at the convention this original census

roll was corrected, and that it was this corrected roll that he reported to the Creek Council, that on his original census roll under No. 26 were written "Minnie Atkins, two children, female," that the word "female" referred to Minnie Atkins, that on the list which he reported to the council, after the town meeting had purged and corrected it, as his original census roll there appeared "No. 22, Marina Atkins and two children, No. 23, Thomas Atkins, No. 24, Mary Atkins," that at the request of the Dawes Commission he examined the list of those the Commission proposed to enroll as Creek citizens from Euchee township in 1901 and 1902, including Minnie Atkins and Thomas Atkins, obtained what information he could concerning them and reported to the Commission regarding that list, that some on the tentative list he discovered had died before April 1, 1899, and he reported that fact to the Commission, together with any other relevant fact he discovered, but that he does not recollect all that he learned or all the information that he gave, that if he had learned that Thomas Atkins was not living on April 1, 1899, he would have reported, as he did regarding others that were on the tentative list of the Commission, that he died before April 1, 1899, but that he made no such report.

As the Commission was required by the acts of Congress to give full force and effect to the authenticated tribal rolls, the usages and customs of each tribe and was by those acts given access to all their rolls and records, the Creek Rolls of 1890 and 1895, on each of which Minnie Atkins and Thomas Atkins as her son were enrolled as citizens of the tribe by blood, constituted not only prima facie, but, in the absence of strong and persuasive countervailing proof, conclusive evidence before the Commission of the right of Thomas Atkins to enrollment as a citizen of the Creek Tribe. In the face of this record counsel for the plaintiffs no longer contend in this court, as they pleaded in the court below, that "no evidence of any character was produced before, or had or obtained by said Commission with respect to the right of the alleged Thomas Atkins under said act of Congress to be so enrolled," but they now argue that, although all the evidence and information disclosed above was before the Commission, there was no evidence before them that Thomas Atkins was living on April 1, 1899. The answer is, first, that the testimony of Merrick and Lyons tends to show that Merrick, who made the census card, had information that he was living before making that card, and made it in reliance upon such information; and, second, that the authenticated Creek roll of 1895 was conclusive evidence that he was living in that year, and, in the absence of any direct evidence before the Commission that he had died, or that he had been in such a dangerous situation that men of reasonable prudence would infer that he had died, prior to April 1, 1899, the conclusive legal presumption was that he continued to live for at least seven years after the making of the Creek roll in 1895, and hence that he was living on April 1, 1899. In the absence of proof of earlier death, or of evidence of unusual danger of such earlier death, the legal presumption is that a live person continues to live for at least seven years. Fidelity Mutual Life Ass'n v. Mettler, 185 U. S. 308, 316, 22 Sup. Ct. 662, 46 L. Ed. 922; Montgomery v. Bevans, 1 Sawy. 653, 17 Fed. Cas. 628, 633, No. 9,735; N. W. Mutual Life

Ins. Co. v. Stevens, 71 Fed. 258, 260, 18 C. C. A. 107, 109; The San Rafael, 141 Fed. 270, 278, 72 C. C. A. 388, 396; Executors of Clarke v. Canfield, 15 N. J. Eq. 119, 122, 123; Lawson on Presumptive Evidence (4th Ed.) rule 43, pages 251, 253, 255; 13 Cyc. 295, 298, note "b."

So it is that all the claims and reasons for the avoidance of the judgment of the Commission and the patents, and for the appointment of a receiver and an injunction on the theory of the original bill, fell disproved by the evidence produced upon the motion for the appointment of the receiver.

But counsel for the plaintiffs presented in that evidence a new issue not set forth in their pleading, which was whether or not there ever was any Thomas Atkins, the son of Minnie Atkins, and whether or not the defendants knew there was no such person before they purchased their title. And counsel now contend that they proved that no such person ever existed and that the defendants were aware of this fact before they became interested in the property in suit. Upon these subjects many witnesses testified. Some of them were weak-willed, dependent, and timorous; some of them were evidently swayed by interest or influence. They testified to occurrences 15 to 20 years before they spoke, and their memories of dates and occurrences were necessarily vague and uncertain. The record convinces that there was an interested and fervent effort on the part of the parties on each side of this litigation to procure favorable evidence for themselves and that much of the testimony introduced is unreliable. Agents of the plaintiffs and of the defendants solicited Minnie Atkins, who seems to have been a timorous, dependent Indian woman, to testify in their favor, and the plaintiffs succeeded in procuring statements from her that she was not the mother of her alleged son, Thomas Atkins, while the defendants obtained statements that he was born and lived her son. At the end of many and continuous solicitations she finally adhered to the latter statement and made affidavit that the former was induced by the overpersuasion of the plaintiffs' agents and her fear of them.

Upon the issue of whether or not Thomas Atkins ever lived, a review of the entire testimony shows it to be conflicting, and that, standing alone, it would have left that issue doubtful. But this testimony is not all the evidence, nor is it the most reliable evidence, upon that issue. There is the Creek tribal roll of 1890, which records Minnie Atkins and two children, Thomas and Mary, there is the Creek tribal roll of 1895, which records Minnie Atkins and Thomas Atkins, there is the receipt of Minnie Atkins upon the pay roll of that year for the payment to her of the per capita allowance for her son Thomas, there is the testimony of the care with which these rolls were made by the town king, corrected by the town meeting, investigated and purged by the committee of the Creek Council, and there is the fact that these rolls were made and approved within 11 years after the alleged birth of Thomas, among the acquaintances of Minnie Atkins, all naturally jealous of and watchful to prevent any undue payment of tribal funds to each other, and there is the fact that under the Creek Agreement the tribe had the right to appear before the Commission and by its agent and its attorney, who during all the enrollment proceedings was un-

der retainer and salary to protect the rights of the tribe, and to prevent the enrollment by the Commission of Thomas Atkins if he was not entitled thereto, and the Creek Agreement that if this was not done the roll of the Commission should be final.

Is it not much more probable that those rolls are right, that Thomas Atkins was living when they were made, and that the people of Euchee township, at whose meetings they were corrected, knew that he was living, and satisfied the officers of the tribe of that fact, than it is that the testimony of witnesses gathered by interested parties to testify to occurrences 20 years behind them tending to show that no such person existed is true? This court will hesitate long to hold on such testimony that Thomas Atkins never existed in the face of these old and hitherto unassailed corrected rolls of the Creek Tribe, and their persuasive evidence of a living Thomas Atkins, the son of Minnie Atkins, when they were made. The proof now before the court that he never existed, that he was a myth, is not clear, unambiguous, convincing or satisfactory to this court.

Nor is there any satisfactory or persuasive evidence that the defendants knew or had notice that Thomas Atkins never existed, before they purchased their lease or title. They had the right to rely and act upon the Creek rolls of citizenship made by the tribe itself and upon the final roll made by the Dawes Commission until they received satisfactory evidence that these rolls were false, and the evidence fails to convince that they ever had such evidence before they purchased.

[8-10] After the court below appointed the receiver, the plaintiffs, with leave of that court, filed an amended complaint, and at the hearing in this court they were permitted to file a copy of it here. In this amended complaint they set forth another ground for the relief they ask. It is, in substance, that the enrollment of Thomas Atkins by the Dawes Commission was induced by the Creek tribal rolls, which as to him were false, that the enrollment of Thomas Atkins on those rolls was fraudulently procured, and that the defendants had notice of these facts before they purchased their titles. Extended consideration of this new basis for relief is pretermitted for two reasons: First, it was not before the court below for its consideration when it appointed the receiver and issued its injunction, and hence it is not pertinent to the determination of the question whether or not there was error in the appointment and issue; second, in so far as this amended complaint was presented to this court to induce its exercise of its jurisdiction in equity to sustain the appointment of the receiver or to appoint another receiver, regardless of the action of the court below, these considerations present themselves. This is a suit in equity. In such a suit the claims of the United States, or of the Creek Tribe, appeal to the conscience of the chancellor with the same, but with no greater or less, force than would those of a private citizen, and, barring the effect of mere delay, they are judicable in a court of chancery, to whose jurisdiction the state or nation or tribe submits them by every principle and rule of equity applicable to the rights of private citizens under like circumstances. State of Iowa v. Carr, 191 Fed. 257, 266, 112 C. C. A. 477, 486; United States v. Stinson, 197 U. S. 200, 204, 205, 25 Sup. Ct. 426, 49 L. Ed. 724; United States v.

Detroit Timber & Lumber Co., 67 C. C. A. 1, 10, 131 Fed. 668, 677; United States v. Chicago, M. & St. P. Ry. Co. (C. C.) 172 Fed. 271, 276; United States v. Chandler-Dunbar Water Power Co., 152 Fed. 25, 26, 27, 37, 38, 40, 41, 81 C. C. A. 221, 222, 223, 233, 234, 236, 237; United States v. Stinson, 125 Fed. 907, 910, 60 C. C. A. 615, 616; Herman on Estoppel, §§ 676, 677; State of Michigan v. Jackson, etc., 16 C. C. A. 345, 351, 69 Fed. 116, 122; United States v. California & Oregon Land Co., 148 U. S. 31, 41, 13 Sup. Ct. 458, 37 L. Ed. 354; Carr v. United States, 98 U. S. 433, 438, 25 L. Ed. 209; Walker v. United States (C. C.) 139 Fed. 409, 411, 412, 413.

The United States has no pecuniary interest in this litigation. The only pecuniary or property interest or equity in the plaintiffs is that of the Creek Tribe, and as the stream cannot rise higher than its source the equities of the United States are no greater and no less than those of the tribe. United States v. Beebe, 127 U. S. 338, 346, 8 Sup. Ct. 1083, 32 L. Ed. 121; French Republic v. Saratoga Vichy Co., 191 U. S. 427, 438, 24 Sup. Ct. 145, 48 L. Ed. 247; State of Iowa v. Carr, 191 Fed. 257, 265, 266, 112 C. C. A. 477, 485, 486; United States v. Detroit Timber & Lbr. Co., 131 Fed. 668, 678, 67 C. C. A. 1, 11; La Clair v. United States (C. C.) 184 Fed. 128, 135, 136; Mountain Copper Co. v. United States, 142 Fed. 625, 629, 73 C. C. A. 621, 625; Chesapeake & Delaware Canal Co. v. United States, 223 Fed. 926, 929, 930, 139 C. C. A. 406, 409, 410, L. R. A. 1916B, 734. Even where equities are equal the defendant prevails. It is only when the case of the complainant appeals to the conscience of the chancellor with the greater force that he will interfere to grant relief, and in equity no one may successfully deny to the damage of another the truth of statements by which he has purposely or carelessly induced another to so change his situation that the assertion of the truth will irreparably or seriously injure him. Hemmer v. United States, 204 Fed. 898, 902, 123 C. C. A. 194, 198; Town of St. Johnsbury v. Morrill, 55 Vt. 165, 169; 2 Pomeroy's Equity Juris. § 739; Illinois Trust & Sav. Bank v. City of Arkansas City, 76 Fed. 271, 293, 22 C. C. A. 171, 193, 34 L. R. A. 518; Paxson v. Brown, 61 Fed. 874, 881, 10 C. C. A. 135, 142; Union Pac. Ry. Co. v. Chicago, R. I. & P. Ry. Co., 51 Fed. 309, 326, 327, 2 C. C. A. 174, 191, 192.

The Creek Tribe made the Creek rolls of 1890 and 1895. By the Creek Agreement (31 Stat. 869, § 28), which it made and ratified, the Creek Tribe contracted with the United States that the Dawes Commission should make the final roll of its citizens and allot them their lands, and that it should base that enrollment on the Creek tribal rolls of 1890 and 1895, and especially upon the latter. It had the opportunity and the privilege to correct and purge its rolls before that tribunal, and it must have had more knowledge and more means of knowledge whether Thomas Atkins was rightly or wrongly enrolled when its tribal rolls were made, and thereafter, while the Commission was sitting, when the acquaintances of Minnie Atkins were living in the tribe and must have known the facts, than the tribe or its members have ever had since. Either purposely or carelessly it failed to correct its roll, if indeed that roll was erroneous, held that roll out to the Commission as correct in the regard here in question, thereby induced that Commission to enroll Thomas Atkins, purposely or care-

lessly held the Commission's roll out as correct, and permitted and induced thereby the allotment of this land to Thomas Atkins, the purchase and improvement of it by the defendants. Between the making of these rolls from 1890 to 1902 and the commencement of this suit a great change in the value of the land, from a few dollars to many thousands of dollars, has occurred, witnesses who knew the facts 16 to 20 years ago must necessarily have died or disappeared, the memory of others has been dimmed with the passage of time, and this tribe first presents its claim that its rolls were fraudulent after all these events, more than 19 years after its last roll was made, and more than 12 years after the final roll of the Dawes Commission became a public record. The equities of the complainants fail to appeal to the conscience of this court with sufficient force to induce it to appoint a receiver for the property in the possession of the defendants, or to sustain the appointment or the injunction already made. The proof in this case is neither clear nor convincing, nor satisfactory that it is probable that the plaintiffs will ultimately recover.

However, this litigation presents claims of some of the parties which have not been material to the decision of the question whether or not the receiver was rightly appointed and the injunction rightly issued, the defendants have offered to give a sufficient bond to protect all parties in interest during the pendency of this suit, and the court is of the opinion that it is wise and equitable to accept and require such a bond. The order of the court will accordingly be that upon the filing in this court within 60 days of the date of the filing of this opinion of a bond with security approved by the judge of the court below in such an amount as shall be fixed by this court on 10 days' notice to be given by Page and Josey to the complainants and the other defendants herein conditioned to account for and pay over to those parties to this suit who shall be finally adjudged to be entitled thereto the profits that have been and shall be derived by them from the land in controversy between March 8, 1915, the date when the receiver was appointed, and the final determination of this suit, to file with the clerk of the court below a verified account of the operation of the property showing generally the expense, the proceeds and the profit thereof between March 8, 1915, and May 1, 1916, on or before August 1, 1916, to file on or before the 25th of each month, commencing on June 25, 1916, such an account of the operation thereof during the preceding month, to pay to the parties ultimately adjudged entitled thereto any damages resulting to them from the negligence or mismanagement of the property, and to abide by and perform the further orders of this court and of the court below in the premises, the order of the court below dated March 8, 1915, appointing the receiver, directing the defendants to deliver the possession of the land, improvements and property to him and enjoining the defendants from operating or interfering with it, shall be in all things reversed and set aside, and this case shall be remanded to the court below for further proceedings not inconsistent with the views expressed in this opinion; and it is so ordered.

CARLAND, Circuit Judge, concurs in result.

WONG YEE TOON v. STUMP, Immigration Com'r.

(Circuit Court of Appeals, Fourth Circuit. May 2, 1916.)

No. 1415.

1. ALIENS ⟸32(8)—CHINESE PERSONS—CERTIFICATE.
A certificate issued to a Chinese person, showing his right to enter and remain in the United States, is prima facie evidence of his right, and he cannot be deported by immigration authorities without substantial evidence showing that he was not entitled to enter and remain.
[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 84; Dec. Dig. ⟸32(8).]

2. EVIDENCE ⟸317(14)—HEARSAY—WEIGHT.
Hearsay evidence of the statement of another Chinese person that petitioner, a Chinese person, admitted as the minor son of a merchant, was not the son of such merchant, is not admissible to establish that fact; the statement not having been made without contradiction in the presence of petitioner or any other person called upon to deny it, so as to become an admission.
[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1187; Dec. Dig. ⟸317(14).]

3. ALIENS ⟸23(2)—CHINESE EXCLUSION—ADMISSION AS MEMBER OF EXEMPT CLASS.
A minor son of a Chinese merchant, admitted as a member of an exempt class, does not forfeit his right to remain in the United States by subsequently working as a laborer.
[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 77; Dec. Dig. ⟸23(2).]

4. ALIENS ⟸32(12)—DEPORTATION OF CHINESE—REVIEW OF PROCEEDINGS OF IMMIGRATION AUTHORITIES.
While the courts will not weigh the evidence on which immigration authorities ordered the deportation of a Chinese person as one not belonging to an exempt class, the courts will review such proceedings, and may reverse them where there is no evidence to sustain the rulings by the immigration authorities.
[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 94, 95; Dec. Dig. ⟸32(12).]

5. ALIENS ⟸32(8)—CHINESE PERSONS—DEPORTATION—EVIDENCE—SUFFICIENCY.
In a proceeding to deport a Chinese person under Chinese Exclusion Act May 5, 1892, c. 60, § 6, 27 Stat. 25, as amended by Act Nov. 3, 1893, c. 14, § 1, 28 Stat. 7 (Comp. St. 1913, § 4320), *held*, that there was no evidence, which is that furnishing or tending to furnish proof of any fact, warranting deportation on the ground that such person was not a member of an exempt class.
[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 84; Dec. Dig. ⟸32(8).]

6. WORDS AND PHRASES—"EVIDENCE."
Evidence is that which furnishes or tends to furnish proof. It is that which brings to the mind a just conviction of the truth or falsehood of any substantive proposition which is asserted or denied.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Evidence.]

Woods, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the District of Maryland, at Baltimore, John C. Rose, Judge.

Petition by Wong Yee Toon against Bertram N. Stump, Commissioner of Immigration, for writ of habeas corpus. From a judgment denying the writ (227 Fed. 247), petitioner appeals. Reversed.

The facts which are not controverted in this case, are in substance these:

The appellant, Wong Yee Toon (who will hereafter be referred to as Toon), came from China to the United States on the steamship Korea, landing in San Francisco, Cal., about October 19, 1913. An inspector for the Department of Labor made an examination of Toon's right to admission, and reported adversely to the Department, but upon an examination by the law section Toon was, on November 7, 1913, admitted to this country as a member of one of the exempt classes by virtue of the fact that he was the minor son of a Chinese merchant, named Wong Que Teung, of Oakland, Cal., and a certificate, dated December 4, 1913, numbered 13,744 was given him, identifying him as the minor son of the said merchant. Wong Que Teung (who will hereafter be referred to as Wong) came to this country in 1901 and was admitted as a merchant, and since that time has been engaged in the mercantile business at Oakland, Cal., and some other places. After the arrival of Wong, a son by the name of Wong Yee Gooey came over from China and was admitted, then Toon came at the date above mentioned, and a little later on another son, Wong Yee Foo, also came to this country and was admitted. The order of the ages as given in the record is Foo 20 years, Gooey 19, and the present appellant 17 years of age.

Some two months after Toon's arrival in this country, having remained in the meantime with the merchant Wong at Oakland, Cal., he went to Baltimore, Md., and took up his abode with a Chinese laundryman by the name of Won or Wong Jim Lee (who will be referred to as Lee), where he was found by the inspector of the Department on the 29th day of December, 1914. It is admitted that Wong was a merchant, and also that he was present in China at the period essential to paternity of Toon.

The inspector, in consequence of declarations alleged to have been made by Lee, information received from persons relative to Toon's working in the laundry, and some other circumstances (all of which will be discussed hereafter) procured to be issued on the 22d day of January, 1915, by an Assistant Secretary of Labor, a warrant for the arrest of Toon on the following grounds: "That he has been found within the United States in violation of section 6, Chinese Exclusion Act of May 5, 1892 [27 Stat. 25, c. 60], as amended by the act of November 3, 1893 [28 Stat. 7, c. 14, § 1 (Comp. St. 1913, § 4320)], being a Chinese laborer not in possession of a certificate of residence; that he has been found within the United States in violation of Rule 9, Chinese Rules, and of the Supreme Court decision on which such rule is based, having secured admission by fraud, not having been at the time of entry the minor son of a member of the exempt classes; and that he has been found within the United States in violation of section 2, Chinese Exclusion Act of November 3, 1893, having secured admission by fraud, not having been at the time of entry a lawfully domiciled exempt returning to resume a lawfully acquired domicile and to follow an exempt pursuit in this country."

An investigation was had, Toon was ordered to be deported, and thereupon he sued out a writ of habeas corpus, which was returned before and heard by his honor, John C. Rose, United States District Judge for the District of Maryland, who affirmed the action of the Department of Labor and dismissed the writ.

The case comes to this court by appeal from this action of the District Judge.

Jackson H. Ralston, of Washington, D. C. (Harold B. Scrimger and Irvin B. Scrimger, both of Baltimore, Md., on the brief), for appellant.

Samuel K. Dennis, U. S. Atty., of Baltimore, Md. (James A. Latane, Asst. U. S. Atty., of Baltimore, Md., on the brief), for appellee.

Before PRITCHARD and WOODS, Circuit Judges, and BOYD, District Judge.

BOYD, District Judge (after stating the facts as above). In order to dispose of the case, it will be necessary in our opinion to consider only the first assignment of error, which is as follows:

"It was an error to dismiss the writ of habeas corpus, as the petitioner is entitled to his liberty."

This brings us at once to the consideration of the proposition as to whether or not there was any evidence to sustain the action of the executive department in ordering the deportation of Toon. Referring to the facts in addition to those found upon the admission of Toon, the learned judge who heard the writ of habeas corpus made this statement:

"All that was really new in the case made at Baltimore is that, very shortly after the boy arrived in California, the alleged father sent him clear across the continent to a laundryman here. The latter's relationship, if any, to either the father or son, is, by petitioner's witnesses, variously and vaguely stated. The statements of the man in question are of such a character as to lead the immigration officials to a conclusion that he is unworthy of belief. No letters have passed between the alleged father and the petitioner, and the former does not claim to have sent for the latter's support during an entire year more than $60. At the conclusion of the hearing, the local immigration authorities decided that he should be deported."

In the investigation upon the arrival of Toon in this country, Wong, the father, and Gooey, the brother, together with Toon himself, testified that he was the son of Wong, the Oakland merchant. The inspector reported against admission on the ground that there were some inconsistencies in the statements of these three witnesses, not as to the paternity of Toon, but as to other matters, pertaining more particularly to the dwellings and locations of houses in the town in China in which these witnesses claimed to have lived; but upon a review of the case, the Department of Labor held that Toon's claim had been established, that he was the minor son of Wong, and was entitled to admission, and a certificate of identity as heretofore stated was issued. The executive authorities now claim that the admission was procured by fraud, in that Toon is not the minor son of a member of one of the exempt classes.

[1] The certificate which Toon holds must be treated, we think, as primary evidence of his right to be here, and in our opinion the executive authorities would not be justified in arbitrarily disregarding its effect. After the certificate is issued, it is our view that the burden is cast upon the government, in case a proceeding is instituted to attack it, to show by testimony which the law recognizes as evidence that it should be annulled before an order for deportation is warranted. Upon the arrival of Toon his claim to admission was investigated, and the Department solemnly adjudged that he was entitled to enter and remain. This, as we have said, cannot be arbitrarily disregarded. It is the privilege of the immigration authorities to prove, if they can,

that the certificate is invalid, and that its issue was procured by fraud; but they are not permitted to treat it as a nullity upon mere suspicion and conjecture. United States v. Chin Len, 187 Fed. 544, 109 C. C. A. 310.

[2-5] It will be observed that in the investigation in Baltimore Toon strengthened the direct testimony as to his paternity, for he not only had the sworn statements of Wong, the alleged father, his brother Gooey, and himself, the three witnesses examined upon that question on his arrival in this country, but in addition he had the sworn statements of his brother Foo, who came to this country since 1913, and also that of Lee, the laundryman. Every one of these witnesses testified under oath that Toon was the son of Wong, the merchant. Yet the circumstances, which the judge below stated were all that was new in the case, are held by the Executive Department to be sufficient to authorize a reversal of the previous adjudication in Toon's favor. Take all of the new elements brought into the case at Baltimore as stated by the court; what do they show? Simply that Toon, after remaining with the Oakland merchant for about two months, was sent to Baltimore, and took up his abode with Lee, the laundryman, and had remained there for about a year, when the investigation took place; that there was no correspondence between the alleged father and Toon during the time; and that so far as appeared the Oakland merchant had sent only $60 to Toon during the time. These are all, save the alleged inconsistencies and contradictions in the statements of Lee, the laundryman, which the court below says were of such a character as to lead the immigration officials to a conclusion that he was unworthy of belief.

It is true that the inspector states that the laundryman, Lee, told him, when he went into the laundry, that Toon was his son; but when Lee came to testify on oath he stated that the youth was the son of Wong, the Oakland merchant, and he also denied that he had told the inspector that Toon was his son. But, take it to be true that Lee made this statement to the inspector, so far as it appears here, it was only hearsay, for there is no suggestion that Toon, or any one who would feel called upon to contradict such statement, heard it. Chief Justice Marshall, in the case of Queen v. Hepburn, 11 U. S. (7 Cranch) 290, 3 L. Ed. 348, laid down the rule with regard to hearsay evidence which is generally accepted in this country, to the effect that hearsay evidence is incompetent to establish any specific fact which is susceptible of proof by witnesses who speak from their own knowledge. In commenting upon this character of testimony the Chief Justice said:

"One of these rules is that 'hearsay' evidence is in its own nature inadmissible. That this species of testimony supposes some better testimony which might be adduced in the particular case is not the sole ground of its exclusion. Its intrinsic weakness, its incompetency to satisfy the mind of the existence of the fact, and the frauds which might be practiced under its cover combine to support the rule that hearsay evidence is totally inadmissible."

There was some testimony to the effect that Toon had been at work in a laundry. Toon himself denied this, as did also Lee and the colored washerwoman who worked for Lee; but, if it be a fact that

he did some work there, it would not affect his right to remain in this country, if he was entitled to admission when he came by reason of the fact that he was a son of a merchant. Ex parte Lam Pui (D. C.) 217 Fed. 456; United States v. Yee Quong Yuen, 191 Fed. 28, 111 C. C. A. 500; United States v. Foo Duck, 172 Fed. 856, 97 C. C. A. 204.

There was some testimony in the investigation relative to the allegation that Toon had been sent to Baltimore to go to school, and that he had not attended any save the Sunday school. Wong testified that the reason that he had sent him to Baltimore to go to school was that the prejudice in California against the Chinese was such that it was not pleasant for a Chinese youth to go to school there, and it was further testified that the reason he had not attended school whilst in Baltimore was that he was not in good health. The learned judge who heard the case seems to have treated this circumstance as of no importance, because he did not mention it as constituting any part of the new matter. To this view of it we readily agree.

Brushing away, therefore, the irrelevant and inadmissible circumstances which were admitted in the case, and taking the only facts which remain, being those stated by his honor who tried the case, save the reference to Lee, the laundryman, we have as the sole basis of the Department's action three facts, to wit: That a short time after Toon's arrival in California, the alleged father sent him clear across the continent to the laundryman here (at Baltimore); that no letters have passed between the alleged father and Toon; and that the alleged father does not claim to have sent for Toon's support during the entire year more than $60.

We are not intending to hold that the weight of the evidence should govern in a case like this, for we fully recognize the law to be that the administrative officers are authorized to deport an alien whenever there is evidence to warrant such action, and the courts have not jurisdiction to interfere in such case; but it is settled by numerous decisions that the courts may supervise the action of the executive authorities in these matters and reverse their rulings when there is no evidence to sustain them.

[6] Evidence is that which furnishes or tends to furnish proof, or, as is said by Mr. Edward Livingstone, it is "that which brings to the mind a just conviction of the truth or falsehood of any substantive proposition which is asserted or denied." We take this quotation from Ex parte Lam Pui (D. C.) 217 Fed. 456. We do not think that the testimony in this case, as affecting the right of Toon to remain after a solemn adjudication that he was entitled to admission as one of an exempt class, possesses the probative value sufficient to dignify it as evidence that he perpetrated a fraud.

When a Chinaman of an exempt class enters this country, intending to remain, he is not indulging a mere privilege accorded him by us, but he is exercising a right which is guaranteed to him by international treaty and the laws of the United States. He cannot be divested of this right upon a charge of fraud unsustained by competent and relevant evidence. We reiterate that we do not find evidence of that character in this record.

It is our conclusion, therefore, that Wong Yee Toon, the appellant in this case, should have been discharged from custody, and that it was error to dismiss the writ of habeas corpus.

Reversed.

WOODS, Circuit Judge. I dissent. The appellant, Wong Yee Toon, a native of China, arrived in San Francisco in October, 1913. He claimed admission as the minor son of Wong Que Teung, a Chinese merchant of Oakland, Cal. The inspector upon investigation reported against his admission; one of his reasons being that in his opinion Toon had not proved the relationship to Teung. The law section of the Department of Labor disagreed with the inspector, and Toon was admitted in November, 1913. About two months afterwards Toon went to Baltimore to live with Won Jim Lee. In January, 1915, a warrant was issued charging Toon with being in the United States in violation of the immigration laws against admission of Chinese. Upon his arrest in Baltimore, Inspector Archibald gave him a full hearing, his counsel participating, and found the evidence sustained the charges made in the warrant. The proceedings before the inspector were first reviewed by Mr. Stump, Commissioner of Immigration, then by Hon. A. Caminetti, Commissioner General of Immigration, then by the Secretary of Labor. All agreed in the conclusion that Toon had obtained admission on the false and fraudulent pretense that he was the minor son of Teung, and that he should be deported. The entire record was then brought before Hon. J. C. Rose, District Judge, under a writ of habeas corpus. Holding that there was in the evidence abundant reason to doubt whether Toon was the son of Teung, Judge Rose dismissed the writ.

The admission of petitioner as a son of Teung, I agree, ought to be regarded prima facie evidence of his right to enter. Liu Hop Fong v. United States, 209 U. S. 453, 28 Sup. Ct. 576, 52 L. Ed. 888; Ex parte Lam Pui (D. C.) 217 Fed. 456. But the right to enter may be afterwards re-examined by the immigration officers, and their conclusion after a fair hearing, when approved by the Secretary of Labor, is final as to all issues of fact. The weight to be given to the fact of admission and all other evidence is for the executive department concerned, and not for the courts. The immigrant may, however, invoke judicial interference in his behalf on the questions of law, whether he has had a fair hearing, and whether the findings of the immigration officers against his right to remain in this country are supported by any substantial evidence. Lewis v. Frick, 233 U. S. 291, 34 Sup. Ct. 488, 58 L. Ed. 967.

It is not denied in the case before us that the hearing was fairly conducted, but it is earnestly contended that there is no substantial evidence supporting the finding that petitioner was not the son of Teung, the Chinese merchant. The evidence should be weighed by the court in view of the difficulty confronting immigration officers in the enforcement of the Exclusion Laws. Evidently the immigrant, especially a Chinaman, has great advantage of the government with respect to direct evidence. If he wishes to come in under false claims, his oath and that of his relations or friends can rarely, if ever, be

met by direct contradiction. The government will hardly ever be able to obtain direct evidence of paternity or other vital matters, and must of necessity rely on contradictions, inconsistencies, and other indirect and circumstantial evidence, if the law is to be enforced. The presumption is that immigration officers will not be arbitrary and unfair, and that they are selected for their intelligence and acquaintance with the manners and customs of the races with whose members they have to deal. They see and hear the witnesses, and may judge of their credibility by their manner and by their racial characteristics and habits. These considerations are suggestive of the greatest caution on the part of the courts in deciding that an immigrant is entitled to remain in this country, contrary to the findings of fact of the immigration officers making the examination, when the findings have been subjected to the scrutiny and have received the approval of higher officers, including the Secretary of Labor.

Here the petitioner relies on his own oath and that of his alleged father and brothers that he is the son of Teung, coupled with the fact that Teung sent $60 for his support while he was in Baltimore. On the part of the government it appears that Toon remained with the man who claimed him as a son but two months after he was admitted. Although he was a mere lad, unacquainted with conditions in this country, and suffering from chills, Teung sent him across the continent to Baltimore to be sent to school by Won Jim Lee, for the alleged reason that the climate would be better for him in his illness. Lee, according to Teung, was a distant relative. Lee represented himself at one time as Toon's father, at another as his uncle, and at another as a distant relative, and he testified that he did not know what was the relationship. No reason is given for expecting the climate of Baltimore to be better for the boy. At the time of the hearing he had been separated from his alleged father and brothers more than a year, and had had no letter or other communication from any of them.

In the application of another son, Yee Gooey, for admission, Teung gave the date of birth of his youngest son, alleged to be the petitioner, as 1897, and his name as Won Yee Chin. In this case he gave the date of Toon's birth as 1896, and his name as Won Yee Toon. There are other circumstances relied on by the inspector and commissioners, but what we have set out seems to be substantial evidence tending to disprove the claim that petitioner is a son of Teung. It is not for the court to say that the finding of the executive officers on the evidence should have been different.

OATES v. UNITED STATES, and three other cases.

(Circuit Court of Appeals, Fourth Circuit. May 2, 1916.)

Nos. 1417–1420.

1. APPEAL AND ERROR ⊂=1053(2)—REVIEW—HARMLESS ERROR.
Even in a jury trial, the admission of incompetent evidence will be regarded as harmless error, if the jury are instructed to disregard it, unless the evidence was so impressive that it probably affected the verdict.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4179; Dec. Dig. ⊂=1053(2); Trial, Cent. Dig. § 977.]

2. CONTEMPT ⊂=66(8)—REVIEW—NEW TRIAL—INCOMPETENT EVIDENCE.
In a contempt case, tried to the judge, the erroneous admission of incompetent evidence does not necessitate new trial, and it is sufficient protection to defendants, if the reviewing court reverse the judgments and direct the trial judge to reconsider the proceedings and indicate what incompetent evidence it disregarded.
[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 213, 215, 232; Dec. Dig. ⊂=66(8).]

3. EVIDENCE ⊂=43(3)—JUDICIAL NOTICE.
The court may take judicial notice of an injunction order which defendants were charged with having violated, and a reference thereto in a judgment in contempt proceedings is unnecessary.
[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 64; Dec. Dig. ⊂=43(3).]

4. CONTEMPT ⊂=66(3)—REVIEW—PRESENTATION OF GROUNDS OF REVIEW IN COURT BELOW—NECESSITY.
Where judgments in contempt proceedings were reversed, and thereafter the trial court on reconsideration indicated what evidence it rejected as incompetent, defendants, if desirous of the rejection of other evidence, should call it to the attention of the court.
[Ed. Note.—For other cases, see Contempt, Cent. Dig. § 229; Dec. Dig. ⊂=66(3).]

5. CONTEMPT ⊂=66(7)—REVIEW—HARMLESS ERROR.
In contempt proceedings, where there were findings showing defendants' guilt, the fact that the trial court made immaterial findings is not prejudicial.
[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 232–237; Dec. Dig. ⊂=66(7).]

6. CONTEMPT ⊂=60(3)—CRIMINAL CONTEMPT—EVIDENCE.
To convict of criminal contempt, the trial court must be convinced of the guilt of accused beyond a reasonable doubt.
[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 185–187; Dec. Dig. ⊂=60(3).]

7. CONTEMPT ⊂=66(7)—REVIEW—FINDINGS.
In criminal contempt, a finding of the trial court on conflicting evidence will not be disturbed on appeal.
[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 232–237; Dec. Dig. ⊂=66(7).]

8. INJUNCTION ⊂=223(2)—VIOLATION—CONTEMPT.
Where all the defendants were enjoined from using threats, force, intimidation, or persuasion to induce an employer's servants to break their contract or leave their work, defendant, who with a number of strikers went on a ferryboat upon which there were employés, with the intention of persuading them to quit, and, if they failed, to fight them, defendant

was guilty of contempt in violating the injunction, though the employés were removed from the boat to avoid friction.

[Ed. Note.—For other cases, see Injunction, Dec. Dig. ⊂⊃223(2).]

9. CONTEMPT ⊂⊃58(3)—PURGING CONTEMPT—MODE OF.

Where defendants did not deny the contempt charged, but merely put in a plea of not guilty and went to trial on that, they did not purge themselves of any contempt in violating the injunction.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 172, 173; Dec. Dig. ⊂⊃58(3).]

10. CONTEMPT ⊂⊃58(3)—PURGING CONTEMPT—MODE OF.

A defendant, who by personal and overt acts violates an injunction, cannot purge himself of his contempt by a denial under oath of the contempt charged.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 172, 173; Dec. Dig. ⊂⊃58(3).]

11. CONTEMPT ⊂⊃68—PROCEEDINGS—IMPOSITION OF COSTS.

Under Rev. St. § 974 (Comp. St. 1913, § 1615), providing that, on every conviction for any offense not capital, the court may in its discretion award that defendant shall pay the costs of the prosecution, costs may be assessed against defendant, convicted in a criminal contempt proceeding, regardless of Judicial Code, § 268 (Comp. St. 1913, § 1245), authorizing punishment by fine and imprisonment.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 238–241; Dec. Dig. ⊂⊃68.]

12. CONTEMPT ⊂⊃66(7)—REVIEW—HARMLESS ERROR—ADMISSION TO BAIL.

In criminal contempt proceedings, where the writ of error was granted and defendants were admitted to bail on the same day sentence was pronounced, they cannot complain that the trial court refused to suspend sentence pending application for a writ of error.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 232–237; Dec. Dig. ⊂⊃66(7).]

13. INJUNCTION ⊂⊃232—CRIMINAL CONTEMPT—SENTENCE.

In proceedings for contempt for violating an injunction, the sentence is within the discretion of the trial court.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 519–528; Dec. Dig. ⊂⊃232.]

In Error to the District Court of the United States for the Northern District of West Virginia, at Philippi; Alston G. Dayton, Judge.

James Oates, Frank Ledvinski, Hiram Stephens, and Fanny Sullens were found guilty of contempt in violating an injunction, and they bring error. Affirmed.

See, also, 223 Fed. 1013, 139 C. C. A. 389.

John C. Palmer, Jr., and Joseph R. Curl, both of Wheeling, W. Va., for plaintiffs in error.

Stuart W. Walker, U. S. Atty., of Martinsburg, W. Va., and John A. Howard, of Wheeling, W. Va., for the United States.

Before KNAPP and WOODS, Circuit Judges, and BOYD, District Judge.

WOODS, Circuit Judge. In these contempt proceedings the plaintiffs in error, defendants below, were found guilty of violation of a temporary restraining order of September 29, 1913, made in the case

of West Virginia-Pittsburgh Coal Company v. John White et al. The tenor of the order was to enjoin interference with plaintiff's business by using threats, force, intimidation, or persuasion to induce its employés to break their contracts or leave their work, or by using like means to induce any person to refuse to accept employment with plaintiff, and to enjoin trespassing on plaintiff's premises for the purposes above indicated. The District Judge made specific findings of a number of acts of disobedience of the order by each of the parties charged, and the sentence imposed on each defendant was the payment of costs and imprisonment for six months.

This court reversed the judgment for the following reasons: First. Incompetent evidence was received; although the District Judge recited in his decree that his findings were based on "the legal evidence produced at the trial, rejecting all improper and irrelevant parts thereof," it was impossible for this court to say what testimony the District Court ultimately rejected, and whether any of the incompetent testimony influenced his findings as to the extent of the punishment inflicted. Second. The District Judge, as one of the grounds of his findings, took judicial notice of certain propositions of law laid down by the District Court in the case of Hitchman Coal & Coke Co. v. Mitchell et al., 202 Fed. 512, which were afterwards held by this court to be erroneous. Third. The District Court imposed a general sentence for the separate acts of contempt alleged and found against the defendants, whereas, under the rule laid down in Gompers v. Buck's Stove & Range Co., 221 U. S. 418, 31 Sup. Ct. 492, 55 L. Ed. 797, 34 L. R. A. (N. S.) 874, the punishment for the different offenses should have been so separated that this court could analyze the evidence and determine which, if any, of the charges were sustained. It was accordingly adjudged that:

"The judgment of the District Court must be reversed, and the causes remanded, so that the District Judge may reconsider them, indicating in his findings the evidence rejected as hearsay, announcing his conclusions of fact in view of the judgment of this court in Hitchman Coal & Coke Co. v. Mitchell et al., supra, and imposing sentence in accordance with the view of the Supreme Court of the United States in Gompers v. Buck's Stove & Range Company, supra."

At a subsequent hearing the District Court indicated plainly the testimony struck out as incompetent, and on the remaining evidence made the following definite findings of violations of the order of injunction against the plaintiffs in error:

"That the defendant James Oates did, by establishing and maintaining a camp near the West Virginia-Pittsburgh Coal Company's Locust Grove mine, occupied by turbulent, disorderly men, intimidate the said company employés at said mine, in violation of the injunction and restraining order, with full knowledge of said injunction.

"That the defendant James Oates did, at the strikers' headquarters at Wellsburg, advise and incite the strikers there assembled to prevent the employés of the West Virginia-Pittsburgh Coal Company from working at the La Belle mine, by assaulting and beating them, and he did thereby incite the said strikers to acts of violence in violation of the injunction and the restraining order, with full knowledge of said injunction.

"That the defendant Hiram Stephens did, in company with the other strikers, follow a number of the employés of the West Virginia-Pittsburgh Coal

Company's employés to the ferryboat at Wellsburg, when they were returning from work at the said company's mine, and attempted to intimidate them, in violation of the injunction, and that he then knew of the said injunction.

"That the defendant Hiram Stephens did also participate in a procession of 150 or more men and women carrying a flag and singing ribald songs, who marched from Wellsburg to the West Virginia-Pittsburgh Coal Company's mines at Colliers, known as its Locust Grove mine, for the purpose of intimidating said company's employés employed at the said mine, in violation of the injunction, and that he then knew of the injunction.

"That the defendant Frank Ledvinski did, at the strikers' headquarters at Wellsburg, advise the strikers there assembled to prevent the employés of the West Virginia-Pittsburgh Coal Company from working at its La Belle mine, by assaulting and beating them, and he did thereby incite the said strikers to acts of violence in violation of the injunction and restraining order, and with full knowledge thereof.

"That the defendant Fanny Sullens led a mob of about 150 men to a road leading to the mine of the West Virginia-Pittsburgh Coal Company, known as the Gilchrist mine No. 3, for the purpose of intercepting said company's employés and assaulting them, in violation of the injunction, and that she then knew of said injunction."

Fanny Sullens was found guilty of the following charge also:

"The said Fanny Sullens has, during nearly all of the time the said restraining order and the said temporary injunction has been in force, with full knowledge of the said restraining order and of said temporary injunction, resorted to the camp maintained by James Oates and others near your petitioner's Locust Grove mine at Colliers, Brooke county, W. Va., and has aided in inciting of force in the camp there, to force, violence, threats, intimidation, and assaults against your petitioner's employés at its said mine, and against other mine workers desiring to enter your petitioner's service at its said mine. The said Fanny Sullens has also been during nearly all of the said time with James Oates and others, aiding him, and has aided and assisted them, in inciting a force of men at Wellsburg, W. Va., to resort to force, threats, violence, intimidation, and actual assaults against your petitioner's employés at its two mines near Wellsburg, W. Va., and against other mine workers desiring to enter the service of your petitioner at its said two mines near Wellsburg."

The court then sentenced each of the defendants to imprisonment for six months and payment of costs; a separate sentence being imposed for each offense found. The marshal was directed in the execution of the sentences to allow credit for the time which each of the defendants had been imprisoned under the sentences passed on April 25, 1914, set aside on writ of error.

[1, 2] By the first assignment of error the point is made that, this court having found when the cases were here before that incompetent evidence was admitted, the error could be corrected only by a new trial, and that the judgment of this court should have been construed as requiring a new trial. It is established by authority from which there is no dissent that even in a jury trial admission of incompetent evidence will generally be regarded harmless error, if the jury are instructed to disregard it. N. Y. & W. R. Co. v. Madison, 123 U. S. 524, 8 Sup. Ct. 246, 31 L. Ed. 258; Hopt v. Utah, 120 U. S. 430, 7 Sup. Ct. 614, 30 L. Ed. 708; Turner v. Am. S. Co., 213 U. S. 257, 29 Sup. Ct. 420, 53 L. Ed. 788. The exception to this rule is that the incompetent evidence will be regarded harmful, notwithstanding its subsequent withdrawal from the jury, if it was so impressive that it probably remained on the mind of the jury and influenced their finding.

Hopt v. Utah, supra; Armour v. Kollmeyer, 161 Fed. 78, 88 C. C. A. 242, 16 L. R. A. (N. S.) 1110; Chicago Ry. Co. v. Newsome, 174 Fed. 394, 98 C. C. A. 1; Knickerbocker T. Co. v. Evans, 188 Fed. 549, 110 C. C. A. 347. For a greater reason, when a case is tried without a jury, the error of admitting incompetent evidence will be regarded harmless, if it is rejected and excluded by the judge before the decision is made. The only valid ground of complaint was the failure of the District Judge to indicate the particular testimony rejected. A new trial was not necessary to correct that error, for the only purpose of the correction was to enable this court to review the findings of the District Court more intelligently.

Indeed, had the admission of incompetent testimony been the only matter involved when the cases were here before, this court would not have been justified in sending the cases back for the correction of that error; it would have been our duty to review the record and decide whether there was sufficient competent testimony to support the judgments. When a judge hears a case without a jury, he is supposed to act only on proper evidence, and if on review it is found that the evidence properly admitted justifies the decree it ought to be affirmed, and if not it ought to be reversed. Weems v. George, 13 How. 196, 14 L. Ed. 108; Mammoth Min. Co. v. Salt Lake Machine Co., 151 U. S. 447, 14 Sup. Ct. 384, 38 L. Ed. 229; West v. East Coast Cedar Co. (C. C.) 110 Fed. 725; Streeter v. Sanitary Dist. of Chicago, 133 Fed. 124, 66 C. C. A. 190; Ware v. Pearsons, 173 Fed. 878, 98 C. C. A. 364. In all these and many other cases the rule laid down by Chief Justice Marshall in Field v. United States, 9 Pet. 202, 9 L. Ed. 94, has been followed:

"As the cause was * * * not tried by a jury, the exception to the admission of evidence was not properly the subject of a bill of exceptions. But if the District Court improperly admitted the evidence, the only effect would be that this court would reject that evidence, and proceed to decide the cause as if it were not on the record. It would not, however, of itself constitute any ground for a reversal of the judgment."

The wisdom of the rule that a new trial is not to be granted because of the admission of incompetent evidence, when the trial is by the judge without a jury, is forcibly illustrated by the cases now before us. The testimony had been taken by the District Judge, and he had made his findings on what he regarded the competent testimony. Had this court determined that certain testimony should have been excluded and the cases sent back for a new trial, the parties would have been put to the expense and trouble of producing all of the witnesses before the same judge, who would have excluded the testimony found by the appellate court to be incompetent. It is manifest that the same result was effected by striking from the record as it stood all of the incompetent evidence and leaving the competent evidence for consideration. Any impression made by the incompetent evidence could not have been better effaced by a new trial than by excluding it from consideration.

The action of this court in directing that the District Judge indicate the testimony designated as incompetent was taken in abundance, if not excess, of consideration for the rights of the defendants, because the liberty of citizens was involved, and because there were findings of

fact requiring reconsideration and restatement by the District Judge before passing sentence. There was no reason for a new trial, and no principle of law would have justified it.

[3] By the next assignment of error it is charged that in saying that the bill and orders in West Virginia-Pittsburgh Company v. White et al. "are now made a part of these findings of fact," the trial judge meant to take the allegations of the bill as evidence. The misapprehension of counsel is obvious. The court only meant to refer to the existence of the bill and orders as the basis of the contempt proceedings. Even that reference to the records was unnecessary, since the court was authorized to take judicial notice of them. Schwartz v. United States, 217 Fed. 866, 133 C. C. A. 576.

[4] The third assignment of error is as follows:

"The court erred in admitting to hearing of the trial judge during the trial of this case a large amount and mass of irrelevant, improper, and prejudicial evidence, the admission of which evidence tended to prejudice and improperly affect the mind of the trial court and to interfere with a fair consideration of all the legitimate evidence in the case."

As we understand, this means that the court should have rejected portions of the testimony in addition to that which was rejected. It is sufficient to say that the District Judge, in disposing of the cases and pronouncing judgment, indicated plainly the portions of the testimony rejected as incompetent. Any other portions of the testimony, which counsel thought should be rejected, should have been called to the attention of the court, and the point raised by exception.

[5] Even if there had been findings of fact not relevant and pertinent to the charges against the defendants, as charged in a general way in the fourth assignment, such findings could not be prejudicial.

[6, 7] To convict in a case of criminal contempt, the trial court must must be convinced of the guilt of the accused beyond a reasonable doubt; but when there is evidence tending to show guilt the finding of fact by the District Court cannot be reviewed by this court. Bessette v. Conkey Co., 194 U. S. 338, 24 Sup. Ct. 665, 48 L. Ed. 997; Schwartz v. United States, supra. While there was conflict of evidence, there could be no serious claim of absence of evidence supporting the specific findings against James Oates, Fanny Sullens, and Frank Ledvinski.

[8] The contention was seriously made, however, that there was no proof of the first finding against Hiram Stephens. The testimony was that Stephens and several other strikers went on the ferryboat on which a number of the employés of the Coal Company were to cross the Ohio river, with the intention of persuading them to quit, and, if that failed, to fight them, and that on this demonstration of the strikers, but before they had commenced to persuade or threaten by words, the foreman called his men off the boat. The demonstration was made as a method of persuasion or intimidation of the company's employés to induce them to quit work, and it was clearly so understood by at least one of the company's employés, the foreman in charge of its men. The participation of Stephens in this expedition and demonstration was therefore a violation of the terms of the injunction.

[9] The ground upon which the defendants mainly rely for reversal

is that they purged themselves of the contempt by a sworn denial of the essential elements of the offenses charged. Numerous authorities, commencing with Blackstone, are cited in support of the position. According to these authorities, in criminal contempt the defendant was first to be interrogated or allowed to put in his formal answer denying the contempt charged. The denial under oath purged the contempt, and if the oath turned out to be false the only remedy was an indictment for perjury. The defendants did not bring themselves within this ancient rule, since they did not put in answers denying the contempt charged, but, on the contrary, merely put in the plea of not guilty and went to trial on that. In re Savin, 131 U. S. 267, 9 Sup. Ct. 699, 33 L. Ed. 150; Kirk v. United States, 192 Fed. 273, 112 C. C. A. 531. Besides, the point was not made by an exception.

[10] But, waiving all that, the Supreme Court of the United States has expressly held that the rule contended for has no application where the charge, as in these cases, is one of personal and overt acts. United States v. Shipp, 203 U. S. 563, 27 Sup. Ct. 165, 51 L. Ed. 319, 8 Ann. Cas. 265; In re Savin, supra; Kirk v. United States, supra; United States v. Huff (D. C.) 206 Fed. 700.

[11] The next position taken is that the imposition of sentences of imprisonment, with payment of costs, was contrary to section 268 of the Judicial Code (Comp. St. 1913, § 1245) which authorizes punishment of contempt by fine or imprisonment. The contention is that both imprisonment and fine cannot be imposed, and that the requirement of payment of costs is the imposition of a fine. We think section 974 of the Revised Statutes is conclusive in favor of the right of the trial judge to require payment of costs in all criminal proceedings, not as a fine, but as an incident of the judgment of conviction. It provides:

"When judgment is rendered against the defendant in a prosecution for any fine or forfeiture incurred under a statute of the United States, he shall be subject to the payment of costs; and on every conviction for any other offense not capital, the court may, in its discretion, award that the defendant shall pay the costs of the prosecution."

While not deciding the point, this view is strongly intimated by the Supreme Court. In re Swan, 150 U. S. 637, 14 Sup. Ct. 225, 37 L. Ed. 1207. The Circuit Court of Appeals of the Eighth Circuit has expressly decided the point contrary to the position of the defendants. Whitworth v. United States, 114 Fed. 302, 52 C. C. A. 214.

[12] Finally, error is assigned in the refusal of the court to suspend sentence and admit the defendants to bail pending the application for a writ of error. The objection is without substance, since the writ of error was granted and the defendants were admitted to bail on the same day the sentence was pronounced. The rule on the subject is thus settled in Hudson v. Parker, 156 U. S. 277, 15 Sup. Ct. 450, 39 L. Ed. 424:

"The statutes of the United States have been framed upon the theory that a person accused of crime shall not, until he has been finally adjudged guilty in the court of last resort, be absolutely compelled to undergo imprisonment or punishment, but may be admitted to bail, not only after arrest and before trial, but after conviction and pending a writ of error."

See In re Claasen, 140 U. S. 200, 11 Sup. Ct. 735, 35 L. Ed. 409; Hardesty v. U. S., 184 Fed. 269, 106 C. C. A. 411; Ex parte Harlan (C. C.) 180 Fed. 119, affirmed 218 U. S. 442, 31 Sup. Ct. 44, 54 L. Ed. 1101, 2 Ann. Cas. 849; 2 Foster's Fed. Practice, 1652.

[13] It is hardly necessary to say that the sentences were within the discretion of the District Judge.

The record shows that the proceedings were conducted with the utmost care and pains, and rigid scrutiny of it discloses no error.

Affirmed.

TRUJILLO & MERCADO v. SUCCESSION OF RODRIGUEZ.

(Circuit Court of Appeals, First Circuit. April 18, 1916.)

No. 1139.

1. WATERS AND WATER COURSES ⟸213—EXTENT OF RIGHT TO USE OF WATER —CONSTRUCTION OF GRANTS.

Decrees of the courts of Porto Rico affirmed, which held that two owners of land on a river both acquired their rights to the use of water therefrom through grants or concessions of the Executive Council, and that under such grants and the local statutes the lower proprietor was not given the right to the full amount specified in his grant under all conditions of water to the exclusion of the upper proprietor, and was not entitled to an injunction to enforce such claimed right.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 304; Dec. Dig. ⟸213.]

2. APPEAL AND ERROR ⟸1008(1)—REVIEW—FINDINGS OF FACT.

In the federal courts findings of fact will not be disturbed by an appellate court unless clearly shown to be erroneous.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3955, 3956; Dec. Dig. ⟸1008(1).]

3. COURTS ⟸406(1)—FEDERAL COURTS—AUTHORITY OF LOCAL DECISIONS—PORTO RICO.

The principle of the rule of the federal courts, that decisions of the highest court of a state relating to such matters of local law as the construction of the Constitution and statutes of the state and the powers of its municipalities are controlling so long as their application involves no infraction of rights secured by the federal Constitution or laws, applies to the decisions of the Supreme Court of Porto Rico construing local statutes and concessions.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1103; Dec. Dig. ⟸406(1).]

4. WATERS AND WATER COURSES ⟸87—USE OF WATER—INJUNCTION.

To justify a perpetual injunction in respect to the use of the waters of a public river, the right must be clearly proven and definitely established.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 77–81, 83, 89, 90; Dec. Dig. ⟸87.]

Appeal from Supreme Court of Porto Rico.

Suit in equity by Trujillo & Mercado against the succession of Blas Rodríguez. Decree for defendant, and complainants appeal. Affirmed.

Hollis R. Bailey, of Boston, Mass. (Antonio F. Castro, of Ponce, P. R., on the brief), for appellants.

José A. Poventud, of Ponce, P. R., for appellee.

Before DODGE and BINGHAM, Circuit Judges, and ALDRICH, District Judge.

ALDRICH, District Judge. In this case the plaintiffs ask for judgment and a perpetual injunction, and we have to consider the water rights of owners whose lands border upon the waters of the Guayanilla river, in Porto Rico.

The questions raised by the record do not relate to any supposed natural rights of riparian owners, but, with the single exception of a question of right by user, to rights based upon government concessions or franchises.

The questions of law and fact have been passed upon by the two local courts of Porto Rico, and while those courts were not created in the same way that the courts of our states were (the local District Court being appointed by the Governor with the advice of the executive council, the Governor having been appointed by the President with the advice and consent of the Senate, and the Chief Justice and the associate justices of the Supreme Court of Porto Rico having been appointed by the President with the advice and consent of the Senate, under the Act of Congress of January 28, 1915, U. S. Stat. at Large, vol. 38, p. 803, c. 22, annexing Porto Rico to the First Circuit), we accept the case and deal with it upon the same theory as that upon which the Supreme Court of the United States accepts and deals with cases coming up upon appeal from decisions of the highest courts of our various states.

[1] The plaintiffs, Trujillo & Mercado, are an agricultural firm, and own a plantation consisting of certain farms called "Rufina," "Faro," and "San Colombano." Trujillo & Mercado are an agricultural partnership which claims that it has succeeded to earlier rights granted to Guillermo Tirado, as the former owner of "Faro" and "San Colombano," and to Dionisio Torres, as the former owner of the estate of "Rufina."

The property of the defendant, succession of Blas Rodríguez, is in the ward of Jagua Alta, with one of its sides bordering upon the river, above the properties of the plaintiffs.

Cane is the principal product of all the properties in question, and there was a factory, or factories, on some of the properties. It is understood that the waters were taken from the river by the contending parties chiefly for purposes of irrigation, though it appears from the record that some part of it was used in connection with the running of the Rufina factory.

We do not understand that any substantial part of the water taken from the river was turned back into its channel; the water being used, for purposes of irrigation, was absorbed by the earth. This being so, the case does not present questions like those raised by riparian owners who under a right, which is pretty nearly a natural right in certain jurisdictions, may take water from rivers for manufacturing purposes, returning it to the channel without substantial diminution, that it may be used in turn by riparian owners below. Nor does it present questions altogether like some of those raised and decided in respect to the waters of the rivers of our Western states, where waters are diverted in some instances under riparian rights, and in others under

grant for purposes of irrigation, and where rights between riparian owners depend upon the fact of reasonableness of use.

It was probably not the rule of Porto Rico, under the civil law, that a riparian owner might divert the entire waters of a public river, or that he might acquire a right to do such a thing by user, neither was it the common law that such a thing might be done. Water rights under our common law and statutory system depend largely upon the character of the river, character of adjacent lands, and the uses to which the waters are adapted and may be appropriated.

We assume that the river in question was one of a public character in the sense that its size was such as to make it subject to certain phases of public consideration. Indeed, the plaintiffs' position in respect to user and prescriptive right is based in one phase, upon article 149 (Rev. St. & Codes 1913, § 2535), of the Statutes and Codes of Porto Rico, in force March 9, 1911, which relates to public waters.

In 1907, the Executive Council conceded to Blas Rodríguez the right to take 40 liters per second from the waters of the River Guayanilla, and in 1908 the Executive Council granted to the plaintiff, under certain reservations, the right to take 183½ liters per second. Both of these grants or concessions were without prejudice to greater rights, and that of the plaintiffs had reference to relative rights.

The plaintiffs' broad contention is that they held old concessions supplemented by user, which gave them prior and superior rights, and if they failed to establish this, that they were at least to have the 183½ liters under all conditions if there was that much water in the river.

The local courts treated their old concession as not definitely proven, and their asserted right by user was not accepted as established, and, therefore, in effect, not within the meaning of article 190 of the Law of Waters (Rev. St. & Codes 1913, § 2576); and they viewed their later concession of 1908, which was without prejudice to prior rights, as not so far absolute, in the equitable sense, as to give them the 183½ liters under all conditions of water, regardless of the 40 liters conceded to Blas Rodríguez in 1907, on the river above.

If the plaintiffs' contention were to be broadly sustained, it would give them the entire use of the waters of the river at certain seasons and under certain drought conditions when the water is most needed by all.

It is to be supposed that the statute in question would not authorize an acquirement of the exclusive right to all the waters of a public river in one single ownership, under the doctrine of user. This, apparently, was the view of the Supreme Court of Porto Rico, and we think it the correct view.

The real question in the case relates to the quantity of water which the defendant may take from the Guayanilla river, and, while that is the immediate question, it is, of course, one subject to being influenced by the rights and uses of the plaintiffs in the waters of the river below.

The plaintiffs' claim is based upon the idea that they are entitled to have the exclusive right of all the waters of the river when needed for their purposes, and that they have this right either through the doctrine of user, or under their franchises or concessions.

Apparently the direct question of fact of reasonableness of use as between riparian owners was not directly raised, yet the District Court, it is to be inferred, had that question in view when it said it would be against all principles of law and justice to establish the plaintiffs' claim and perpetually enjoin the defendant.

The Porto Rican courts, after rejecting the idea of exclusive right by user, dealt with the controversy as one involving relative rights under concessions or franchises granted by the Porto Rican authorities. Whether this local view was originally based upon the idea of the civil law, or not, is quite immaterial, because it does not conflict at all with the law which obtains in some of our states and territories in respect to irrigation, and because under our system the right to take water and use it for purposes of irrigation is subject to regulation by the proper authorities.

The parties to this controversy, the administrative authorities, and the courts as well, apparently accepted the authority to grant concessions and franchises, authority formerly exercised by the Minister of the Interior and now by the Executive Council, as administrative and regulatory, and regulations thereunder, as in no sense conclusive of the rights of the parties; obviously deeming controversies as to ultimate substantive rights, in respect to waters, as something for judicial investigation and determination.

This is true as to the parties, because they both went before the administrative authorities to have the quantity of water regulated, and the plaintiffs, Trujillo & Mercado, not being satisfied with the uses made by the defendant, succession of Blas Rodríguez, instituted a proceeding in court, setting forth the full measure of their rights as they claimed them, and asking for an injunction.

The local courts of Porto Rico disposed of one phase of the case upon the ground that the old concession as claimed by the plaintiffs was not proven, and under their interpretation of the statutes that the plaintiffs had utterly failed to establish an exclusive right to the waters of the river.

It is quite reasonable to assume that the conclusion of both the District and Supreme Courts, under their interpretation of the local statutes and the concession or franchise granted to the defendant, involved a finding of fact that the uses exercised by him upon the river above were not so far unreasonable, when viewed relatively with respect to the rights of the plaintiffs upon the river below, as to justify a judgment and perpetual injunction against him.

Under the well-recognized rule which obtains in this court, in respect to findings of fact coming up from the federal District Courts, and which is supported by numerous decisions not necessary to cite, and under the rule existing in the Supreme Court that findings of fact in courts below will not be disturbed upon review unless found to be clearly erroneous, we see nothing in the record and evidence which would justify us in reversing the conclusion of the two local courts of Porto Rico. On the contrary, the situation would seem to be such that it would be inequitable to grant an injunction which would give the landowner below the exclusive use of the waters of the river at a

time when some part of its waters were needed by those above. In respect to such a river, unless a superior right, through grant or otherwise, is clearly and definitely shown, it would seem that a just distribution of its waters would be the more equitable view, and that appears to be the one which controlled the local courts.

[2] As to considerations which govern with respect to a review of questions of fact, it is quite sufficient to refer to a recent decision of the Supreme Court of the United States, where it is said:

"The rule is well settled that a finding of this nature will not be disturbed upon review here unless clearly shown to be erroneous." Bank of Athens v. Shackelford, Trustee, 239 U. S. 81, 36 Sup. Ct. 17, 60 L. Ed. 158.

See, also, Villanueva v. Villanueva, 239 U. S. 293, 36 Sup. Ct. 109, 60 L. Ed. 293; Washington Securities Co. v. United States, 234 U. S. 76, 78, 34 Sup. Ct. 725, 58 L. Ed. 1220; Stuart v. Hayden, 169 U. S. 1, 14, 18 Sup. Ct. 274, 42 L. Ed. 639.

[3] So far as this case is concerned with questions relating to the interpretation of Porto Rican statutes and concessions, we are governed by the principle of the long-established rule obtaining in the Supreme Court of the United States in respect to questions of interpretation raised upon appeal, and by writ of error, from the highest courts of the various states, and the rule is this: That the decisions of the highest court of a state relating to such matters of local law as the construction of the constitution and statutes of the state, and the powers of its municipalities, are controlling so long as their application involves no infraction of right secured by the Constitution of the United States, or its laws. Trust Co. v. City of Omaha, 230 U. S. 100, 33 Sup. Ct. 967, 57 L. Ed. 1410; Smiley v. Kansas, 196 U. S. 447, 455, 25 Sup. Ct. 289, 49 L. Ed. 546; City of Pomona v. Company, 224 U. S. 330, 343, 32 Sup. Ct. 477, 56 L. Ed. 788; Villanueva v. Villanueva, 239 U. S. 293, 299, 36 Sup. Ct. 109, 60 L. Ed. 293.

[4] It is a principle of equity that to justify a perpetual injunction in respect to the use of the waters of a river that the right must be clearly proven and definitely established. The Porto Rican courts evidently looked upon the plaintiffs' case as one not answering the requirements of this principle of equity. The District Court of Porto Rico dismissed the application for a perpetual injunction, and that judgment or decree was affirmed by the Supreme Court of that Island, and we see no reason for disturbing the result.

We think the affidavit of José Trujillo Piza, against which no counter affidavits were directed, should be accepted as establishing the amounts or values in controversy sufficient to create the right of appeal.

The judgment or decree of the Supreme Court of Porto Rico is affirmed, and the appellee recovers costs of this appeal.

AMERICAN TEMPERANCE LIFE INS. ASS'N OF CITY OF NEW YORK v. SOLOMON et al.

(Circuit Court of Appeals, Third Circuit. June 12, 1916.)

No. 2073.

1. INSURANCE ⊂668(6)—LIFE INSURANCE—ACTIONS—JURY QUESTIONS.
In an action on a life policy, where the defense was insured's false answers to questions in the application as to his age, use of intoxicating liquors, and rejection of any previous application for insurance, the court properly decided as a matter of law that answers to such questions were material to the risk, but left to the jury the question whether the answers given were false.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1737–1740, 1758–1760; Dec. Dig. ⊂668(6).]

2. INSURANCE ⊂655(2)—LIFE INSURANCE—EVIDENCE—MATERIALITY.
Where the application for a life policy denied that insured had ever been rejected by any other company, the question whether insured could read or write is immaterial on the question of the binding force of the representation; but, in determining whether insured applied for a policy in another company, the question whether he could read or write, and so understood that an agent was making application for him in a different company, is material.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1677, 1680, 1681, 1685; Dec. Dig. ⊂655(2).]

3. APPEAL AND ERROR ⊂1064(1)—HARMLESS ERROR—INSTRUCTIONS.
Error in instructions on the materiality of representations in the application for a life policy relating to insured's age and use of intoxicants does not warrant reversal, where the answers, if false, were not such as to avoid the policy.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4219; Dec. Dig. ⊂1064(1); Trial, Cent. Dig. §§ 475, 525.]

In Error to the District Court of the United States for the Western District of Pennsylvania; Charles P. Orr, Judge.

Action by Louis Solomon and others, administrators of the estate of Max Solomon, deceased, for the use of Louis Solomon, and others, against the American Temperance Life Insurance Association of the city of New York. There was a judgment for plaintiffs, and defendant brings error. Affirmed.

George R. Wallace, of Pittsburgh, Pa., for plaintiff in error.

Weil & Thorp, of Pittsburgh, Pa. (S. Leo Ruslander and George K. Warn, both of Pittsburgh, Pa., of counsel), for defendants in error.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

BUFFINGTON, Circuit Judge. In this case the administrators of Max Solomon, citizens of Pennsylvania, brought suit against the American Temperance Life Insurance Association, a corporate citizen of New York state, to recover $5,000 on a policy of insurance issued on the life of Max Solomon. The policy in question was a 10-year endowment one, on which the deceased had paid several annual premiums. On the first trial of the case the plaintiff recovered. On

a writ of error this court, in an opinion reported at 209 Fed. 345, 126 C. C. A. 271, reversed and directed a retrial. On such trial the plaintiff again recovered a verdict, and on entry of judgment the insurance company sued out this writ.

The questions here involved concern statements made in the application for the policy sued on concerning the applicant's age, his drink habits, and prior applications for insurance. The contention of the defendant is that under the evidence it was the duty of the court to hold the policy was invalid and give binding instructions for defendant. The several answers made by the deceased, which are quoted below, were contained in the copy of such application attached to the policy sued on. Such policy recites that it was based on the application for membership in this association, "which the insured hereby warrants to be true, and which is made a part of this contract," and that "this policy is accepted upon the terms stated upon the second page of the policy, which are made a part of this contract." Among the terms thus recited were that:

"This policy shall be null and void if the insured herein uses, sells, or is interested in the sale of alcoholic liquors or intoxicating drinks in any form as a beverage, or for misstatement of age, fraud, nonpayment of any payment or payments due to the association under the conditions of this policy."

[1] In its charge the court, inter alia, said:

"The plaintiffs, of course, rely upon a contract of insurance, and have brought suit upon that contract, and therefore affirm the contract in all respects. * * * The application is part of this contract, and the statements in the application the insured warrants to be true. The application contains a number of questions to be answered, and which in the application are answered. * * * Now those three questions are as follows: '6. Place and date of your birth—9th of August, 1856. 18. Have you ever used wine, beer, alcoholic liquors, or any intoxicating drinks as a beverage? If yes, how long since did you discontinue? State explicitly. Yes, whisky, 1 glass a week. 10. Had any proposal to insure your life ever been postponed or declined? If so, by what company, association, or society, and for what reason? No. 11. Has any proposal or application to insure your life or for membership ever been made to any company, association, society, or agent upon which a policy or certificate of membership has not been received by you in person for the full amount and kind and at rate applied for? No.'"

Turning, first, to the subject of prior insurance, the court, inter alia, charged:

"With respect to questions 10 and 11, with regard to application for other insurance, those questions are partly for the court and partly for the jury. The jury's part is to determine whether or not the answers to those questions were false. You have heard the testimony on both sides of this case. Was there an application to another company made at the time this application, connected with the policy in suit, was made? If there was an application made, and there had been no policy received, then it would be a postponement, or it would be perhaps a rejection, or if there was another application for the insurance made at the time the application for this policy was made, then the answers to that question were false, and as a matter of law the court will say that they are material to the risk."

This instruction is assigned for error, but we think the instruction was justified. The question was, as stated, a mixed one of fact and law. The law question, namely the materiality and legal effect of

the answers to the question, the court assumed and correctly answered, by holding that, if the answers to that question were false, "as a matter of law the court will say they are material to the risk." As to the question of fact, the court properly submitted it to the jury, correctly holding "the jury's part is to determine whether or not the answers to those questions were false." Under the proofs in the case, it would clearly have been error for the court to have taken that question from the jury. The insured was, of course, bound by his answer that he had not applied for other insurance, or been refused it; but whether he had in point of fact made such application, or it had been declined, was for the jury to determine under the proofs.

[2] We shall not quote in detail the testimony bearing on this question, but shall restrict ourselves to saying that proofs in that regard were such that it was the court's duty to submit them to the jury. In doing so attention was carefully called to the fact that Solomon was bound by the application on which the policy in suit was issued, but that with reference to the application produced by the Hartford Company the question was whether it had been made to that company with his approval and authority. This question was fairly submitted in the charge, as follows:

"So far as this contract is concerned, it is immaterial whether the insured could read or write, or not, or whether he understood what was contained in his application. The plaintiffs affirm the contract, the contract exists, it cannot be changed or modified in this proceeding, and it is, as I say, immaterial whether the insured could read or write at the time this application was made. But it is a material fact in relation to whether or not an application had been made to another company, and the only evidence in the case here, upon which the defendant relies, is that there was an application made to the Hartford Life Insurance Company for the insurance. It is material in relation to that, as to whether the insured of this defendant company could read or write. Was that application to the Hartford the application of the insured in the case at bar, made by him or by his authority, not perhaps for his benefit, but with his approval, and with his authority? You have heard the testimony upon the part of the defendant. You have the application from the files of the Hartford Life Insurance Company. You have the testimony with respect to the relations of the insured to the person who witnessed the application in the suit at bar, and who apparently witnessed the other Hartford application, and you have some testimony that the man Kann had a number of applications that were signed in his presence by the insured in this case, by his mark. I must leave that question of fact to you, as to whether or not the Hartford application, offered in evidence here by the defendant, was the application of Max Solomon, either by him personally, or at his instance. If it was, then was it in existence at the time this application attached to the policy in suit was made? If it was, then the answers to questions 10 and 11, which I have read to you, are false, and, if they were false, then they were material to the risk, and there should be no recovery in this case."

[3] It remains to consider the court's treatment of the other two questions quoted above, bearing on decedent's age and his drink habits. In that regard the court submitted the falsity and the materiality of both to the jury, as follows:

"With respect to the question as to age, and with respect to the question as to the use of alcoholic beverages, you are to determine whether or not they were material questions, under the test that I have stated to you. You have heard the evidence on both sides with respect to the age of the insured. Is the statement false? Was it material if it was false? Those are the ques-

tions for you to answer and to consider. So, with respect to whether or not his answer to the question as to the use of alcoholic beverages, was that answer false, and, if it was false, was it material? In other words, would the company have refused to give the insurance, if true answers had been made, and they had known the real facts?"

It is now contended the court erred in submitting the materiality of these questions to the jury. Assuming, for present purposes, that it did err in submitting the materiality of these questions to the jury, a matter, however, on which we express no present opinion, a study of the proofs shows that no such substantial wrong was done the defendant thereby as to warrant a reversal of this judgment on that ground, for the character of proof submitted is such that a court would not have been justified in sustaining a verdict adverse to the policy. On the plaintiffs' side the age of the deceased was affirmatively proved by two members of the decedent's family, while the only witness called by the defendant, who stated the deceased had made another statement as to his age some years before, admitted he was so uncertain about it that his testimony in reality amounted to nothing. So, also, on the issue of the deceased having used liquors as a beverage there was no such evidence as would have supported a verdict, had the jury so found. The evidence of a very occasional taking of a drink on some special occasions was not the use of liquor as a beverage which was contemplated by his application.

Upon a full consideration of the whole case, we are of opinion no reversible error is shown, and the judgment below is therefore affirmed.

CITY COUNCIL OF AUGUSTA, GA., v. TIMMERMAN, County Auditor, et al.

(Circuit Court of Appeals, Fourth Circuit. May 2, 1916.)

No. 1413.

1. TAXATION ⟸608(9)—COLLECTION—INJUNCTION.
Ordinarily the collection of taxes will not be enjoined, on the ground that the tax is illegal, unless complainant has no adequate legal remedy.
[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1238; Dec. Dig. ⟸608(9).]

2. TAXATION ⟸608(9)—COLLECTION—INJUNCTION—REMEDY.
A statutory provision for payment of taxes under protest and a legal action to recover them back affords an adequate remedy, and precludes enjoining collection.
[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1238; Dec. Dig. ⟸608(9).]

3. TAXATION ⟸608(9)—SALE OF LAND FOR NONPAYMENT OF TAX—INJUNCTION —POWERS OF FEDERAL COURT.
Civ. Code S. C. 1912, § 460, prohibits enjoining the collection of taxes, while section 461 provides that any property owner, deeming a tax charged against his property unjust or illegal, may pay it under protest and bring an action for recovery thereof in the court of common pleas of the county in which such taxes are made payable. Section 462 makes this remedy exclusive. Land of a nonresident was ordered sold in South Carolina for taxes, and the owner applied in the federal courts for an

injunction. *Held* that, as a state statute conferring a substantive right cannot exclude a citizen of another state from asserting such right in the federal courts, the remedy given by the South Carolina statute was adequate, as the nonresident could sue in the federal courts to recover back the taxes illegally exacted, and so injunction would be denied.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1238; Dec. Dig. Dig. ⟸608(9).]

4. TAXATION ⟸608(12)—COLLECTION—CLOUD ON TITLE.

Where the tax levy itself would disclose complainant's exemption, if any, without other evidence, collection of the tax will not be enjoined on the ground that the tax levy, being a lien on the land, would constitute a cloud on the title.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1241; Dec. Dig. ⟸608(12).]

5. TAXATION ⟸608(11)—COLLECTION—INJUNCTION—MULTIPLICITY OF SUITS.

Collection of taxes on property claimed to be exempt will not be enjoined on the ground that it would avoid a multiplicity of suits, for it will be assumed that tax officers will act in a practical way, and, taxes for one year being defeated, will not subsequently assert rights of taxation.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1240; Dec. Dig. ⟸608(11).]

6. TAXATION ⟸217—EXEMPTIONS—CONSTRUCTION.

Civ. Code S. C. 1912, § 294, exempting from taxation all waterworks to supply water for the use of a town or city, the machinery and fixtures connected therewith, and grounds occupied thereby, when owned by the city or town, does not extend the exemption to land located in South Carolina and used in connection with the water supply of a city in an adjoining state; it being obvious that the exemption was intended to apply only to local governmental agencies.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 355, 356; Dec. Dig. ⟸217.]

Appeal from the District Court of the United States for the Western District of South Carolina, at Greenville; Joseph T. Johnson, Judge.

Bill by the City Council of Augusta, Ga., against J. R. Timmerman, Auditor of Edgefield County, S. C., and others. From an order (227 Fed. 171) denying a temporary injunction, complainant appeals. Affirmed.

D. S. Henderson, of Aiken, S. C. (Hendersons, of Aiken, S. C., and C. Henry Cohen, of Augusta, Ga., on the brief), for appellant.

Fred H. Dominick, of Newberry, S. C., and B. E. Nicholson, of Edgefield, S. C. (Thos. H. Peeples, of Columbia, S. C., on the brief), for appellees.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

WOODS, Circuit Judge. These are the material facts alleged in the bill for an injunction against the collection of the state and county taxes by the defendants as tax officers of Edgefield county in the state of South Carolina: The city of Augusta, situate on the Georgia side of the Savannah river, about 40 years ago acquired three acres of land on the South Carolina side of the river, which it uses as an abutment to a dam constructed across the river for the purpose of forcing water into canals on the Georgia side. The water thus supplied is used for

fire protection and municipal and domestic purposes, and some of it is furnished by the city to manufactories established along the canals. If the city should be deprived of the portion of the dam on the South Carolina side, the utility of the entire dam would, of course, be destroyed. The defendants, as tax officers of the county of Edgefield, in which the three acres of land and one-half of the dam is situated, are about to advertise the property for sale for the collection of a tax levied on it for the year 1914, amounting with costs and penalties to $774.35, and they have levied a similar tax for the year 1915. Besides these claims the tax authorities intend to institute proceedings to recover taxes for the past 10 years, amounting to $5,000 or $7,000. The claim of exemption from these taxes, on which the injunction is asked, is made under section 294 of the Code of South Carolina, which includes as one of the 20 classes of exempt property:

"All waterworks to supply water for the use of a town or city, the machinery and fixtures connected therewith and the grounds occupied thereby, when owned by any city or town."

[1-3] The District Judge refused the temporary injunction on the ground that the South Carolina statute, providing that the complainant might pay the taxes under protest and bring an action to recover them back, furnished an adequate legal remedy. The statute provides that any person who conceives the taxes charged against him to be unjust or illegal shall "pay the said taxes notwithstanding under protest," and that he "may at any time within thirty days after making such payment, but not afterwards, bring an action against the said county treasurer for the recovery thereof in the court of common pleas for the county in which such taxes are made payable." Code of S. C. 1912, § 461. This remedy is made exclusive by section 462.

The general rule is that courts will not interfere by injunction with the collection of the public revenue, on the ground that a tax is illegal, unless it clearly appears that the complainant has no adequate legal remedy, and that a statutory provision for the payment of taxes under protest and a legal action to recover them back affords an adequate legal remedy. Dows v. Chicago, 11 Wall. 108, 20 L. Ed. 65; Boise Water Co. v. Boise City, 213 U. S. 276, 29 Sup. Ct. 426, 53 L. Ed. 796; Dalton Adding Machine Co. v. State Corp. Com'rs of Va., 236 U. S. 699, 35 Sup. Ct. 480, 59 L. Ed. 797; Dodge v. Osborn, 240 U. S. 118, 36 Sup. Ct. 275, 60 L. Ed. 557.

[4, 5] It is insisted, however, that only in an injunction from the court of equity is an adequate remedy to be found, because (1) the tax levy being a lien on the land, constitutes a cloud on the title; and (2) the assertion of complainant's claim to exemption would require a multiplicity of legal actions. The Supreme Court has disposed of the first position by holding that there exists no cloud upon a title which justifies the interference of the court of equity, when the alleged fatal defect in the tax levy or other proceeding appears on the face of the record, requiring no evidence aliunde to make it plain. Hannewinkle v. Georgetown, 15 Wall. 547, 21 L. Ed. 231; Ogden City v. Armstrong, 168 U. S. 224, 18 Sup. Ct. 98, 42 L. Ed. 444.

The complainant has not stated a case that entitles him to equitable

relief under this rule. There could be no real issue of fact requiring evidence outside of the record about the nature of the property. The tax assessment would doubtless make that plain; and the sole question in a suit to recover the taxes would be a legal one, namely, whether the statutory exemption from taxation of the waterworks and grounds occupied thereby, "when owned by any city or town," applies to waterworks and grounds occupied thereby owned by a city situated in another state. That this question could be decided with convenience and dispatch in an action at law to recover the taxes after paying them under protest is obvious.

Assuming as we must that the tax officers will look at the matter in a practical way, there is no reason to apprehend a multiplicity of suits. Suit may be brought it is true for taxes for ten years claimed to be due. But the judgment in a suit to recover back the taxes for one year would settle all the claims, for all stand on the same footing. The conclusion that the bill states no case for injunction does not accord with all the expressions on the subject found in federal and state decisions, but it is based on reason, and the best considered and latest decisions.

The contention that the amount involved is not sufficient to give the federal court jurisdiction is not well taken. The bill shows if the claim for taxes is valid, the amount due and collectible for the ten years, to which the statutory liability extends, will be about $6,000; and the whole amount would be a lien on the land, if it is subject to taxation.

[6] But assuming, contrary to our conclusion, that the matter is cognizable by a court of equity, the complaint must fail on the merits. Unless otherwise expressed, all legislation of a state relating to cities and towns refers to the cities and towns of that state, and not of another state or country. This is for the reason that the state has no control of cities and towns in other states, and from a governmental standpoint no interest in them. For a state to attempt to promote the development of cities and towns outside of its borders by exempting property owned by them from taxation exacted of its own citizens would be so anomalous and contrary to legislative history and governmental policy that nothing but the clearest affirmative expression would warrant such an inference. The General Assembly of South Carolina, legislating concerning taxation and exemptions of cities and towns, had no thought of cities and towns not subject to its legislation. The plain purpose was to exempt certain governmental agencies of its own municipal corporations. The precise point was so decided in State v. Holcomb, 85 Kan. 178, 116 Pac. 251, 50 L. R. A. (N. S.) 243, Ann. Cas. 1912D, 800, and Spokane Water Co. v. Kootenai County (D. C.) 199 Fed. 481.

Affirmed.

BUN CHEW v. CONNELL, Immigration Inspector.

(Circuit Court of Appeals, Ninth Circuit. May 1, 1916. Rehearing Denied June 2, 1916.)

No. 2661.

1. ALIENS ⇐32(5)—CHINESE PERSONS—BURDEN OF PROOF.
The burden is always upon an alien to show his right to be and remain in the United States; therefore, where a Chinese person, after securing a certificate of residence, departed from the country and returned, he has the burden of showing that his re-entry was legal, and not fraudulent, and, upon deportation proceedings being instituted, his original certificate of residence is not prima facie evidence of his right to remain.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 84; Dec. Dig. ⇐32(5).]

2. ALIENS ⇐32(9)—CHINESE PERSONS—DEPORTATION—TIME FOR.
Under Immigration Act Feb. 20, 1907, c. 1134, § 21 (Comp. St. 1913, § 4270), requiring the Secretary of Labor to cause an alien subject to deportation under the laws of the United States to be taken into custody within 3 years after landing or entry and returned to the country whence he came, the Secretary has three full years in which to institute proceedings, and where he causes the arrest of a Chinese person and the institution of deportation proceedings within that time, such Chinese person is not entitled to discharge because not actually deported within 3 years.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 94; Dec. Dig. ⇐32(9).]

3. ALIENS ⇐32(10)—DEPORTATION—CHINESE PERSON.
Where a Chinese person entered the United States, remained there for some years, went to Mexico, and thereafter fraudulently re-entered the United States, so that he was subject to deportation, he will be deported to China, and not to Mexico.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 92; Dec. Dig. ⇐32(10).]

Ross, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the Southern Division of the Southern District of California; Benjamin F. Bledsoe, Judge.

Application by Bun Chew for writ of habeas corpus against Charles T. Connell, as Immigration Inspector in charge. From an order denying the writ, applicant appeals. Affirmed.

See, also, 220 Fed. 387.

Frank Stewart, of Los Angeles, Cal. (J. W. Howell, of Los Angeles, Cal., on the brief), for appellant.

Albert Schoonover, U. S. Atty., of Los Angeles, Cal. (Clyde R. Moody, Asst. U. S. Atty., of Los Angeles, Cal., of counsel), for appellee.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge. Bun Chew, a Chinese alien, appeals from an order of the District Court dismissing a writ of habeas corpus,

and remanding the appellant to the custody of the immigration inspector in charge at Los Angeles, Cal. The petition for the writ alleged that Bun Chew was in possession of a Chinese laborer's certificate of residence, he having registered as such Chinese laborer at Hanford, Cal., on February 17, 1894, but that the inspector had unlawfully detained him in custody and was about to deport him to China. The return to the writ alleged that, pursuant to the powers vested in him by the United States immigration laws, the immigration inspector at Los Angeles had granted Bun Chew a hearing concerning his right to be and remain in the United States, and that on the record thereof the Secretary of Labor had ordered the appellant's deportation to China, on the ground that he had been found within the United States in violation of the act of Congress approved February 20, 1907 (34 Stat. 898, c. 1134), as amended by the act approved March 26, 1910 (36 Stat. 263, c. 128), in that, at Douglas, Ariz., he had entered the United States from Mexico on or about January 1, 1912, in violation of section 36 of said act (Comp. St. 1913, § 4285), and section 7 of the act of September 13, 1888 (25 Stat. 477, c. 1015 [Comp. St. 1913, § 4308]). The District Court, upon the hearing, dismissed the writ. The appellant contends that the court below erred in finding that he was given a fair hearing before the Immigration Department at Los Angeles, and in holding that the evidence was sufficient to show that he entered the United States from Mexico, or was ever in Mexico, and he contends that the Secretary of Labor exceeded his jurisdiction in ordering deportation, and that in any event the appellant should have been ordered to be deported to Mexico, instead of to China.

[1] The contention that there was no evidence to authorize deportation rests upon the proposition that the appellant was in the possession of a certificate of residence, which had not been canceled or set aside, and which was prima facie evidence of his right to remain in the United States. The answer to this is that by the evidence it was shown that the appellant had left the United States and had gone to Mexico, and that he was there as late as April 1, 1912, and he produced no evidence that in re-entering the United States he complied with the law and did not make a fraudulent entry. In such a case it does not devolve upon the prosecution to prove that the re-entry was fraudulent, but the burden rests upon the alien to show that his entry was legal, since the burden is always upon him to show his right to be and remain in the United States. The case of Liu Hop Fong v. United States, 209 U. S. 453, 28 Sup. Ct. 576, 52 L. Ed. 888, is not in point. In that case the court held that, when a Chinaman of the exempt class has been admitted to the United States on a certificate made in conformity with the treaty, he cannot be deported for having fraudulently entered, unless there is competent evidence to overcome the legal effect of the certificate. The court recognized the prima facie effect of the certificate made in conformity with the treaty, under which the Chinaman had entered the United States. In the case at bar, the appellant entered the United States from Mexico, not by virtue of a certificate, but presumably in violation of the provisions

of the statutes, since he has wholly failed to prove that he complied therewith.

[2] We have given careful consideration to the contention that the Secretary of Labor was without jurisdiction to cause the deportation of the appellant, for the reason that deportation was not accomplished within 3 years from the date of his entry into the United States. The date of the appellant's return to the United States was April 1, 1912, as shown by testimony, and as set forth in the warrant of deportation. The warrant of arrest was dated May 22, 1914, and the warrant of deportation was dated March 26, 1915. The petition for the writ of habeas corpus was filed April 13, 1915, 3 years and 13 days after the date of the appellant's return to the United States. Section 21 of the Immigration Act of 1907 (Comp. St. 1913, § 4270), requires that the Secretary of Labor "shall cause such alien, within the period of three years after landing or entry therein to be taken into custody and returned to the country whence he came." The appellant cites International Mercantile Marine Co. v. United States, 192 Fed. 887, 113 C. C. A. 365, and United States v. Oceanic Steam Nav. Co., 211 Fed. 967, 128 C. C. A. 465, cases in which the Circuit Court of Appeals for the Second Circuit held that the civil liability of the masters, agents, owners, or consignees of vessels to take on board and return to the country whence he came any alien ordered to be deported did not attach unless the alien were tendered to the steamship line for deportation within the 3-year period prescribed in section 21 of the act of 1907. We are unable to agree that such a limitation should be placed upon the power of the Secretary of Labor to order the deportation of an alien who is unlawfully in the country. We think the statute should be construed in analogy with statutes of limitation in criminal cases, the requirement of which is answered if prosecution is begun within the time limited. It does not seem reasonable to suppose that Congress intended that before ordering the arrest of an alien believed to be unlawfully in the country the Secretary must take into account the probable time that must ensue between the arrest and the warrant of deportation, and compute the time of all possible delays in obtaining testimony, and possible delays to be caused by appeals or writs of habeas corpus. In United States v. Redfern (C. C.) 180 Fed. 506, Judge Foster, in construing the statute, said:

"I consider the government should have the whole of the last day of the 3 years in which to make the arrest, and, prescription being interrupted by the arrest, the government is entitled to a reasonable time in which to carry out the sentence of deportation."

That language was approved and the decision was followed by Judge Lacombe in United States v. International Mercantile Marine Co. (C. C.) 186 Fed. 669, although his decision was reversed by the Circuit Court of Appeals in the case above noted. 192 Fed. 887, 113 C. C. A. 365. In the case at bar the arrest was made and the warrant of deportation was issued within the 3 years from the date of the appellant's entry into the United States, and, although the warrant was not actually executed within the 3 years, we hold that deportation was still within the power of the Secretary of Labor.

[3] The warrant of deportation properly directed that the appellant

be returned to China. He had no right to demand that he be returned to Mexico. He had been in Mexico but a short time, and the fact that he returned to the United States may be taken as evidence that he went to Mexico with the intention of returning. Under the circumstances China was the country "whence he came," within the meaning of the act. Lewis v. Frick, 233 U. S. 291, 34 Sup. Ct. 488, 58 L. Ed. 967; Lee Sim v. United States, 218 Fed. 432, 134 C. C. A. 232; Ex parte Chin Him (D. C.) 227 Fed. 131.

The order is affirmed.

ROSS, Circuit Judge (dissenting). I am unable to agree to the judgment in this case. As shown in the opinion, the appellant entered the United States April 1, 1912, was arrested May 22, 1914, on the ground that he was not entitled to be in this country, and, after trial, was ordered deported March 26, 1915, which was within the 3-year period fixed by the act of Congress referred to in the opinion. No effort on the part of the appellant appears to have been made during that 3-year period to stay any of the proceedings under the statute; so it is unnecessary to consider what, if any, effect should properly be given to any such action on the part of the person against whom the deportation proceedings were taken. The fact, therefore, remains, that the appellant was not deported within the period fixed by Congress for such action, and upon the expiration of that period I am of the opinion that he was entitled to a discharge from custody. If he could be held in custody one day thereafter, I am unable to understand how any court can fix the limit to such further imprisonment, for no court has any power of legislation; and that is purely a matter of legislation, in my opinion. If the 3-year period fixed by Congress for the arrest and deportation of such persons as the appellant should be extended, it is for Congress, and Congress only, to fix the time.

SPRING GARDEN INS. CO. OF PHILADELPHIA, PA., v. WOOD.

(Circuit Court of Appeals, Fourth Circuit. May 2, 1916.)

No. 1398.

1. INSURANCE ⊂668(5)—FIRE POLICIES—ACTIONS—JURY QUESTION.
In an action on a fire policy upon a building in which the agent writing the policy had an interest, the question whether the insurer was notified of the agent's interest *held* for the jury.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1737–1740, 1758–1760; Dec. Dig. ⊂668(5).]

2. INSURANCE ⊂668(6)—FIRE INSURANCE—ACTIONS—JURY QUESTION.
In an action on a fire policy upon property in which the agent had an interest, the question whether the agent, in attaching a rider allowing other insurance without permission of the insurer, acted fraudulently, and whether other insurance avoided the policy, *held* for the jury.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1737–1740, 1758–1760; Dec. Dig. ⊂668(6).]

⊂For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

3. TRIAL ⊂⊃260(1)—INSTRUCTIONS—REFUSAL.
Where the instructions given presented the issues, the refusal of other instructions emphasizing such facts is proper.
[Ed. Note.—For other cases, see Trial, Cent. Dig. § 651; Dec. Dig. ⊂⊃260(1).]

4. APPEAL AND ERROR ⊂⊃1057(2)—REVIEW—REVERSIBLE ERROR.
Where plaintiff admitted as true all that would have appeared from certain reports, the exclusion of such reports themselves was not reversible error.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4197, 4198, 4205; Dec. Dig. ⊂⊃1057(2).]

5. EVIDENCE ⊂⊃151(1)—INSURANCE—INTENT—CONTINGENCY.
In an action on a fire policy, evidence by the insurer's agent as to what he would have done, had he known certain facts which insured claimed were communicated to him, is inadmissible.
[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 440; Dec. Dig. ⊂⊃151(1).]

Dayton, District Judge, dissenting.

In Error to the District Court of the United States for the Eastern District of Virginia, at Richmond; Edmund Waddill, Jr., Judge.

Action by T. Gilbert Wood, suing for the benefit of himself, the Roanoke Sheet Metal Company, and J. D. Wood, against the Spring Garden Insurance Company of Philadelphia, Pa. There was a judgment for plaintiff, and defendant brings error. Affirmed.

See, also, 194 Fed. 669, 114 C. C. A. 416; 215 Fed. 355, 131 C. C. A. 497.

George Bryan, of Richmond, Va., and Gustavus Remak, Jr., of Philadelphia, Pa., for plaintiff in error.

George E. Caskie and James R. Caskie, both of Lynchburg, Va., for defendant in error.

Before KNAPP and WOODS, Circuit Judges, and DAYTON, District Judge.

WOODS, Circuit Judge. There have been three trials of this action on a fire insurance policy issued by the plaintiff as agent of the defendant company on his own property.

Two defenses were relied on at the first trial: (1) The condition that the policy would be avoided by other insurance; and (2) the failure of the plaintiff as agent of the defendant company to notify it that he was the owner of the property. After hearing the evidence the District Court refused to direct a verdict in favor of the defendant, and the jury found for the plaintiff. This court held that, the plaintiff having reported the policy issued to "Haytokah Inn" as the owner, and having failed to show that his principal was advised as to his ownership, he could not recover. It was on this ground alone that the case was sent back for a new trial. On the second trial the defendant abandoned the first defense and relied entirely on the second. The District Judge on the second trial directed a verdict for the defendant. On writ of error this court found the evidence of notice to defendant's special agent Young of plaintiff's ownership of the property and of Young's authority to represent the defendant, materially stronger than that offered on the first trial and sufficient to raise an issue for the

jury whether the defendant did not accept the risk with notice of Wood's ownership. The cause was accordingly remanded for a new trial. On the third trial the defendant reinstated without objection the defense of subsequent insurance contrary to the terms of the policy, and in addition relied again on the defense that the plaintiff as agent of the defendant had insured his own property without notice to his principal of his ownership. At the close of the evidence the District Judge refused to direct a verdict for the defendant, and the jury again returned a verdict in favor of the plaintiff for the amount claimed. The first question is whether the defendant was entitled to a directed verdict.

[1] As to the defense that the plaintiff failed to notify the defendant of his ownership of the property, the evidence varied little from that which this court had held sufficient to require the submission of the issue of notice to the jury, except in one particular. The defendant produced from its own possession at the last trial a copy of a line sheet indicating in writing the property which the special agent, Young, had authorized the plaintiff to insure, and on that the hotel property does not appear. Young testified that the original of this line sheet was either left with Wood or sent to him from the company's office. Wood denied that he had ever received the line sheet, and testified, on the contrary, that his instructions were verbal, and that Young, with full notice that he had an interest in the hotel, authorized and encouraged him to insure it. This testimony made a square issue of fact for the jury between Young and Wood on a material point.

It seems clear from these considerations, in addition to what was said in the former opinions, that the trial judge could not properly take the case from the jury on the ground that there could be no reasonable difference of opinion that Wood had insured his own property without the knowledge or the consent of his principal.

[2] The other important point presents greater difficulty. In the report sent in by Wood of the policy for $2,500 sued on he noted the fact that there was $7,000 other insurance outstanding; but he failed to note that a rider containing the three-fourths clause which related to additional insurance had been attached to the policy. He received a request from the company by letter of January 31, 1910, to attach "three-fourths value and fire protection clauses." Wood testified he thought it unnecessary to answer defendant's letter, as he found on examination that the three-fourths value rider had been attached. After the policy sued on was issued he took out additional insurance in another company to the amount of $2,000; and it is this additional insurance which the defendant claims avoided the policy.

The slip attached to the policy known as "Form 204" allowed other insurance without permission of the company. At this time Wood had in his possession forms of slip No. 219, which allowed additional insurance only on permission of the company. The point pressed by the defendant is that it was Wood's duty to attach the latter form of slip, which would have denied him the right to take out additional insurance without notice to the company and its permission, and that his failure to do so, coupled with the fact that additional insurance was taken out

without notice to the company annulled the contract. We think this inference depends on the good faith of Wood. It is true that he did attach form 219 to the other policies issued by him, and that good business methods required that in making his report he should indicate that a three-fourths clause allowing additional insurance had been attached and the form he had used. The argument is strong that Wood failed in his duty to the company when he attached to the policy the form 204 allowing additional insurance and said nothing more to the company about it after receiving its letter on the subject. But, on the other hand, there is reason in Wood's explanation that the form 219 on its face seemed to be intended to apply to a policy on household furniture, while this policy was on an unfinished building without furniture. He was a school-teacher and untrained in the insurance business, which the defendant's special agent had solicited him to undertake. The defendant had furnished him the form of slip he used, and had not withdrawn it, nor instructed him not to use it, nor to use form 219. These are strong considerations in favor of the inference of entire good faith, and of his error from the negligence of the company in supplying him with forms it did not intend he should use, and in failing to give him instructions as to the proper slips to be attached. The issues of fact on the two defenses set up were therefore properly submitted to the jury.

[3] The charge, it is true, did not emphasize the point of view of the defendant on these issues; but the District Judge did instruct the jury that, for the plaintiff to recover, they must believe from the evidence that the plaintiff acted in good faith in attaching to the policy a form allowing additional insurance which had been furnished him by the company; that Young, the special agent, was advised that the policy about to be issued covered the plaintiff's property, or property in which he had an interest; that Young was fully authorized to act for the company, and was the only representative of the company in the state of Virginia known to the plaintiff; that the plaintiff had acted with the utmost frankness and good faith in all the matters relating to the issuance of the policy; and that unless the plaintiff had made out his case in all material particulars by the preponderance of the evidence the verdict should be for the defendant. This covered the law of the case. The requests of the defendant merely elaborated and emphasized the defendant's view of the issues, and their rejection is not sufficient ground for a new trial.

[4] There was no reversible error in the refusal to receive as evidence plaintiff's reports of other policies to the stamping office, since the plaintiff admitted as true all that would have appeared from these reports.

[5] The question asked Young as to whether he would have accepted the policy, had he known of Wood's ownership, was properly excluded. The plaintiff could not be bound by what Young now says he would have done. The material inquiry was what the company actually did, in view of the alleged information given by Wood to Young that he was the owner.

The case is one of difficulty, but consideration of the evidence offer-

ed tending to show Wood's good faith, knowledge of the material facts by the special agent of the insurance company, the negligence of the company in making Wood's mistake possible by leaving form No. 204 in his hands as if for use, and the company's failure to furnish him with instructions, together with the fact that two juries have found the issues of fact against the defendant, leads to the conclusion that it would be going too far to say that no reasonable inference on the vital issues could be drawn in favor of the plaintiff.

Affirmed.

DAYTON, District Judge, dissents.

LEPPER v. UNITED STATES.

(Circuit Court of Appeals, Fourth Circuit. May 2, 1916.)

No. 1409.

CRIMINAL LAW ⊂⊃1170½(1)—TRIAL—CONDUCT OF JUDGE.

When first charged with the offense of counterfeiting, accused pleaded guilty; but the trial court rejected his plea and liberated him on his own recognizance upon a promise of reformation. Thereafter accused having re-engaged in such practices he was brought to trial. On trial the court asked accused whether he had, not prior to his having been brought into the jurisdiction for trial, written or procured others to write to the court letters admitting accused's guilt, but requesting a suspension of sentence. Accused admitted such letters, but stated he had done so to avoid trouble as to the charge. *Held* that, as there was no contention that the production of the letters would have shown the matter in any better light for accused, the conduct of the trial judge, which was not objected to, cannot be deemed prejudicial error, other evidence abundantly establishing accused's guilt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3129; Dec. Dig. ⊂⊃1170½(1).]

Pritchard, Circuit Judge, dissenting.

In Error to the District Court of the United States for the District of Maryland, at Baltimore; John C. Rose, Judge.

Hiram Lepper, otherwise called Charles Strailia, otherwise called George Briggie, was convicted of counterfeiting, and he brings error. Affirmed.

Harry B. Wolf, of Baltimore, Md., for plaintiff in error.

Samuel K. Dennis, U. S. Atty., of Baltimore, Md.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

KNAPP, Circuit Judge. Plaintiff in error, hereinafter called defendant, was convicted of counterfeiting and sentenced to imprisonment for 15 years. From the meager report of the trial, and from subsequent correspondence of defendant with the District Judge and the clerk of his court, which correspondence has been certified to this court, the following facts appear or may reasonably be inferred:

The offense of which defendant was found guilty was the alteration

or "raising" of a silver certificate of the United States from $1 to $10 and fraudulently passing the same at its raised value on the person named in the indictment. It would seem that defendant by long practice had become expert in this particular form of swindling. His method of operation was to call upon the keeper, usually a woman, of a cheap lodging house, engage a room, tender the raised certificate for payment in advance, receive in change the difference between the price paid for the room and the apparent amount of the bill, and then disappear. This performance was repeated a great many times and in numerous places. It is probable that in most instances he escaped detection, but he was sometimes caught and punished. It was testified that he had served a term of imprisonment for the same offense in Illinois, in Michigan, in Kansas, and two terms in the penitentiary at Atlanta, Ga. He admitted on cross-examination:

"That for a period of many years, perhaps as many as 20, he had been frequently arrested in different parts of the country for doing precisely the thing charged in the indictment; that sometimes he had pleaded guilty, sometimes he had served sentences, and sometimes had been paroled."

When arraigned on the indictment set forth in the record, in November, 1913, he admits that he pleaded guilty, but the District Judge, for reasons which can only be inferred, refused to accept the plea and allowed him to go on his own recognizance, on condition that he would abandon his criminal practices and thereafter conduct himself as a law-abiding citizen. But instead of keeping his promise in this regard it is alleged that within a few months he was found engaged in the same contemptible operations in another part of the country. He was apprehended, brought back to Baltimore, tried and convicted, though protesting his innocence, in May, 1914, and sentenced as above stated.

Within the required time he applied for a writ of error, which was granted, but the District Judge refused to sign or allow the bill of exceptions which he presented, because, as the correspondence discloses, (1) it was not presented within the time fixed by a rule of the court; (2) because it did not state correctly the testimony in the case or the action of the court; and (3) because no exceptions were taken in the course of the trial. It appears that no stenographer was present, and no record made of the testimony or charge to the jury; and it was admitted in argument that no objection was made or exception taken to anything that transpired during the trial, including the entire testimony for the government and the instructions given to the jury. As the accused was defended by a lawyer of experience and high standing at the Baltimore bar, the fact that no objection was made creates the strongest presumption that the trial was in all respects fairly conducted.

Nevertheless it is insisted that the judgment should be reversed and the defendant granted a new trial because of error alleged to be "so grave and glaring" that this court should grant relief the same as though challenged by formal exception. The injustice charged is based in the main on a single occurrence at the trial which presents the only question that needs to be considered. As to the proceedings in court

when defendant was tried we have no information, for reasons above stated, except the certificate of the District Judge prepared and transmitted at our request. In this certificate the occurrence referred to is narrated as follows:

"The court asked him whether he had, prior to the time of the alleged conversation with the witnesses Wright and Bradley, and prior to his having been brought to Maryland to answer the charge, written or procured others to write to the judge letters in which his guilt was admitted and in which the judge was asked to suspend sentence upon him. The traverser answered that he had. The court then asked him why, if he had not committed the offense, he had done so, and the prisoner answered in substance that he had had so much trouble with charges of this kind that he thought that was the safest way to deal with it."

This action of the trial judge and the questions put by him are alleged to be so improper and illegal "that the statement thereof without argument suffices to establish the right of the plaintiff in error to a reversal of the conviction and judgment below." Despite this confident assertion we are of opinion that the contention should not be sustained for reasons that will be briefly indicated.

In the first place we cannot estimate the effect of the colloquy upon the minds of the jury without fuller knowledge of the circumstances under which it took place. Assuming that the questions asked by the court are open to technical objection, and chiefly because they were asked from the bench, it does not follow that such prejudice resulted as should require a reversal of the judgment. Apparently the able counsel defending the accused did not regard the inquiry as improper or unfair, because he made no protest or objection. His failing to do so implied assent to the action of the court as entirely legitimate. There was no request for the production of the letters and no suggestion that the full disclosure of their contents would present the matter in any aspect more favorable to the defendant. Indeed, it is fairly inferable that the occurrence in question was a mere incident, of which little notice was taken at the time, and which no one regarded as liable to improperly influence the jury. In short, we are not persuaded that the action of the court was seriously objectionable, under the circumstances then existing, or that it operated in a legal sense to the prejudice of defendant.

In the second place the testimony which constituted the government's case was sufficient to justify the jury in believing the defendant guilty beyond a reasonable doubt, and we perceive no ground on which they could have failed to find an adverse verdict if the questions asked by the court had not been propounded. Two witnesses testified that the defendant freely and voluntarily confessed to them that he had committed the offense charged in the indictment, and this with the other testimony was ample for conviction without taking into account the letters which asked suspension of an anticipated sentence.

We yield the fullest assent to the doctrine that appellate courts should not affirm an unjust conviction because formal objection was not made, when the record discloses plain error in a matter vital to the defeated party. Wiborg v. United States, 163 U. S. 632, 16 Sup. Ct. 1127, 41 L. Ed. 289; Clyatt v. United States, 197 U. S. 207, 25 Sup. Ct. 429, 49 L. Ed. 726; Crawford v. United States, 212 U. S.

183, 29 Sup. Ct. 260, 53 L. Ed. 465, 15 Ann. Cas. 392. But this beneficent rule of law, established for the purpose of preventing a miscarriage of justice, may not be invoked to give a new trial to a chronic criminal, self-confessed and proven, who seeks to escape the consequences of repeated wrongdoing by a belated charge of error—if error there was in this case—to which no objection was made at the time when it could have been wholly corrected.

We are satisfied that the defendant had a fair and impartial trial, and that no sufficient reason appears for disturbing the judgment.

Affirmed.

WOODS, Circuit Judge (concurring). I think the questions asked by the trial judge were clearly improper. If a judge has in his possession evidences of a defendant's guilt or innocence they can be adduced for or against him only by examination and cross-examination of the judge on the witness stand at a trial presided over by another judge. It seems clear beyond argument that it would be fatal to any conviction of crime that it was founded on references by the trial judge to facts within his knowledge. Indeed, a judge presiding at a trial is not a competent witness, for the duties of a judge and a witness are incompatible. If he testifies he would have to pass upon the competency of his own testimony; and as a witness he might be regarded a partisan, and would be subject to embarrassing conflicts with counsel. The danger to the dignity of the bench, of subjecting its impartiality to doubt and of placing the defendant at an unfair disadvantage by admitting the presiding judge as a witness is very obvious. People v. Dohring, 59 N. Y. 374, 17 Am. Rep. 349; Rogers v. State, 60 Ark. 76, 29 S. W. 894, 31 L. R. A. 465, 46 Am. St. Rep. 154; Estes v. Bridgforth, 114 Ala. 221, 21 South. 512; 23 Cyc. 589.

No one could be more jealous of the obligations of the bench in these respects than the fair and learned judge who fell into the inadvertence of asking the defendant questions as to letters acknowledging guilt written to him by or on behalf of defendant. Even the most careful judge however cannot always guard against errors which afterwards seem obvious. The inadvertence was no doubt due to the conviction of the judge that the defendant was trifling with the court, and to the surprise of the judge at the denial of guilt which the defendant had before offered to admit.

I agree, however, that the error was harmless in this case. The competent evidence against the defendant could not have left any doubt of his guilt in the minds of the jury. By his own admissions on the stand he was a professional criminal in raising the denominations of currency bills. He had before offered in open court a plea of guilty to the charge here involved. The woman upon whom he practiced the imposition in this case identified him with reasonable certainty. Two witnesses testified to his full confession. Against all of this there was nothing but his own denial. Under these circumstances I do not think it possible that defendant could have escaped conviction on the competent evidence. The error should, therefore, be regarded harmless.

PRITCHARD, Circuit Judge, dissents.

SWIFT & CO. v. DETROIT ROCK SALT CO.

(Circuit Court of Appeals, Sixth Circuit. June 16, 1916.)

No. 2792.

1. CONTRACTS ⊂=248—ACTIONS FOR BREACH—EVIDENCE—SUFFICIENCY.
In an action for breach of contract with defendant's predecessor, the question whether defendant had adopted the contract *held* for the jury.
[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1140; Dec. Dig. ⊂=248.]

2. CONTRACTS ⊂=240—ASSUMPTION—MODE.
For a stranger to assume a contract, it is not necessary that he should do so expressly; it being sufficient if he conducts himself so as to lead others to believe that he intended to make the contract his own.
[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1125; Dec. Dig. ⊂=240.]

3. PRINCIPAL AND AGENT ⊂=171(1)—RATIFICATION—EQUITABLE ESTOPPEL.
Where defendant apparently recognized a contract made by its predecessor, making deliveries and accepting substantial benefits thereunder, it is thereafter estopped from questioning the authority of the agent who apparently recognized the contract.
[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 644, 645, 653, 654; Dec. Dig. ⊂=171(1).]

4. PRINCIPAL AND AGENT ⊂=119(1)—AUTHORITY OF AGENT—PRESUMPTION.
Parties dealing with an agent have the right to presume that his agency is general, and that he is acting within the scope of his authority, and, as regards third persons, the authority of the agent depends, not on the instructions given, but upon the character of the authority bestowed.
[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 391, 393, 398, 399, 401; Dec. Dig. ⊂=119(1).]

5. CORPORATIONS ⊂=425(4)—AGENTS—AUTHORITY OF.
When one deals with a corporation without knowledge of any irregularity on the part of the corporation's agents, the corporation cannot deny the authority of its agents to make contracts apparently within the scope of their authority, where such contracts are not ultra vires.
[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1700, 1701; Dec. Dig. ⊂=425(4).]

In Error to the District Court of the United States for the Eastern District of Michigan; Arthur J. Tuttle, Judge.

Action by Swift & Co. against the Detroit Rock Salt Company. There was a judgment for defendant, and plaintiff brings error. Reversed and remanded.

T. G. Long, of Detroit, Mich., for plaintiff in error.

P. B. Moody, of Detroit, Mich., for defendant in error.

Before KNAPPEN and DENISON, Circuit Judges, and SESSIONS, District Judge.

SESSIONS, District Judge. In March, 1911, the Detroit Salt Company, a Michigan corporation, was engaged in mining, manufacturing and selling salt. Its plant was located near Detroit. On March 24, 1911, the Detroit Salt Company and the plaintiff, Swift & Co., entered into a written agreement whereby the former agreed to sell to

the latter all of the rock salt used by it in a specified territory for a term of five years from January 1, 1912, at the price of $2.25 per ton in bulk f. o. b. the Salt Company's mine. The contract also gave to plaintiff an option to purchase at the same price the salt used in its plants at East St. Louis and South St. Paul after the termination of an existing contract which expired October 31, 1912. Four days later, March 28, 1911, in a foreclosure suit in the circuit court for the county of Wayne, the Security Trust Company of Detroit was appointed receiver for the Salt Company. The order appointing the receiver authorized and directed it "to continue the business of said defendant company without interruption and to fulfill its contracts (other than the payment of indebtedness of said company)." Immediately after its appointment the receiver notified plaintiff "that all existing contracts for the delivery of salt will be carried out by the receiver, who has been authorized so to do by the court." August 1, 1912, Warren W. Clute succeeded the Security Trust Company as receiver. The receivership was terminated September 30, 1912, when the defendant, Detroit Rock Salt Company, was organized by the stockholders, bondholders and other creditors of the old company and took over the latter's property and business. Mr. Clute, the receiver, became president of the new corporation. During the receivership all orders for salt were given by the plaintiff and filled by the receiver in accordance with the terms of the contract. After the receiver was discharged and until the end of the year 1912 salt was furnished to the plaintiff by the defendant upon orders (75 in number), referring directly to the contract and at the price and upon the terms therein named. Defendant's letter heads, invoices and other stationery were all stamped or printed: "Detroit Rock Salt Co., Successors to Detroit Salt Co."

One Edward E. Rude had charge of the salt sales under the receiver and after the organization of the defendant corporation continued in sole charge of its Detroit office for about nine weeks. During that time no officer of the company was in the office and no instructions were given to him. He attended to all correspondence and made or supervised all sales of salt. On October 8, 1912, while Rude was in charge of the office, plaintiff sent a letter of inquiry, addressed to the Detroit Salt Company, asking for prices for salt delivered at South St. Paul for a period of one year after November 1, 1912, when its former contract expired, and in reply received a letter dated October 9, 1912, signed "Detroit Rock Salt Company, per Rude," and containing the statement:

"Your kind favor of the 8th inst. to hand * * * inquiring for price on your rock salt requirements for South St. Paul, Minn., commencing November 1st. In reply, you will find the above proposition covered in contract, entered into March 24, 1911. Reference to this document will undoubtedly give you the information required."

On October 12, 1912, plaintiff again wrote to defendant:

"Referring to your letter regarding rock salt requirements for South St. Paul, you understand that our five-year contract with you gives us the option of including our St. Paul and East St. Louis requirements. The chances are good we will be able to buy rock salt delivered at South St. Paul and East

St. Louis at figures less than those in the contract in question. Therefore we thought you would prefer to make a special price at South St. Paul now and another for East St. Louis a little later."

In reply plaintiff received the following letter, dated October 19, 1912:

"Replying to your kind favor of the 12th inst. we hardly think it would be just the thing for you to do, to place your South St. Paul and St. Louis business elsewhere. We naturally prefer that our mine be your full source of supply. We also take advantage of this opportunity to suggest that in our opinion you will certainly experience some difficulty in securing any better price than represented in our contract, which will mean, $4.05 St. Louis or $4.55 St. Paul, based on present freight rates."

From November 1 to December 31, 1912, plaintiff's orders for salt for South St. Paul delivery were filled at the contract price which was a reduction of 25 cents per ton from the price named in and paid under the former contract. On December 5, 1912, there was a change of management of the defendant company and after December 31, 1912, defendant refused to fill plaintiff's orders except at an increased price of 50 cents per ton, which plaintiff has been compelled to pay. This suit is brought to recover damages for the alleged breach of the contract of March 24, 1911. At the close of the proofs the trial judge directed a verdict in favor of defendant mainly upon the ground that there was no evidence to warrant a finding that Rude was authorized to act for the defendant or that the defendant had adopted the contract made with its predecessor, the Detroit Salt Company.

[1-5] If the case had been submitted to the jury, would the evidence, with all legitimate inferences which might have been drawn therefrom, have warranted and supported a finding that the defendant had so far adopted the contract made with its predecessor, the Detroit Salt Company, as to bind itself to the performance thereof by the sale and delivery of salt at the price, in the quantity, for the term and upon the conditions therein set forth? As said by the Supreme Court in Wiggins Ferry Co. v. O. & M. Railway Co., 142 U. S. 396, 408, 12 Sup. Ct. 188, 192 (35 L. Ed. 1055); and adopted and followed by this court in E. E. Taenzer & Co. v. Chicago, R. I. & P. Co., 170 Fed. 240, 245, 95 C. C. A. 436, 441:

"It is not necessary that a party should deliberately agree to be bound by the terms of a contract to which he is a stranger, if, having knowledge of such contract, he deliberately enters into relations with one of the parties, which are only consistent with the adoption of such contract. If a person conduct himself in such manner as to lead the other party to believe that he has made a contract his own, and his acts are only explicable upon that theory, he will not be permitted afterwards to repudiate any of its obligations."

The evidence fairly shows that the receiver of the Detroit Salt Company was authorized to and did perform the contract in accordance with its terms during the receivership. After the receiver was discharged, the defendant, instead of repudiating and refusing to be bound by the agreement, to all appearances expressly recognized the contract and continued to perform it for a period of more than two months and, during that time, accepted and retained substantial bene-

fits arising therefrom. The reasonable and probable result of such conduct was to lead plaintiff to believe that defendant had adopted and would carry out the agreement in its entirety and thus to prevent plaintiff from contracting for its salt elsewhere before the rise in price. In Bronson's Executor v. Chappell, 12 Wall. 681, 683, 20 L. Ed. 436, the Supreme Court said:

"Where one, without objection, suffers another to do acts which proceed upon the ground of authority from him, or by his conduct adopts and sanctions such acts after they are done, he will be bound, although no previous authority exist, in all respects as if the requisite power had been given in the most formal manner. If he has justified the belief of a third party that the person assuming to be his agent was authorized to do what was done, it is no answer for him to say that no authority had been given, or that it did not reach so far, and that the third party had acted upon a mistaken conclusion. He is estopped to take refuge in such a defense. If a loss is to be borne, the author of the error must bear it."

The receiver under whose directions the contract had been partially performed became the president of the new corporation. The sales agent of the receiver was continued in the same position and was given sole charge of defendant's principal business office. The testimony tends strongly to show that both had full knowledge of the contract with plaintiff and their knowledge is attributable to defendant. Aside from the natural inference arising from the magnitude, character, history, customs and methods of conduct of the business carried on by the Detroit Salt Company, its receiver and its successor, there is some evidence that term contracts for the sale of salt are usual and even necessary in that industry. It is conceded that the agent in charge of its sales department had authority to make current sales of salt for immediate delivery, but the insistence is that his powers were strictly limited to such sales and that his acts in making or adopting sales contracts covering a term of years were outside of the scope of his authority and not binding upon the defendant. The record does not show that any express limitations or restrictions were placed upon the powers of its agent by its officers and directors. Certainly plaintiff had neither knowledge nor notice of any such restrictions or limitations. Rude was the agent of defendant and was given charge of its office and correspondence for the express purpose of selling its salt. The rule is settled that, in the absence of notice otherwise, "parties dealing with an agent have a right to presume that his agency is general, and not limited * * * and the presumption is that one known to be an agent is acting within the scope of his authority," and also "that the authority of the agent must depend, so far as it involves the rights of innocent third persons who have relied thereon, upon the character bestowed, rather than the instructions given." Austrian & Co. v. Springer, 94 Mich. 343, 54 N. W. 50, 34 Am. St. Rep. 350; Inglish v. Ayer, 79 Mich. 516, 44 N. W. 942; Grand Rapids Electric Co. v. Walsh Mfg. Co., 142 Mich. 4, 9, 105 N. W. 1; Lamon v. Speer Hardware Co. (C. C. A. 8), 198 Fed. 453, 457, 119 C. C. A. 1. In Merchants' Bank v. State Bank, 10 Wall. 604, 644, 19 L. Ed. 1008, the Supreme Court thus applied this rule to corporations:

"Where a party deals with a corporation in good faith—the transaction is not ultra vires—and he is unaware of any defect of authority or other irregu-

larity on the part of those acting for the corporation, and there is nothing to excite suspicion of such defect or irregularity, the corporation is bound by the contract, although such defect or irregularity in fact exists. If the contract can be valid under any circumstances, an innocent party in such a case has a right to presume their existence, and the corporation is estopped to deny them. The jury should have been instructed to apply this rule to the evidence before them."

The question of whether the defendant had adopted the contract between plaintiff and the Detroit Salt Company and hence was liable for its breach thereof should have at least been submitted to the jury under proper instructions and it was error to direct a verdict in its favor. Inasmuch as the evidence upon a new trial may not be the same, we find it unnecessary to decide whether upon the evidence presented at the former trial a direction of verdict in plaintiff's favor would have been proper.

The judgment of the lower court is reversed and a new trial granted.

McDOUGAL, Sheriff, etc., v. MUDGE et al.

(Circuit Court of Appeals, Eighth Circuit. May 1, 1916.)

No. 4478.

1. TAXATION ⊂⊃608(10)—REMEDY FOR WRONGFUL ENFORCEMENT—INJUNCTION.
Laws Ark. 1909, p. 764, creating the state tax commission, gives it comprehensive powers in aid of its functions as a board of equalization, to the end that all assessments on property, privileges, and franchises in the state shall be made in relative proportion to the just and true value thereof, in substantial compliance with the law, and requires such board to examine and compare the rates of the assessments of property in the several counties of the state, and to proceed to equalize the same, so that all property shall bear its equal and just proportion of taxes of the different counties. The tax commission assessed the property of railroad corporations on a basis of 50 per cent. of its actual value, in conformity with customary assessments on other property. The county board of equalization thereafter reduced all assessments in the county, except that of railroads, to 25 per cent. *Held*, that as the state tax commission was given powers of equalization, and it was the legislative intent that such body should grant relief in such cases, the railroad company discriminated against by such assessment cannot in the first instance be granted an injunction, but must first apply to the commission.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1239; Dec. Dig. ⊂⊃608(10).]

2. TAXATION ⊂⊃608(10)—RESTRAINING TAX—REMEDIES—SCOPE OF.
Under Const. Ark. art. 16, § 13, and Kirby's Dig. § 3966, authorizing an injunction against any illegal exaction whatever, as well as any illegal or unauthorized taxes, an injunction against the collection of such taxes cannot be granted; there being a remedy by application to the state tax commission, and the taxes not being illegal, within the intent of those provisions.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1239; Dec. Dig. ⊂⊃608(10).]

Appeal from the District Court of the United States for the Eastern District of Arkansas; Jacob Trieber, Judge.

Bill for injunction by Henry U. Mudge and Jacob M. Dickinson, receivers of the Chicago, Rock Island & Pacific Railway Company, against J. F. McDougal, Sheriff and Tax Collector of St. Francis County, State of Arkansas. From an order granting a temporary injunction (222 Fed. 562), defendant appeals. Reversed, with directions to dismiss the bill.

James P. Clarke, of Little Rock, Ark., for appellant.

Thomas S. Buzbee, of Little Rock, Ark., for appellees.

Before HOOK and CARLAND, Circuit Judges, and AMIDON, District Judge.

HOOK, Circuit Judge. The Chicago, Rock Island & Pacific Railway Company sued the tax collector of St. Francis county, Ark., to enjoin the collection of the taxes of 1914 against its railroad property because of an unequal, discriminating valuation. Receivers subsequently appointed were substituted as plaintiffs. A temporary injunction was granted, and the tax collector appealed.

Under the statutes of Arkansas the property of railroad companies and certain other corporations is assessed by the state tax commission, and the ascertained valuation is apportioned among the various counties and subordinate divisions thereof in which the property is located, and accordingly certified to the local county authorities. All other property, real and personal, in the several counties, is valued by local assessors. There are county boards of equalization, with authority to equalize the valuations of property within their respective jurisdictions, excepting the property of the corporations mentioned. The state tax commission acts as a state board of equalization, with jurisdiction over the valuations directly made by them as above noted and also over the aggregates of local valuations as equalized by the county boards.

The Constitution of Arkansas provides that all property shall be taxed according to its value, and that no one species subject to taxation shall be taxed higher than another of equal value. Article 16, § 5. Nevertheless it was a custom in that state for the local officials to extend upon the assessment rolls but 50 per cent. of the ascertained true value of the property locally assessed. The state tax commission yielded to the custom by certifying down a like per cent. of the valuations of railroad and other corporate property they assessed. In 1914, after the valuation so reduced by the state tax commission had been certified down and extended on the assessment rolls, and after the other property in St. Francis county had been locally assessed on a like basis, the county board of equalization cut in two the local valuations, leaving those certified untouched. The result of this was that the property of plaintiff and other corporations similarly situated was assessed and taxed at half its value, while all other real and personal property in the county was assessed and taxed at but a quarter of its value. The plaintiff, offering to pay taxes on the latter basis, brought this suit to enjoin the excess. The defendant moved to dismiss the bill of complaint on a number of grounds, one of which was that plaintiff had not availed itself of the statutory remedies for the

correction of the wrong asserted. The motion does not seem to have been passed upon; but, if it was well taken, the bill of complaint should have been dismissed, and that result can be directed on appeal.

[1] If the practice of assessing on a basis of 50 per cent. of the true value were carried out uniformly as to all subjects of taxation in the state, a property owner could not justly complain of discrimination against him, but what was done in St. Francis county discriminated, not only against the owners of property there which was not embraced in the local reduction, but against the owners of all taxable property elsewhere in the state. It remains, however, to consider the appropriate remedy. The state tax commission, created by an Arkansas statute (Laws 1909, p. 764), was given comprehensive powers in aid of its functions as a board of equalization "to the end that all assessments on property, privileges and franchises in the state shall be made in relative proportion to the just and true value thereof, in substantial compliance with the law." When sitting as a state board of equalization it acted, not only upon its own direct valuations of railroad and other corporate property, but also upon the valuations of all other property established or confirmed by the county boards of equalization. As to the latter its power was exercised upon the aggregate valuations by way of addition to or deduction from totals. As a board of equalization they were to "examine and compare the returns of the assessment of property in the several counties of the state and proceed to equalize the same, so that all the taxable property in the state shall be assessed at its true value and that all property shall bear its equal and just proportion of the taxes of the different counties of the state."

We think that in performing their duties the state board of equalization were authorized to bring the equalized valuations of the county boards into comparison with their own valuations of railroad property. In no other way could the manifest intent of the legislation as to state-wide equality and uniformity be secured. We also think the clear legislative intent was that the state board of equalization should be a primary administrative tribunal for the hearing and correction of complaints like that made in this case, and that with such an expeditious and effective remedy at hand a complainant cannot ignore it if he desires redress. Such a complaint in this case would doubtless have resulted in a correction of the discrimination—very probably in the vacation of the unauthorized action of the county authorities. An injunction by a court in the first instance would not completely correct the wrong complained of, but would simply add the plaintiff to the number of taxpayers illegally favored. Of course a person is not to be denied a judicial remedy because others similarly situated do not seek it; but where a statute provides a simple administrative method of correcting discriminations in assessments and of securing uniformity throughout the state it should be tried out before a resort to a federal court of equity. That is the prevailing rule in the courts of the United States.

Counsel cites Bank of Jonesboro v. Hampton, 92 Ark. 492, 123 S. W. 753, to the effect that the state board has no power to equalize in-

dividual assessments. But individual assessments within the meaning of that decision are the valuations made by the local assessors upon which the county boards of equalization have already acted. When such assessments come before the state board, they then meet those of railroad and other corporate property with which they have not before been compared by competent authority. As already observed, the state board takes the local results by county or subdivisional aggregates, not by individual constituent units, and we think that when so taken they may be compared, not only with similar returns from other counties, but with the valuations made by the state tax commission of the class of property within their cognizance. A contrary construction is not required by the letter or spirit of the statute and would open wide the door to discrimination.

[2] It is also urged that the Constitution of Arkansas (article 16, § 13) and a statute (Kirby's Digest, § 3966) as construed by the Supreme Court of the state expressly authorize the judicial remedy of injunction. The words of the Constitution are "any illegal exaction whatever"; those of the statute are "illegal or unauthorized taxes and assessments." The decisions of the state court cited show that these expressions have been confined to defects or errors which are jurisdictional, and that they have not been extended to those defects or errors committed in the exercise of a jurisdiction conferred as to which a plain and adequate administrative remedy has been provided. In Vaughan v. Bowie, 30 Ark. 278, the injunction was against the excess of a school tax above the maximum rate prescribed by law. In Little Rock v. Barton, 33 Ark. 436, the question was whether the Legislature had power to authorize a municipal occupation tax or license; in Brodie v. McCabe, 33 Ark. 690, whether a tax contracted to be levied to pay bonds stood unimpaired against subsequent legislation. Cole v. Blackwell, 38 Ark. 271, involved a tax levied by a body without power under the law. In Harris Lumber Co. v. Grandstaff, 78 Ark. 187, 95 S. W. 772, the question was whether certain property of a corporation was subject to taxation in a certain county; in Dreyfus v. Boone, 88 Ark. 353, 114 S. W. 718, whether a city ordinance was a valid exercise of the police power, or an attempt to create a monopoly of a private business. In Merwin v. Fussell, 93 Ark. 336, 124 S. W. 1021, the injunction was against a road tax levied under an unconstitutional act of the Legislature. In McDaniel v. Texarkana, etc., Co., 94 Ark. 235, 126 S. W. 727, the plaintiff paid its taxes in the proper county and was granted an injunction against taxes in another county in which its property was not taxable. In Waters-Pierce Oil Co. v. Roberts, 96 Ark. 92, 131 S. W. 205, the county board of equalization raised the taxpayer's valuation after its power to do so had expired and without the notice required by statute to enable him to pursue his statutory remedy. The increase of valuation and the tax thereon were wholly illegal. In Harrison v. Norton, 104 Ark. 16, 148 S. W. 497, and St. Louis, etc., Ry. Co. v. Kavanaugh, 78 Ark. 468, 96 S. W. 409, the question was whether a road tax had been authorized at an election as required by statute.

On the other hand, see Arlington Hotel Co. v. Buchanan, 110 Ark.

34, 160 S. W. 895; Clay County v. Brown Lumber Co., 90 Ark. 413, 119 S. W. 251; Board of Equalization Cases, 49 Ark. 518, 6 S. W. 1. The differences between the case at bar and the cases cited to support the injunction are marked. Here the statutes relating to the assessment and taxation are valid. The plaintiff's property was subject to taxation, and the part in St. Francis county was properly taxable there on the apportioned valuation. The tax rate was not illegal. The valuation upon which the rate was calculated was regularly ascertained and was not inherently excessive; it was but 50 per cent. of the real value. The sole error was a relative one disclosed by a comparison with the assessment of other property in the county, an error the correction of which was essentially the function of a statutory tribunal created specially for the purpose. Resort to that tribunal to secure an adjustment of valuations to a common standard should have been had before a court of equity is called upon to intervene. This question under the Constitution and statutes of Arkansas was recently fully considered by this court in McLaughlin v. Railway, 232 Fed. 579, — C. C. A. —, and the same conclusion reached.

The order is reversed, with direction to dismiss the bill of complaint.

RAYMOND v. CHICAGO, M. & ST. P. RY. CO.

(Circuit Court of Appeals, Ninth Circuit. May 29, 1916.)

No. 2544.

1. COMMERCE ⊂=27—"INTERSTATE COMMERCE"—FEDERAL EMPLOYERS' LIABILITY ACT.

A laborer in a tunnel, which, when completed, was intended to be used by a railroad company to shorten its line over which it transported intra and inter state commerce, is not engaged in "interstate commerce," so as to maintain an action for personal injuries under Employers' Liability Act April 22, 1908, c. 149, 35 Stat. 65 (Comp. St. 1913, §§ 8657–8665).

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 25; Dec. Dig. ⊂=27.

For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.]

2. JURY ⊂=31(1)—MASTER AND SERVANT ⊂=347—JURY TRIAL—DENIAL OF.

Despite Const. U. S. Amend. 7, declaring that the right to trial by jury shall be retained, the states may deny jury trial, and Laws Wash. 1911, c. 74, providing a scheme of compensation to injured workmen without any action triable by jury, is not invalid for that reason.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 204, 214; Dec. Dig. ⊂=31(1); Master and Servant, Dec. Dig. ⊂=347.]

3. CONSTITUTIONAL LAW ⊂=313—JURY TRIAL—DENIAL—DUE PROCESS OF LAW.

As due process of law is the process due according to the law of the land, the states may abolish jury trial and so Laws Wash. 1911, c. 74, providing for compensation to injured workmen, which did away with jury trial, is not invalid under Const. U. S. Amend. 14, as denying a workman due process of law.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 933; Dec. Dig. ⊂=313.]

4. MASTER AND SERVANT ⊂=347—INJURIES TO SERVANT—WORKMEN'S COMPENSATION ACT—POLICE POWER.

Laws Wash. 1911, c. 74, providing for compensation to employés injured in hazardous occupations, is a valid exercise of the police power, though the compensation provided for is not great, and is not invalid as denying equal protection of the laws.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. ⊂=347.]

In Error to the District Court of the United States for the Northern Division of the Western District of Washington; Jeremiah Neterer, Judge.

Action by William Raymond against the Chicago, Milwaukee & St. Paul Railway Company. Judgment for defendant, dismissing the petition, and plaintiff brings error. Affirmed.

John T. Casey, of Seattle, Wash., for plaintiff in error.

George W. Korte, of Seattle, Wash., for defendant in error.

Before GILBERT and ROSS, Circuit Judges, and RUDKIN, District Judge.

GILBERT, Circuit Judge. The plaintiff in error in his complaint in the court below alleged that he was an employé of the defendant in error, and was engaged in the work of driving a tunnel to improve and better the roadbed on the defendant's main railroad line, so as to facilitate and make less difficult and expensive and more easy to secure expeditious and efficient operation of freight and passenger trains on the defendant's line, in the carriage of freight and passengers in interstate commerce. From the pleadings it appeared that the tunnel when completed would be about 14,000 feet in length, and that the plaintiff was engaged therein as a common laborer with a pick and shovel, the tunnel being intended to shorten the line which at the time ran over the mountain through which the tunnel was located. The defendant in error filed a motion for a judgment on the pleadings, on the ground that it affirmatively appeared therefrom that the complaint was based upon the federal Employers' Liability Act, that at the time when he was injured the plaintiff was not employed or engaged in interstate commerce, so as to bring his services within the terms of the act, and on the further ground that the court was without jurisdiction of the action on account of the act of the Legislature of the state of Washington (chapter 74, Laws of 1911), relating to the compensation of injured workmen, engaged in tunnel work, in force in that state. The motion was sustained, and a judgment was entered for the defendant in error, dismissing the action.

[1] The plaintiff in error contends that from the pleadings it appears that the work in which he was engaged was interstate commerce, and that the cause of action is within the terms of the federal Employers' Liability Act. He relies principally upon the case of Pedersen v. Del., Lack. & West. R. R., 229 U. S. 146, 33 Sup. Ct. 648, 57 L. Ed. 1125, Ann. Cas. 1914c, 153, and contends that the facts in that case as they are stated in the District Court (184 Fed. 737) and in the Circuit Court of Appeals (197 Fed. 537, 117 C. C. A. 33) are similar to the facts in the case at bar. In the District Court it is stated in

the opinion in that case that at the time of the plaintiff's injury the defendant was engaged in building an additional track, part of which was to be laid on a bridge, and that the plaintiff was hurt while upon the uncompleted structure, and while carrying material from one part of the work to another. In the Circuit Court of Appeals the statement was made that the plaintiff "was an iron worker on a bridge on which an additional track was being placed." In both of those courts it was held that the plaintiff was not engaged in interstate commerce. But in the Supreme Court the facts are stated differently. There it is said that:

"On the afternoon of his injury the plaintiff and another employé, acting under the direction of their foreman, were carrying from a tool car to a bridge, known as the Duffield bridge, some bolts or rivets which were to be used by them that night or very early the next morning in 'repairing that bridge'; the repair to consist in taking out an existing girder and inserting a new one. The bridge could be reached only by passing over an intervening temporary bridge at James avenue. These bridges were being * * * used in both interstate and intrastate commerce. While the plaintiff was carrying a sack of bolts or rivets over the James Avenue bridge, on his way to the Duffield bridge, he was run down and injured by an intrastate passenger train."

It was on that statement of the facts that the court reversed the decision of the lower courts, and held that the plaintiff was engaged in interstate commerce within the provisions of the federal Employers' Liability Act. In considering that question the court said:

"Was that work being done independently of the interstate commerce in which the defendant was engaged, or was it so closely connected therewith as to be a part of it? Was its performance a matter of indifference so far as that commerce was concerned, or was it in the nature of a duty resting upon the carrier? The answers are obvious. Tracks and bridges are as indispensable to interstate commerce by railroad as are engines and cars, and sound economic reasons unite with settled rules of law in demanding that all of these instrumentalities be kept in repair. The security, expedition, and efficiency of the commerce depends in large measure upon this being done. * * * We are of opinion that the work of keeping such instrumentalities in a proper state of repair while thus used is so closely related to such commerce as to be in practice and in legal contemplation a part of it."

We think there is a clear distinction between the facts in that case and those in the case at bar. The plaintiff in error here was engaged in constructing a new instrumentality. When completed it was intended to be used in interstate commerce, but as yet it was no part of the railroad line of the defendant in error, and it had not become an instrumentality in interstate commerce. To the state of facts which is here presented on the pleadings, the language of the Supreme Court in the Pedersen Case is applicable. The court said:

"The true test always is: Is the work in question a part of the interstate commerce in which the carrier is engaged? * * * Of course, we are not here concerned with the construction of tracks, bridges, engines, or cars which have not as yet become instrumentalities in such commerce, but only with the work of maintaining them in proper condition after they have become such instrumentalities and during their use as such."

The present case is similar to Bravis v. Chicago, M. & St. P. Ry. Co., 217 Fed. 234, 133 C. C. A. 228, in which the Circuit Court of

Appeals for the Eighth Circuit held that an employé engaged in the construction of a bridge 600 feet distant from the railroad on a cut-off more than a mile in length, and which had never been provided with rails or used as a railroad, is not employed in interstate commerce, although his employer is so engaged, and intends to use the cut-off when completed. The court said:

"The mere fact that it was the purpose and intention so to use it at some future time did not make it an instrumentality of interstate commerce. That purpose and intention might be changed, and it might never be used in interstate commerce, or at all. The argument that the building of the cut-off was the mere correction or prevention of a defect or insufficiency of the defendant's instrumentality for conducting interstate commerce is too remote and inconsequential to convince."

[2, 3] It is contended that, even if the allegations of the complaint fail to bring the case within the federal Employers' Liability Law, they sufficiently allege a common-law cause of action against the defendant, and for that reason it was error to enter a judgment against the plaintiff on the pleadings. The statute of Washington of 1911 (Laws 1911, p. 345), entitled "An act relating to compensation of injured workmen," declares that the common-law system governing the remedy of workmen against employers for injuries received in hazardous work is inconsistent with modern industrial conditions, economically unwise and unfair, that the remedy of the workman has been uncertain, slow, and inadequate, and that the state of Washington, exercising its police and sovereign power, declares that all phases of the premises are withdrawn from private controversy, and it provides a system of compensation in all cases of death or injury of employés in hazardous work. It declares that the construction of tunnels is a hazardous work within the meaning of the act, and it provides a schedule of contribution by employers, and a schedule of compensation in case of death or injury, declares that the total loss of eyesight is a permanent total disability within the meaning of the act, and provides that the person injured shall receive monthly, during the period of such disability, if unmarried, the sum of $20.

It is contended that the provision for the payment of this insignificant sum in a case where a strong, healthy young man has been totally deprived of his eyesight, is so inadequate that it results in depriving him of his property without due process of law, and denies him the equal protection of the laws, and deprives him of his right under the Seventh Amendment to the federal Constitution to a trial by jury. The proposition that by the Compensation Law of Washington, the plaintiff is deprived of the right to a jury trial, contrary to the provisions of the federal Constitution, cannot be sustained. Neither the Seventh Amendment nor the Fourteenth Amendment forbids the state to abolish or deny the right of trial by jury. Edwards v. Elliott, 21 Wall. 532, 22 L. Ed. 487; Walker v. Sauvinet, 92 U. S. 90, 23 L. Ed. 678. Said the court in the case last cited:

"Due process of law is process due according to the law of the land. This process in the states is regulated by the law of the state."

[4] The constitutionality of the law of the state of Washington has been affirmed in State ex rel. Davis Smith Co. v. Clausen, 65 Wash.

156, 117 Pac. 1101, 37 L. R. A. (N. S.) 466, State ex rel. Pratt v. Seattle, 73 Wash. 396, 132 Pac. 45, State v. Mountain Timber Co., 75 Wash. 581, 135 Pac. 645, and Peet v. Mills, 76 Wash. 437, 136 Pac. 685, L. R. A. 1916A, 358, Ann. Cas. 1915D, 154. We are not convinced that the act is within the prohibition of any provision of the federal Constitution. It was adopted by the state in the exercise of its police power, and with a view of correcting an evil by the substitution of a remedy for the existing remedy, which, the act declared, "has been uncertain, slow and inadequate" for injuries which, "formerly occasional, have become frequent and inevitable." In Noble State Bank v. Haskell, 219 U. S. 104, 110, 31 Sup. Ct. 186, 55 L. Ed. 112, 32 L. R. A. (N. S.) 1062, Ann. Cas. 1912A, 487, Mr. Justice Holmes said:

"Many laws which it would be vain to ask the court to overthrow could be shown, easily enough, to transgress a scholastic interpretation of one or another of the great guaranties in the Bill of Rights. They more or less limit the liberty of the individual, or they diminish property to a certain extent. We have few scientifically certain criteria of legislation, and as it often is difficult to mark the line where what is called the police power of the states is limited by the Constitution of the United States, judges should be slow to read into the latter a nolumus mutare as against the law-making power. * * * It may be said in a general way that the police power extends to all the great public needs. Camfield v. United States, 167 U. S. 518 [17 Sup. Ct. 864, 42 L. Ed. 260]. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare."

The state Legislature, in the exercise of its wisdom, has adopted for the case of an injury resulting in total disability to an employé a monthly compensation which is fixed and determined, and is secured to him for the remainder of his life. We are not prepared to say that it is not a better provision for him than the common-law remedy, whereby he was required to prove the negligence of the defendant, and his cause of action was subject to the defenses of contributory negligence and assumption of risk, and the amount recoverable was uncertain, and was largely to be reduced by the payment of attorney's fees.

We find no error. The judgment is affirmed.

In re GRIGGS et al.

(Circuit Court of Appeals, Eighth Circuit. May 27, 1916.)

No. 165.

1. MANDAMUS ⊂=172—PROHIBITION ⊂=28—ABSENCE OF JURISDICTION.

On application for writ of prohibition or mandamus to prevent a lower court from exercising jurisdiction, neither the merits of the main case nor whether the action of the trial court is equitable is involved, but the sole inquiry is whether that court is clearly without jurisdiction; the writs being extraordinary remedies, which should not issue, unless the absence of jurisdiction be clear.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 381–385; Dec. Dig. ⊂=172; Prohibition, Cent. Dig. § 77; Dec. Dig. ⊂=28.]

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

2. APPEAL AND ERROR ⊂⊃1170(1)—REVIEW—HARMLESS ERROR.
Rev. St. § 954 (Comp. St. 1913, § 1591), declaring that no summons or other proceeding, etc., shall be abated or reversed for any defect or want of form, but the court shall proceed and give judgment according to the right of the case and matter, covers every step of the case from summons to judgment, and is independent of state statutes and procedure, though it cannot supply a lack of jurisdiction.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4032, 4066, 4454, 4540; Dec. Dig. ⊂⊃1170(1).]

On petition for rehearing. Petition denied, and former opinion affirmed.

For former opinion, see 227 Fed. 795, 142 C. C. A. 319.

James A. Brown, of Fergus Falls, Minn., and Boys, Osborn & Griggs, of Streator, Ill., for petitioners.

Before HOOK, Circuit Judge, and AMIDON and VAN VALKENBURGH, District Judges.

HOOK, Circuit Judge. Counsel misconceive the limited office of the writ they sought and the effect of the opinion of this court denying their application. The situation was as follows:

The defendants resided in Illinois. As executors they had procured ancillary letters in Minnesota where part of the estate of the testator was located. The plaintiff sued them in Minnesota, both as individuals and as executors, and real property of the estate in that state was attached. Instead of contesting the attachment and the jurisdiction of the court, they voluntarily entered their appearance in both capacities, and gave a bond to discharge the attachment. The case was defended upon the merits, the defendants participating as individuals until the stipulation was made for their dismissal in that capacity (in effect without prejudice) and that judgment upon any verdict for plaintiff should go against them as executors. The plaintiff secured a verdict and judgment accordingly. On a writ of error obtained by the executors from this court it was held they were not liable, notwithstanding the stipulation, and the cause was remanded for a new trial. The intent of the stipulation was defeated. At a subsequent term, when the case again arose in the trial court, the plaintiff moved to vacate the stipulation. Defendants appeared generally as executors and resisted the motion; as individuals they filed a special appearance and denied the jurisdiction of the court over them in that capacity. The trial court vacated the stipulation and reinstated the case against defendants as individuals. There is no question of lack of notice and opportunity to be heard upon the vacation of the stipulation, excepting that growing out of a distinction between the two capacities of the defendants. In effect they say that, while still in court as executors, they were beyond its jurisdiction as individuals.

[1] The application now in question was for a writ of prohibition or mandamus to prevent the trial court from exercising jurisdiction over the defendants in their individual capacities. On such an application the merits of the main case are not involved, nor whether

the action of the trial court is equitable or not. The sole inquiry on such an application is whether that court was clearly without jurisdiction, not whether it was likely to commit error while exercising it. And all we held was that under the circumstances it had a right, under its power to authorize amendments, or in analogy thereto, to allow the action to proceed against defendants as individuals. What that court could properly do afterwards is another matter; it was not before us and was not decided. If the law be that the case as stated in the original petition is not sustainable against defendants in both capacities, representative and individual, a contrary course would be erroneous; but the error would not be jurisdictional. The writ of mandamus is an extraordinary remedy, and to justify its issue the absence of jurisdiction should be plain and clear.

Our opinion does not conflict with the original opinion in the main case, reported in 137 C. C. A. 189, 221 Fed. 381. There the defendants sought a review of the judgment rendered against them as executors, and the plaintiff asked us to amend the judgment below, so that it would stand against the defendants as individuals. Obviously that request could not be granted, but what the trial court could or could not do after the case was remanded for a new trial was not before us, and there was no intention to decide in advance or to lay down a course for its procedure. The general language in that opinion to which attention is now directed was descriptive of the doctrine of Wetmore v. Karrick, 205 U. S. 141, 27 Sup. Ct. 434, 51 L. Ed. 745, which was cited. But in that case the action had come to an end by dismissal, and after what was equivalent to the expiration of the term the order of dismissal was vacated, the action was reinstated, and judgment was rendered against the defendant, without motion or proceeding to vacate, and without notice to him or process upon him. While here there was a formal proceeding, the defendants were still in court, as executors, it is true, and they had full opportunity to be heard in either or both of their dual capacities. The vital essentials of due process of law were not lacking, as in Wetmore v. Karrick, and as In re Metropolitan Trust Co., 218 U. S. 312, 31 Sup. Ct. 18, 54 L. Ed. 1051, they had no decree in their favor, they had not gone without day upon the merits.

In denying defendants' application for a writ of prohibition or mandamus we took the case as though it had been originally commenced against them as executors only. Perhaps this was unnecessary; but, even when so regarded, the action of the trial court involves a question which seems more properly referable to its amendatory power over pleadings and parties than to its jurisdiction. In some circumstances a person going into a foreign jurisdiction does not carry with him his representative character, as, for example, where he is a director of a corporation on whose business he is not bent (Remington v. Railroad, 198 U. S. 95, 25 Sup. Ct. 577, 49 L. Ed. 959); but if he goes officially it is difficult to see that he leaves himself personally at home beyond the reach of the notice which lies at the foundation of jurisdiction. Similar considerations apply when he is in a court of justice. In the case here defendants as executors opposed the vacation

of the stipulation, a matter in which they had no interest in their purely representative character; their denial of jurisdiction was by the same persons speaking as individuals.

[2] The authority of the courts of the United States under section 954, Rev. Stat. (Comp. St. 1913, § 1591), is of the very broadest character, and while it cannot be employed to supply a lack of jurisdiction it covers every step of a case from summons to judgment. McDonald v. Nebraska, 41 C. C. A. 278, 101 Fed. 171. The corresponding section of the Judiciary Act of 1789 (1 Stat. 91) "was designed to free the administration of justice in the federal courts from all subtle, artificial and technical rules and modes of proceeding in any way calculated to hinder and delay the determination of causes in those courts upon their very merits."

The power is independent of state statutes and procedure. Mexican Central R. Co. v. Duthie, 189 U. S. 76, 78, 23 Sup. Ct. 610, 47 L. Ed. 715. In Randolph v. Barrett, 16 Pet. 138, 10 L. Ed. 914, it appeared that defendant was not an administrator, as he was sued, but was executor, so the former designation was stricken out, and the latter substituted. McDonald v. Nebraska, supra, was first brought by an individual in his capacity as state treasurer, and, when it was determined he had no legal capacity to sue, the state was substituted in his stead. In Commissioners v. Bank of Commerce, 97 U. S. 374, 24 L. Ed. 1060, a judgment against defendants, described as commissioners of a county, was held sustainable against the county as the proper corporate body liable. In Van Doren v. Railroad, 35 C. C. A. 282, 93 Fed. 260, a plaintiff, who was both widow and administratrix, sued in the latter capacity, in which it was held she had no cause of action under the applicable statute; she was allowed to amend. In St. Louis & S. F. R. Co. v. Herr, 113 C. C. A. 578, 193 Fed. 950, plaintiff's cause of action was as heir of the decedent, and not as administrator, in which capacity he sued. It appeared he was both, and the judgment was allowed to stand on appeal. In Chicago G. W. Ry. Co. v. First Methodist Episcopal Church, 42 C. C. A. 178, 102 Fed. 85, 50 L. R. A. 488, it was held that a judgment in favor of the church in its corporate name was sustainable on appeal in favor of the trustees of the church, in whom was vested the legal title to its property. It was said that "this court would merely direct the substitution of the trustees of the church as plaintiffs in the action." True, these cases are not precisely like the one at bar; but it is not perceived that the difference presents a jurisdictional obstacle. There are cases in the state courts under reformed rules of procedure, some of which were cited in our former opinion, more nearly like the one here. Though not binding, they are persuasive of the intent of such legislation that form yield to substance in the administration of justice.

The petition for rehearing is denied.

WATLINGTON v. UNITED STATES. *

(Circuit Court of Appeals, Eighth Circuit. May 1, 1916.)

No. 4275.

1. JURY ⊜131(15)—SELECTION—QUESTIONING OF VENIREMEN.
It is not an abuse of discretion of the court to refuse to allow counsel to ask the veniremen questions calculated to induce a misunderstanding.
[Ed. Note.—For other cases, see Jury, Cent. Dig. § 579; Dec. Dig. ⊜131(15).]

2. CRIMINAL LAW ⊜385—EVIDENCE—CUSTOM—MAILING OF LETTERS.
The mailing of letters may be shown by evidence of the custom and course of men's private offices and business.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 861, 865–868, 870, 878; Dec. Dig. ⊜385.]

3. CRIMINAL LAW ⊜323—PRESUMPTIONS—MAILS.
The mailing of a letter, postage prepaid, raises a presumption of receipt by the addressee.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 724, 726, 730–751; Dec. Dig. ⊜323.]

4. CRIMINAL LAW ⊜402(1)—SECONDARY EVIDENCE—COPIES OF LETTERS.
Proved copies of letters sent to accused, who was charged with using the mails to defraud, may be received in evidence, without otherwise accounting for the originals.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 887; Dec. Dig. ⊜402(1).]

5. POST OFFICE ⊜49—POSTAL OFFENSES—USE OF MAILS TO DEFRAUD.
Where accused was charged with using the mails in aid of a scheme to defraud in connection with disposing of the stock of a loan company, letters written by stockholders in the company seeking information regarding its affairs while the scheme of accused was in progress are admissible.
[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 84–86; Dec. Dig. ⊜49.]

6. CRIMINAL LAW ⊜444—EVIDENCE—IDENTIFICATION OF LETTERS.
Where accused was charged with using the mails with intent to defraud, a stenographer in his office may testify as to the significance of typewritten initials on the letters, and that they showed who dictated them and who took the dictation and transcribed the letters.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1028; Dec. Dig. ⊜444.]

7. CRIMINAL LAW ⊜830—TRIAL—INSTRUCTIONS.
Where a requested instruction was not in proper shape, and would have to be recast by the court, it may be denied for that reason.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2012, 2017; Dec. Dig. ⊜830.]

8. POST OFFICE ⊜35—OFFENSES—USE OF MAILS TO DEFRAUD.
Where, by organizing a corporation, accused intended ultimately to defraud stockholders, the legality of the corporation's object and charter purpose is no defense to prosecution for using the mails in connection with the scheme to defraud.
[Ed. Note.—For other cases, see Post Office, Cent. Dig. § 55; Dec. Dig. ⊜35.]

⊜For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

*Rehearing denied September 20, 1916.

9. POST OFFICE ⊂=35—OFFENSES—USE OF MAILS TO DEFRAUD.
Where accused used the mails to dispose of corporate stock, and subsequently appropriated the property of the corporation, he is not guilty of using the mails with intent to defraud, unless there was a fraudulent intent at the time the mails were used.
[Ed. Note.—For other cases, see Post Office, Cent. Dig. § 55; Dec. Dig. ⊂=35.]

In Error to the District Court of the United States for the Western District of Oklahoma; John H. Cotteral, Judge.

W. H. Watlington was convicted of using the mails in aid of a scheme to defraud, and he brings error. Affirmed.

Norman R. Haskell and Samuel W. Hayes, both of Oklahoma City, Okl. (E. G. McAdams and Lawrence Mills, both of Oklahoma City, Okl., and Carlos Bee, of San Antonio, Tex., on the brief), for plaintiff in error.

Isaac D. Taylor, Asst. U. S. Atty., of Guthrie, Okl. (John A. Fain, U. S. Atty., of Lawton, Okl., and W. B. Herod, Asst. U. S. Atty., of Guthrie, Okl., on the brief), for the United States.

Before HOOK, Circuit Judge, and AMIDON and VAN VALKENBURGH, District Judges.

HOOK, Circuit Judge. Watlington was convicted of using the mails in aid of a scheme to defraud. Section 215, Penal Code (Act March 4, 1909, c. 321, 35 Stat. 1130 [Comp. St. 1913, § 10385]). Briefly stated, the scheme set forth in the indictment was the organization of a mortgage loan corporation and the sale of stock thereof with intent to convert to his own use and embezzle the assets of the company, including the proceeds of the stock sold.

[1] There is no merit in the complaints of the rulings of the court during the impaneling of the jury. As happens at times, counsel succeeded in confusing jurors by questions they did not fully comprehend, but upon explanations by the court and their answers to further questions they showed themselves fully qualified. Counsel contended for a right to ask in his own way some questions which were calculated to induce a misunderstanding. They were rightly excluded by the court, with an explanation and permission to frame other questions accordingly. The discretion of the court in such cases was far from being exceeded.

[2-5] No error occurred in the admission of evidence nor as regards instructions to the jury. The four letters of Harrison & Norment were properly received, though the two to the loan company were quite unimportant in themselves. There was sufficient evidence that the letters were mailed and were received. The mailing of letters may be shown by evidence of the custom and course of men's private offices and business. Knickerbocker Life Ins. Co. v. Pendleton, 115 U. S. 339, 345, 6 Sup. Ct. 74, 29 L. Ed. 432. The mailing of letters postage prepaid raises a presumption of their receipt by the addressee. Kimberly v. Arms, 129 U. S. 512, 9 Sup. Ct. 355, 32 L. Ed. 764. The business of the accused and the size of the city in which he conducted it admit of the presumption, without the addition of his street num-

ber to the address. Besides, there was other proof that he received them. Proved copies of letters sent to an accused may be admitted in evidence, without otherwise accounting for the originals. Trent v. United States, — C. C. A. —, 228 Fed. 648; McKnight v. United States, 61 C. C. A. 112, 122 Fed. 926. The letters referred to were written by stockholders of the Loan Company while the scheme of the accused was in progress. They sought information regarding the affairs of their company to which they were entitled and they were a part of a course of correspondence in which the accused and the company participated. See Rumble v. United States, 75 C. C. A. 30, 143 Fed. 772.

[6] Complaint is also made of the testimony of a stenographer in the office of the Loan Company tending to connect the accused with the letters set forth in the indictment. She was asked what certain typewritten initials on the letters "signified and showed," and she answered that they "signified and showed" who dictated them and who took the dictation and transcribed them. There is no merit in the complaint. The phrase employed in the question and answer simply meant what the initials on the letters indicated according to the business practice in the office. Of course the testimony was not conclusive as to the authorship of the letters but it was relevant, and with other facts and circumstances constituted convincing proof upon the subject. There are other complaints as to the evidence but none more substantial than the above. The relevancy of the evidence upon which its admissibility depends is distinct from its probative effect. Moffatt v. United States, 232 Fed. 522, — C. C. A. — (decided at the December term).

[7] An instruction was requested that the rules by which the testimony of accomplices is tested should be applied to the testimony of certain witnesses. It was refused. Had the instruction been given as requested it would not have informed the jury what the rules were and it was not the duty of the court to put it in shape. Exception was taken to a passage in the general charge explaining the fiduciary relation of directors of a corporation towards the stockholders. The point of the exception was that a constructive as well as an active fraud might have been inferred by the jury; but the charge in its entirety left no doubt of the correct meaning in that particular.

[8, 9] Finally, it is urged that a motion for a directed verdict of acquittal should have been granted. We think, however, the verdict was supported by substantial evidence. The fact that the Loan Company was lawfully organized as a corporation and its chartered purpose a legitimate business did not prevent it being made the vehicle of a scheme to defraud. Miller v. United States, 66 C. C. A. 399, 133 Fed. 337; Lemon v. United States, 90 C. C. A. 617, 164 Fed. 953. It is clear beyond doubt that in the end the accused succeeded in perpetrating a swindle upon those he induced to buy shares of stock. The company was stripped of its business and assets, its records were removed to another state, and the stockholders were denied information of its affairs. Gross dishonesty is scarcely denied, but it is contended that this result occurred some two years after the company was organized, and that there was no evidence of a fraudulent intent

at the times the mails were used as specified in the indictment. Of course, if this were so, the offense would be only against the laws of the state. We think, however, that in the facts and circumstances surrounding the organization of the company, and in the conduct of the accused which soon developed and progressively continued, there was substantial evidence that, when he organized the company, sold the stock, and used the mails, he had in view the object he afterwards consummated—the defrauding of the company and its stockholders. The significant items of evidence need not be recited. Some of them were apparently innocent when regarded by themselves, as counsel argues them, but in their natural relations to a larger connected transaction they assume a different color.

The sentence is affirmed.

Petition of FRIEDLAENDER.

In re WELLMADE GAS MANTLE CO.

(Circuit Court of Appeals, First Circuit. June 15, 1916.)

No. 1188.

BANKRUPTCY ⇐140(2)—JURISDICTION OF BANKRUPTCY COURT—BANKRUPT'S ESTATE.

Where a seller by replevin sought to rescind a contract for the sale of goods on the ground that they were obtained by fraud, but an involuntary petition in bankruptcy against the buyer was filed before judgment was had in the replevin suit, the bankruptcy court had jurisdiction to determine the question whether the seller was entitled to rescind, for title passed to the bankrupt, subject to the seller's right of rescission, and, judgment not having been rendered in the replevin suit, such title passed to the bankrupt's trustee. Donaldson v. Farwell, 93 U. S. 631, 23 L. Ed. 993, distinguished.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 219; Dec. Dig. ⇐140(2).]

Petition for Revision of Proceedings of the District Court of the United States for the District of Massachusetts, in Bankruptcy; Jas. M. Morton, Judge.

In the matter of bankruptcy of the Wellmade Gas Mantle Company. Petition by Oscar O. Friedlaender against Philip W. Jacobs, as the trustee in bankruptcy, to revise a decree of the District Court (230 Fed. 502) affirming an order of the referee. Affirmed.

A. B. Cook, of Boston, Mass. (Phipps, Durgin & Cook, of Boston, Mass., on the brief), for petitioner.

Joseph B. Jacobs, of Boston, Mass. (Jacobs & Jacobs, of Boston, Mass., on the brief), for respondent.

Before PUTNAM and DODGE, Circuit Judges, and ALDRICH, District Judge.

PUTNAM, Circuit Judge. This is a petition to revise action in the District Court in a matter of bankruptcy. It is best stated in the language of the petition, as follows:

⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

"This is a petition to revise, in matter of law, an order of the District Court of the United States for the District of Massachusetts, entered on the 23d day of February, 1916, affirming a decree of the referee, restraining the petitioner from prosecuting a replevin action instituted by him in the municipal court of the city of Boston, and directing the said petitioner to turn over to the trustee in bankruptcy all property seized thereunder.

"From the agreed statement of facts it appears that the Wellmade Gas Mantle Company assigned, for the benefit of its creditors, to one David Stoneman, on February 8, 1915; and thereafter, on the 9th day of February, 1915, an involuntary petition in bankruptcy was filed in said District Court against it, upon which an adjudication was had on the 26th day of March, 1915.

"Six days after the filing of the petition in bankruptcy, and on the 15th day of February, 1915, the petitioner, Friedlaender, instituted an action of replevin in the municipal court of the city of Boston against said Stoneman, as assignee, to recover certain property to which Friedlaender asserted title and the right of possession, which said property the petitioner caused to be seized under his writ of replevin on the said 15th day of February, 1915. No receiver had then been appointed or applied for, nor had any restraining order been issued.

"On the 16th day of April, 1915, Philip W. Jacobs, Esq., was duly elected trustee, and thereafter filed a petition to restrain said Friedlaender from prosecuting his replevin action. Upon the 10th day of December, 1915, the referee entered an order restraining Friedlaender from prosecuting his suit, and directing him to turn over to the trustee the property so seized, from which order the said Friedlaender claimed this review by the District Court.

"Thereafter, and on the 23d day of February, 1916, the District Court ordered the decree of the referee affirmed, and from this order of the District Court this review is taken.

"The question presented by this review is whether the filing of a petition in bankruptcy in and of itself brings into custodia legis all property then in the possession of the bankrupt or its common-law assignee, whether owned by it or not."

The response to this petition depends upon the fact that there is a replevin writ in controversy which was taken out and served before the adjudication of bankruptcy, and consequently before the court appointed a trustee. It seems to be conceded, and, in fact, it must be conceded, that, if the adjudication in bankruptcy and the appointment of the trustee had preceded bringing the replevin suit, the goods in question would have become, at least ostensibly, a part of the assets of the estate in bankruptcy, so that, in accordance with the well-settled rules in bankruptcy, the trustee would have had qualified jurisdiction over the same.

The petition seems to rest upon the claim that, inasmuch as it is claimed that the goods were obtained by fraud, so that the sale was rescindable by the vendor, and the vendor had taken action by replevin suit to rescind the same, the goods are in no part assets of the estate.

Various cases are cited as sustaining this defense. Apparently with the rest is Blake v. Openhym, 216 U. S. 322, 30 Sup. Ct. 309, 54 L. Ed. 498, decided February 21, 1910. As this case is reported in the Supreme Court, it is not clear whether the facts which appear here appeared there; but on turning to the case as it was reported in the Court of Appeals (157 Fed. 536, 87 C. C. A. 122), it is clear that they were identical. However, the report in the Supreme Court shows that the point in view here was not contested, because the vendor in that case voluntarily submitted himself to the court in bankruptcy, and on

the facts that court sustained the vendor. A careful examination of the other cases cited by the petitioner fails to sustain him in any respect; but in Fairbanks Steam Shovel Co. v. Wills, Trustee, 240 U. S. 642, 36 Sup. Ct. 466, 60 L. Ed. 841; decided on April 10, 1916, the Supreme Court applied Acme Harvester Co. v. Beekman Lumber Co., 222 U. S. 300, at page 306, 32 Sup. Ct. 96, 56 L. Ed. 208, wherein it affirmed the expressions in Mueller v. Nugent, 184 U. S., by quoting verbatim from what was said there, at page 14, 22 Sup. Ct. 269, 46 L. Ed. 405, the underlying principle which applies to all this class of cases, thus extending fully the doctrine of lis pendens, and holding that the estate was in custodia legis from the time the party was petitioned into bankruptcy.

The application of the rule as to where the title of property vests varies apparently from the standpoint of investigation. In this case the title had passed from the vendor to the bankrupt. What was left in the vendor was the right of rescission which the vendor had undertaken to assert by the replevin suit; but as there had been no adjudication of the suit, this did not disturb the title. The bringing of it was only a step in the matter of rescission; and, according to the well-known rules, until adjudication in that litigation had reached a result, either party had the right to assert full title for certain purposes and against certain persons. It may be said that this right did not, in fact, disturb the title. So long as the replevin suit was pending, and until it was decided, there was sufficient title left in the purchaser to recover its full value in an action of trover, although possibly subject to prior rights of the vendor, if asserted. The property till then remained in the purchaser, and it became quasi a part of his estate in bankruptcy. While in Donaldson v. Farwell, 93 U. S. 631, 23 L. Ed. 993, the ultimate decision was in favor of the vendor, the question of fraud on the part of the purchaser was not disputed. Fraud was assumed in the instructions given to the jury. 93 U. S. 632, 23 L. Ed. 993. It appears (93 U. S. at pages 632, 633, 23 L. Ed. 993) that the question here might have been considered by the court, but it was not. The case went off on the proposition that an intent not to pay for goods might be fraudulent to such an extent that, if no innocent third party intervened, the sale might be disaffirmed. We can hardly consider this case except in the light of the later cases which we have cited.

The decree of the District Court is affirmed, and the petitioner, Friedlaender, pays the costs on this petition.

NEW YORK, N. H. & H. RY. CO. v. KILBY.

(Circuit Court of Appeals, First Circuit. May 12, 1916. On Petition for Rehearing, August 7, 1916.)

No. 1179.

1. CARRIERS ⟸347(7)—INJURY TO PASSENGERS—CONTRIBUTORY NEGLIGENCE. Since the general adoption by railroad companies of vestibule connections between passenger cars, there is no rule which makes it negligence as matter of law for a passenger to pass over or stand upon the plat-

forms of cars so connected; but the question of negligence is one of fact in each case.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1355, 1356, 1376, 1378, 1402; Dec. Dig. ⊂⊃347(7).]

2. CARRIERS ⊂⊃320(15)—ACTION FOR INJURY TO PASSENGER—QUESTIONS FOR JURY.

A passenger, while passing with others from one car to another, shortly after the train started, in search of seats, stopped for a short time in the vestibule connecting the cars, and, being jostled by others, placed his hand on the face plat s on the connecting vestibules, where it was caught and injured when the plates opened and closed as the train entered or passed from a curve. Such plates were not equipped with roller curtains or shield guards to protect passengers from injuries, although such equipment was in common use, and was used in some of the vestibules in the same train. *Held*, that the questions of the company's negligence and the passenger's contributory negligence were both for the jury.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1318; Dec. Dig. ⊂⊃320(15); Negligence, Cent. Dig. § 301.]

In Error to the District Court of the United States for the District of Massachusetts; James M. Morton, Jr., Judge.

Action at law by Thomas E. Kilby against the New York, New Haven & Hartford Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

John L. Hall, of Boston, Mass. (Stuart C. Rand, of Boston, Mass., on the brief), for plaintiff in error.

Frederick W. Fosdick, of Boston, Mass. (John W. Saxe, of Boston, Mass., on the brief), for defendant in error.

Before PUTNAM and DODGE, Circuit Judges, and ALDRICH, District Judge.

ALDRICH, District Judge. [1] We look upon this case as one upon simple lines and one which should be decided in favor of the defendant in error. It is a case in which neither the question of the plaintiff's nor the defendant's care, or want of care, could have been determined under any absolute rule of law. Such questions of negligence and care under the circumstances of this case, were reasonably in the field of fact. It cannot be that any of the older cases with reference to passengers standing upon the old-style platforms have any particular pertinency in a situation like this, because, under the old platform system, the arrangements for connecting the cars were manifestly against the idea of passing over the platforms, or standing there when trains were in motion. The newer system of connection involved in this case is quite different, because the vestibule system is such as to reasonably present the question of fact whether the purpose was not to afford easy communication between the different parts of the train, and to afford reasonable protection to passengers while exercising the right of going from one passenger coach or parlor car to another, or to the dining or smoking car, according to the circumstances under which the train might be made up. We do not think any absolute rule, one way or the other, is created by the fact whether the train was a through train, or one made up altogether of parlor cars, or altogether of vesti-

bule cars. Given circumstances in that respect, one way or the other, might have some bearing upon the question of the reasonableness of care.

The train in question was bound from the South Terminal Boston Station to the Fall River wharf, and was made up of something like ten cars, including an emigrant car, a baggage car, and eight passenger cars, of which the two rear cars were parlor cars. Some or all of the passenger cars had modern vestibule connections. The parlor cars had vestibule connections equipped with what was called a "safety roller curtain" or "shield guard." Ahead of the parlor cars were the passenger cars with vestibules without the safety guards. These vestibule connections are so constructed that they open a little and close again in passing from a straight line on to and off a curve, and the supposed object of the safety guard, or curtain, is to afford protection against passengers being involved in injury in passing through the passageway from car to car.

Upon the question of a passenger's care, if a passenger was rightfully going from one part of a train to another, it would become a reasonable question for the jury whether, when a train was running on a straight track, with the vestibule connections perfect, the passenger might not, without carelessness, inadvertently be involved in injury as the train was jostled, by placing his hand on one side or the other of the vestibule connection, not knowing that the vestibule connections opened and closed.

[2] In the case at bar, as the evidence tended to show, the plaintiff, not being able to find a seat in a certain car, the seats being occupied and the aisles crowded, left his baggage and passed forward to find a seat, and stopped for a moment or so on the platform between two cars with vestibule connections, not having what is called the safety roller curtain or shield guard. As the evidence tended to show, the evening was hot, and as the train was moving out passengers were moving back and forth to find seats in order to locate themselves, and the platforms were more or less occupied or crowded, and the plaintiff stopping for the purpose of getting a breath of fresh air, and being jostled, to steady himself placed his hand against the face plates on the connecting vestibules, where it was caught and injured.

In a situation like this, we think it a question for the jury, whether the vestibule arrangement does not contemplate more or less passing over the platform and more or less stopping for comfort and convenience; and if, in passing, or while momentarily stopping, a passenger is injured, that it would be a question for the jury whether he was careless. It could not be said, we think, that the mere facts of a passenger's passing through a vestibule connection and stopping for a moment or so for air, and while thus stopping, being jostled, undertook to steady himself by placing his hand upon the plates of the vestibule connections, which he may or may not have known opened and closed under the varying conditions of the track line, constituted negligence as a matter of law.

Now, as to the question of the railroad's want of care. The evidence tended to show that, under vestibule connections, the face plates or

diaphragms of the vestibules open and close as the cars are passing from straight lines to curves, and from curves to straight lines, and for minimizing hazard that roller curtains, or shield guards, are not only accessible, but have for a considerable time been used upon railroads using cars with vestibule connections.

It seems that these guards were on the vestibules between the parlor cars on the train in question. That, perhaps, is of no particular importance, aside from the fact that it tended to show that they were in use by the railroad, and the use would be evidence upon the question of the railroad's understanding that they were vestibule appliances in the direction of safety.

We do not understand that there is any rule of law, or rule of care, which would require these curtains, or guards, on parlor cars with vestibule connections and justify their non-use on ordinary passenger cars with similar vestibule connections. It would hardly do to say that a jury would be justified in holding the railroad culpable for not having safety guards on parlor car vestibules, and that it was in the exercise of due care in not having them upon ordinary passenger cars with like vestibule connections in the same train.

As has already been pointed out, we see no view in which this case could have been ruled under principles of law, one way or the other, on either of the questions of the plaintiff's or the defendant's care. We think, in both aspects, that they were questions of fact under the circumstances, and that none of the authorities cited sustain the claim that it should have been ruled as law either that the injury resulted from the plaintiff's carelessness or that the defendant was in the exercise of due care. Under such view, the case was submitted to the jury under clear, definite and comprehensive instructions which it would be hard to improve upon.

The judgment of the District Court is affirmed, with interest, and the costs of this court.

On Petition for Rehearing.

PER CURIAM. We have carefully examined this petition, and are of the opinion that, independently of, and notwithstanding, any criticisms submitted to us by the petition, the substantial questions involved in the case are questions of fact for determination by the jury, and that the same were properly submitted; and we cannot interfere with the result.

The petition for rehearing is denied, and the mandate will issue forthwith.

CHRISTY, County Treasurer, et al. v. ATCHISON, T. & S. F. RY. CO.

(Circuit Court of Appeals, Eighth Circuit. May 1, 1916.)

No. 4295.

ATTORNEY AND CLIENT ⊂=86—POWER OF ATTORNEY—STIPULATION.

While an attorney, by reason of his retainer, is not authorized to compromise his client's claim or confess judgment, a stipulation by attorneys for county, one of whom was the county attorney, admitting the existence of relevant facts, entered into without fraud, mistake, or collusion, but in good faith, to save expense, is valid and binding on the

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

county, though upon the facts found the court decided against the county.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 155–160; Dec. Dig. ⊂=86.]

Appeal from the District Court of the United States for the District of Colorado; Robert E. Lewis, Judge.

Bill by R. L. Christy, as County Treasurer, and others, against the Atchison, Topeka & Santa Fé Railway Company. From a decree dismissing the bill (214 Fed. 1016), complainants appeal. Affirmed.

Allen M. Lambright, of Las Animas, Colo. (Willard B. Gordon, of Lamar, Colo., on the brief), for appellants.

Henry T. Rogers, of Denver, Colo., and Gardiner Lathrop, of Chicago, Ill. (Daniel B. Ellis, Lewis B. Johnson, Pierpont Fuller, and George A. H. Fraser, all of Denver, Colo., and S. T. Bledsoe, of Chicago, Ill., on the brief), for appellee.

Before HOOK, Circuit Judge, and AMIDON and VAN VALKENBURGH, District Judges.

HOOK, Circuit Judge. This is a suit in equity by the county treasurer and board of county commissioners of Prowers county, Colo., to vacate a prior judgment at law obtained by the railway company for an invalid excess of taxes paid under protest. The trial court dismissed the bill as insufficient, and this appeal was taken.

The attack upon the prior judgment at law is because it proceeded upon a stipulation of facts signed by counsel for both parties, and, as claimed, that counsel for the county, one of whom was the county attorney, were not authorized to sign it. The bill does not charge fraud, mistake, or collusion, or disobedience of affirmative instructions. The question is simply one of the implied power of counsel for a litigant. The form of the stipulation was the customary one in such cases. The prefatory part recited that the parties agreed that certain matters afterwards set forth were true, and might without further proof be offered in evidence in the case subject to all proper objections as to competency, relevancy, or materiality, except that the stipulation was not the best evidence. The matters set forth consisted of statements in detail as to the railroad property outside and within the state and county and the values thereof; also of the methods, standards, and results of assessments locally made in the county, and of the acts of the state authorities in respect of the equalization and assessment of railroad property. In the concluding paragraph of the stipulation the right was reserved to either party to introduce other evidence. The stipulation is characterized in plaintiffs' bill as one to compromise the case and as a confession of judgment. With that as a premise, Holker v. Parker, 7 Cranch, 436, 3 L. Ed. 396, and United States v. Beebe, 180 U. S. 343, 21 Sup. Ct. 371, 45 L. Ed. 563, and other cases are cited to show counsel were without authority. It is not necessary to review the cases cited. In each there was a compromise of the matter in suit or a confession of judgment by counsel without other authority than that implied from a general retainer.

It is well settled that short of a compromise of a client's claim or a confession of judgment the authority of counsel in a case extends generally to all the customary incidents of litigation and embraces

all agreements, stipulations, and admissions appertaining to its conduct through the courts. Holker v. Parker, supra; Halliday v. Stuart, 151 U. S. 229, 14 Sup. Ct. 302, 38 L. Ed. 141; Oscanyan v. Arms Co., 103 U. S. 261, 26 L. Ed. 539; Stone v. Bank of Commerce, 174 U. S. 412, 19 Sup. Ct. 747, 43 L. Ed. 1028; Brown v. Arnold, 67 C. C. A. 125, 131 Fed. 723. And after judgment, though he cannot discharge it without payment, "his authority is complete to control the remedy which the law gives him to secure or collect the debt of his client." Rogers v. The Marshal, 1 Wall. 644, 651, 17 L. Ed. 714. The stipulation in question here was not a compromise or a confession of judgment. It was merely an agreement as to the existence of relevant facts entered into without fraud, mistake, or collusion, but in good faith, to save expense, and to facilitate the trial of the case. Though it resulted in a judgment against the county, neither party having offered further evidence, still the judgment was not by confession, but came from the court's application of the law to the facts before it. It is urged that the facts stipulated were contrary to the denials and averments of the answer of the county. Testimonial admissions of that kind are naturally addressed to issues joined by the pleadings, and make for or against the asserted stand of one of the parties. Were there no issues in the pleadings, there would be no occasion for proofs, and therefore none for stipulations dispensing with the formal presentation of evidence. The argument that the stipulation was inconsistent with the answer would, if tenable, condemn a long-established practice in the courts the propriety of which has rarely been questioned. Averments in pleadings are not of that dignity and sanctity that they must be adhered to at all events by counsel who prepared them.

The above conclusion disposes of the merits of the case, and it is therefore unnecessary to consider whether the bill of complaint is otherwise sufficient as a pleading.

The decree is affirmed.

BUCHANAN v. UNITED STATES,

and six other cases.

(Circuit Court of Appeals, Eighth Circuit. May 1, 1916.)

Nos. 4263–4269.

1. CONSPIRACY ⟸29—OFFENSES—INTENT.

Under Penal Code (Act March 4, 1909, c. 321) § 19, 35 Stat. 1092 (Comp. St. 1913, § 10183) making it a crime for two or more persons to conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise of any right secured to him by the Constitution or federal laws, or because of his having exercised the same, intent is an essential of the offense, and where defendants believed that one of their number was entitled to improvements upon an unperfected homestead belonging to another, and in good faith went upon the land and removed the improvements, they are not guilty.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 42–52; Dec. Dig. ⟸29.]

2. CRIMINAL LAW ⟸390—EVIDENCE—ADMISSIBILITY.

Where accused's intent is material, he may testify as to his intent.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 858; Dec. Dig. ⟸390.]

3. CRIMINAL LAW ⟸390—EVIDENCE—ADMISSIBILITY—INTENT.
Where defendants claimed that they entered upon an unperfected homestead and removed improvements, believing that such improvements belonged to one of their number, and their intent was material, defendants, to show their intent, may introduce in evidence statements which third persons made to them.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 858; Dec. Dig. ⟸390.]

In Error to the District Court of the United States for the District of Colorado; Robert E. Lewis, Judge.

Eugene Buchanan, Irving Monette, Gilbert Schwartzlander, August Sindt, John Sindt, Ole Simonson, and Frank Miller were convicted of crime, and they separately bring error. Reversed and remanded.

Charles W. Waterman and Caldwell Martin, both of Denver, Colo. (S. E. Naugle, of Sterling, Colo., on the brief), for plaintiffs in error.

Eugene B. Lacy, Asst. U. S. Atty., of Denver, Colo. (Harry B. Tedrow, U. S. Atty., of Denver, Colo., on the brief), for defendant in error.

Before HOOK and CARLAND, Circuit Judges, and VAN VALKENBURGH, District Judge.

HOOK, Circuit Judge. [1] The plaintiffs in error were convicted of violating section 19 of the Penal Code which makes it a crime for two or more persons to conspire "to injure, oppress, threaten or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same." They went upon land held by James H. Scott and wife by virtue of an unperfected homestead entry under the laws of the United States, and tore down and removed buildings and improvements.

Buchanan was the leader and director; the others were men either in his general service or specially employed by him to assist in what was done. In any aspect the conduct of the accused was indefensible. Viewed most favorably for them, it was a case of high-handed, lawless self-help. But there was a question, and rather a close one as to most of them, whether their intent was to interfere with the exercise by the Scotts of their homestead right, or, on the other hand, and wholly aside from the character of the occupancy of the land, they believed Buchanan owned the improvements and was entitled to remove them. If that belief was entertained in good faith, and the intent of Buchanan's helpers was but to aid him in the assertion of his supposed title they did not violate the act of Congress. Intent in respect of the federal right is an essential element of the offense charged. See United States v. Waddell, 112 U. S. 76, 80, 5 Sup. Ct. 35, 28 L. Ed. 673. The legal quality and consequences of an act are not always apparent or definitely indicated. Some acts are of such an equivocal or ambiguous character that the judicial inquiry turns wholly upon the particular motive which may be disclosed by extrinsic evidence. The murder of a homestead entryman, for example, would effectually prevent him from perfecting and enjoying

his entry, but it may have been the result of private personal malice without relation to his tenure.

[2, 3] The trial court excluded various questions asked the accused by their counsel to elicit their belief that Buchanan owned the improvements, the grounds of their belief, and their intent in what they did. Whenever the belief of a person, or the motive or intent of his act or conduct is material, he may testify directly what it was. Wigmore on Ev. § 581. He may also give the grounds of the belief upon which his motive or intent proceeded, including the statements of third persons to him. Id. §§ 245, 655, 1789. In the case at bar the statements of third persons to the accused, which were excluded, were not offered as evidence of their truth, but as tending to show the state of mind they produced, and therefore they were not within the rule against hearsay evidence. It was immaterial whether the statements were true or false; the fact that they were made was material. A familiar application of this doctrine is to communicated threats of the deceased in a case of homicide, where the defense is fear of bodily harm. Wallace v. United States, 162 U. S. 466, 477, 16 Sup. Ct. 859, 40 L. Ed. 1039. We think the error in the exclusion of this evidence prejudicially affected the defense of all the accused. The criticisms of the indictment are without merit; the other matters may not arise again.

The sentences are reversed, and the cause is remanded for a new trial.

PAINE v. ARCHER.

In re WISHKAH LOGGING CO.

(Circuit Court of Appeals, Ninth Circuit. May 1, 1916.)

No. 2676.

1. BANKRUPTCY ⟸327(1)—CLAIMS—PRIORITY.

Where, at the time of the hearing in the court below, no claim by a county against a bankrupt's estate for taxes had been filed, and there was nothing to show that such claim was ever allowed or brought to the attention of the trial court, an allowance to a receiver appointed by the state court to conserve the bankrupt's property is not improper, as denying priority of claims for taxes.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 515; Dec. Dig. ⟸327(1).]

2. BANKRUPTCY ⟸347—CLAIMS—CLAIMS OF RECEIVER.

Where, before bankruptcy, a receiver is appointed by the state court to conserve the bankrupt's property, and thereafter the property is transferred to the trustee in bankruptcy, the claim of the receiver for compensation is entitled to priority; it being considered that the assets come to the trustee charged with such claim.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 538; Dec. Dig. ⟸347.]

Petition for Revision of Proceedings of the District Court of the United States for the Southern Division of the Western District of Washington; Edward E. Cushman, Judge.

In the matter of the bankruptcy of the Wishkah Logging Company, a corporation. Petition by W. B. Paine, trustee in bankruptcy for revision of an order of the District Court whereby the claim of F. R. Archer, receiver, was allowed priority. Affirmed.

The trustee in bankruptcy of the Wishkah Logging Company, a bankrupt corporation, filed in this court his petition for revision, to review the order of the District Court whereby the claim of the respondent for the sum of $256.20 was allowed as a prior and first charge against the assets in the hands of the trustee. The petition alleges that a claim against the estate in bankruptcy was filed by Chehalis county, Wash., for unpaid and delinquent taxes against the property of said estate, in the sum of $452.15, with interest; that thereafter the respondent filed his claim for $256, the amount allowed him by the superior court of Chehalis county, for his services and expenses as receiver in preserving said estate in the state court prior to the adjudication of bankruptcy, which services were performed within four months prior to the adjudication; that thereafter the referee made an order disbursing all of the funds in the hands of the trustee, for the payment of the costs of the administration and attorney's fees, and that the sum so to be disbursed was $300, which sum represented the total assets of the bankrupt's estate; that thereafter the court below, upon a hearing on the question of the priority of the claims, ordered that the respondent's claim be entitled to priority of payment as against the costs of the administration, the attorney's fees, and the taxes due Chehalis county; that thereafter, on July 31, 1915, the referee made an order disbursing to the respondent the sum of $256.20, and on October 25, 1915, the order was approved and payment was directed by the judge of the District Court. The petitioner further alleges that the claim for the sum so ordered to be paid by the state court for receiver's fees is entitled to priority only as against general creditors, and that the expenses of administration and the taxes due to Chehalis county are a first and prior charge against the assets in the hands of the trustee.

G. R. Snider and T. B. Bruener, both of Aberdeen, Wash., for petitioner.

Austin M. Wade, of Aberdeen, Wash., for respondent.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). [1] It does not appear that on June 30, 1915, the time of the hearing in the court below, any claim for taxes had been filed or was considered by the court. The transcript shows that the claim of Chehalis county for taxes was not presented until July 16, 1915. There is nothing whatever in the record to show that the claim was ever allowed, or that it was at any time brought to the attention of the court below. Such being the case, no ground is presented here to review the decision of that court as to the priority of a claim for taxes, since it does not appear that any error was committed in the matter complained of.

[2] It remains to be considered whether the court below erred in giving to the respondent's claim priority to the costs and expenses of administration in the court of bankruptcy. From the fact that the court below ordered the payment of the respondent's claim as entitled to priority, we may assume that upon the hearing it was shown to the court that the allowance so made to the respondent by the superior court was for services rendered prior to the adjudication in bankruptcy for necessary work and labor in the preservation of the estate, and, indeed, the petition for revision so alleges the facts to have been. In Randolph v. Scruggs, 190 U. S. 533, 539, 23 Sup. Ct. 710, 712

(47 L. Ed. 1165) the court recognized the priority of claims such as that of the respondent herein, and said:

"If beneficial services are allowed for, they are to be regarded as deductions from the property which the assignee is required to surrender, and in that way they gain a preference."

See, also, Loveland on Bankruptcy (4th Ed.) §§ 40 and 594; In re Chase, 124 Fed. 753, 59 C. C. A. 629; Summers v. Abbott, 122 Fed. 36, 58 C. C. A. 352; In re Scholtz (D. C.) 106 Fed. 834; In re Stewart, 179 Fed. 222, 102 C. C. A. 348; In re Standard Fuller's Earth Co. (D. C.) 186 Fed. 578. The court below recognized the doctrine so established, and regarded the assets in the hands of the trustee as subject to reduction by paying out of the same the amount for which in equity the assets were chargeable as compensation to the receiver before they came into the hands of the trustee. In so doing we hold that the court was not in error.

The judgment is affirmed.

THE METTACOMET.

(Circuit Court of Appeals, First Circuit. May 12, 1916.)

No. 1180.

SEAMEN ⊂=27—WAGES—MEMBERS OF FISHING CREW.

Extra wages due a cook on a fishing vessel, where all hands ship on the lay, but the cook is to receive an extra per diem, are a charge against the catch; but, in the absence of a special agreement otherwise, the vessel is not liable where there is no catch.

[Ed. Note.—For other cases, see Seamen, Cent. Dig. §§ 4, 141, 157–169; Dec. Dig. ⊂=27.]

Appeal from the District Court of the United States for the District of Massachusetts; Jas. M. Morton, Jr., Judge.

Suit in admiralty by R. H. Holmes against the schooner Mettacomet. Decree for respondent, and libelant appeals. Affirmed.

For opinion below, see 230 Fed. 308.

John R. Lazenby and Reginald Heber Smith, both of Boston, Mass., for appellant.

J. M. Marshall, of Gloucester, Mass., for appellee.

Before PUTNAM and DODGE, Circuit Judges, and ALDRICH, District Judge.

PUTNAM, Circuit Judge. This is a libel for wages of a cook, instituted by Holmes, who shipped as cook aboard the schooner Mettacomet, at the port of Gloucester, for a shore blue-fishing voyage, on the coast of North Carolina, in the winter season. As usual, there were no shipping papers, and only a parol arrangement with the captain of the vessel by which the libelant was to receive a share with the other members of the crew, and, in addition thereto, a sum of $1 per day for each day.

According to the record, there was no agreement that Holmes was to be paid anything except out of the catch. This was in accordance with the well-known customs of the port of Gloucester, by virtue of which the pay of the crew and cook was classed to be paid from the catch of the voyage. There was no catch which would constitute shares of the voyage; so that in the District Court the libel was dismissed, and Holmes appealed to us. It follows clearly enough that we must affirm the decree of the District Court, and really the only questions are about costs.

It has not been the custom to impose costs on libelants in cases of this class, as such libelants are regarded for purposes of this kind of litigation as wards of the court, and the imposition of costs would ordinarily result in nothing but imprisonment. Dunlap's Admiralty Practice, p. 110, and elsewhere. Nevertheless, as this appeal was promoted by a charitable society duly incorporated and known as the Boston Legal Aid Society, in subsequent cases of this kind, it should protect itself in some way against costs by proceeding in forma pauperis.

The decree of the District Court is affirmed, without costs of appeal.

HAUSER AWNING ARM CO. v. ANTON et al.

(Circuit Court of Appeals, Sixth Circuit. June 6, 1916.)

No. 2781.

1. PATENTS ⟸328—VALIDITY AND INFRINGEMENT—AWNING ARM.
The Anton patent, No. 986,120, for an awning arm, *held* not anticipated, valid, and infringed.

2. PATENTS ⟸176—CONSTRUCTION OF CLAIMS.
While elements not named in a patent claim will not be read into it in order to save it from anticipation, yet when some general arrangement was evidently intended by the patentee, is fully described in the specifications, and is such that without it the whole device is inoperative, this feature will be deemed to have been contemplated by the patent grant, and to that extent may be read into the claim.
[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 250⅔–252; Dec. Dig. ⟸176.]

Appeal from the District Court of the United States for the Western District of Tennessee; John E. McCall, Judge.

Suit in equity by Frederick A. Anton and others against the Hauser Awning Arm Company. Decree for complainants, and defendant appeals. Affirmed.

W. N. Key, of Jackson, Tenn., for appellant.

W. F. Small, of Washington, D. C., and W. K. Small, of St. Louis, Mo., for appellees.

Before KNAPPEN and DENISON, Circuit Judges, and SATER, District Judge.

DENISON, Circuit Judge. Infringement suit on patent No. 986,120, issued March 7, 1911, to F. A. Anton, for an awning arm. The awning is supported through two or more jointed arms which are

pivoted to a frame attached to the face of the building, and which, when extended, incline outwardly and downwardly. Their outer ends are pivoted to a rigid rod parallel with the building, and forming the outer edge of the extended awning. The awning itself is carried on a roller adjacent to the building front. When released, these arms operate by gravity only, swinging out and unfolding themselves; the two pivots corresponding to the shoulder and elbow of the human arm. To raise the awning, the roller is revolved and the awning rolled up as the arms fold. By this device, the patentee avoids the necessity of horizontal brace rods from the lower edge of the awning to the building, and occupies, with the awning fixtures, less vertical space on the building front than otherwise necessary.

[1] The present record requires us to assume that this was the first awning arm opening by gravity alone, and not connected with or supported from the building excepting at the one point where pivoted thereto. This pivot, at what may be called the shoulder, is carried in the attaching frame, and has its upper end tilted forward, whereby the arm naturally swings outwardly. This pivot may also have the upper end tilted laterally toward the side away from the fold, and this tilt will accelerate the latter part of the outward swing. If the second or elbow pivot were fixedly parallel with the first or shoulder pivot, the resistance of the unrolling awning and the change in the tilt of the pivot with relation to the building front would tend to check the action of this elbow joint before it was fully opened; and, to neutralize this tendency, Anton gave his second pivot an additional tilt at an angle lateral to the first pivot, which tilt, when the arm was perhaps two-thirds opened, would give, by gravity, further aid to the full opening of the elbow from this point on. To prevent having the three pivots come into straight line—and so put the arm on what may be called a "dead center" when it was attempted to roll up the awning and fold the arm—he provided a stop for the elbow which checked the opening just before completion. The device has gone into extensive use and seems to meet a situation created by the recently recognized need of getting lighting space above the top of the awning. The two claims in suit, Nos. 1 and 2, are quoted in the margin.[1] The District Court decreed infringement, and defendant appeals.

[2] It is urged that the addition of a stop, where desired, and the tilting of a pivot to aid a gravity swing, are common expedients and do not involve invention; that claims 1 and 2 depend upon these ele-

[1] Claim 1. An awning arm comprising two sections, pivoted together at their adjacent ends, the other end of the inner section being pivoted to a frame and the other end of the other section being pivoted to an awing pole, the pivots being so disposed that the sections are foldable together laterally, and a stop for stopping the middle pivot from coming in line with the end pivots.

Claim 2. An awning arm comprising two sections pivoted together at their adjacent ends, the other end of one section being pivoted to a frame, and the other end of the other section being pivoted to an awning pole, the pivots being so disposed that the sections are foldable together laterally, and the middle pivot being tilted at a lateral angle to the inner end pivot.

ments of novelty; and hence that these claims are void. It is not necessary to decide whether the mere addition of these elements to existing structures would constitute invention. The novelty here involved is broader. While it is well settled as a general rule that elements not named in a claim will not be read into it in order to save the claim from anticipation, it is equally well recognized that when some general arrangement or environment was evidently intended by the patentee, is fully described in the specification, and is such that, without it, the whole device is inoperative, this feature will be deemed to have been contemplated by the patent grant, and, to that extent, may be read into the claim. "This may be done with a view of showing the connection in which a device is used and proving that it is an operative device." McCarty v. Railroad, 160 U. S. 110, 116, 16 Sup. Ct. 240, 242, 40 L. Ed. 358. Here the thought that the awning arm should unfold by gravity only is not, in so many words, expressed in either claim, and is implied in the first claim less clearly than in the second; but it is expressed in the specification as one of the purposes, the whole description is appropriate to that idea and not to any other form and we think it plain enough that the patent was intended to reach only that form. Under these conditions, claims 1 and 2 should be interpreted as restricted to awning arms which operate by gravity. So restricted, no anticipation appears, and it is not important that the patentee has (perhaps unnecessarily) limited his claims by referring to a stop and a tilted pivot which may, of themselves, be common expedients. If a commercially successful device on the principles of the patent cannot be constructed without using these expedients, the scope of the patent is not practically limited; and the present case does not require consideration of any other hypothesis.

Infringement of the first claim, by the use of a stop equivalent to the form shown in the patent, is clear. From an examination of the exhibits, we are satisfied that the second or elbow pivot in defendant's device is tilted at a lateral angle to the first pivot in substantially the same way and accomplishing the same results as contemplated by the second claim in the patent. Defendant undertakes to prove the contrary by producing as an exhibit one of its commercial forms modified so that the second pivot is parallel with the first and by insisting that this modified structure has the characteristic full-opening action of the patent in even greater degree than in the patented form. However, the exhibit so produced and operated, with this alleged result, was not tied by an awning pole to another arm so that the outer end must move always in a line perpendicular to the building, and so that the second or outer section of the arm must be unfolding constantly at the same rate as the inner section. When this exhibit model is operated and its motion thus restricted, it seems to support rather than to discredit the theory of the patent as to the beneficial effect of tilting the second pivot; and it appears that defendant found the patented idea, as expressed in the tilted pivot of the second claim, useful enough to justify adoption in defendant's commercial form.

The decree of the court below is affirmed.

MARSHALL FIELD & CO. v. GEORGE S. KELLEY CO., Inc.

(Circuit Court of Appeals, First Circuit. April 28, 1916.)

No. 1176.

1. PATENTS ⊜328—VALIDITY AND INFRINGEMENT.
The Tarnow patent, No. 985,075, for fastening device for ribbon bows, is strictly limited to the device shown and described, and, as so limited, *held* not infringed.

2. TRADE-MARKS AND TRADE-NAMES ⊜93(3)—UNFAIR COMPETITION.
To justify an injunction against alleged unfair competition, which will operate as restraint in the mercantile field, the case must be unmistakably clear and beyond question.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 106; Dec. Dig. ⊜93(3).]

Appeal from the District Court of the United States for the District of Rhode Island; Arthur L. Brown, Judge.

Suit in equity by Marshall Field & Co., a corporation, against the George S. Kelley Company, Incorporated. Decree for defendant, and complainant appeals. Affirmed.

George L. Wilkinson, of Chicago, Ill. (James H. Thurston, of Providence, R. I., on the brief), for appellant.

Alex. P. Browne, of Boston, Mass. (Browne & Woodworth, of Boston, Mass., and William S. Flynn and F. Webster Cook, both of Providence, R. I., on the brief), for appellee.

Before PUTNAM, Circuit Judge, and ALDRICH and MORTON, District Judges.

ALDRICH, District Judge. [1] The device with which this case is concerned is one which provides means for holding securely, in an attractive way, a ribbon bow when worn upon the hair of young girls or women. We view it as one having some measure of novelty in its application to a sort of passing fad, because it points out not only the mechanical means for holding a ribbon in place, but illustrates, in a way, the style or fashion of the day, including the kind of a bow which it will hold, and how it may be attractively placed upon the hair.

After considerable delay in the Patent Office proceedings, in which the inventor's claims were readjusted, simplified, and limited, the patent was issued upon a claim which expressly described a particular mechanical device.

The court below dealt with this case as not only one in which the ordinary and reasonable construction would limit the patentee's rights to the particular thing described, but as one in which the patentee himself had acted upon that idea.

While the patentee describes measurably ingenious means for holding a hair ribbon bow in place, such result is reached through assembling well-known mechanical means, and while it is accomplished through a somewhat deft handling of such instrumentalities for the purpose of easy adornment, and while it may have been justifiable to sustain the patent with the limitations which confine it to the particular

device described, we do not see in it such originality or general merit as would justify a liberal and broad construction to the end that the patent should cover other ingenious arrangements for that kind of personal adornment.

As we hold this view, it follows that the conclusions of the court below must be affirmed upon this phase of the case.

[2] Now, as to unfair competition in trade: The ornamental device of which the plaintiffs complain does the work in substantially the same way as that of the one described in the patent, yet there are mechanical differences in the way the clasps are arranged, and there are differences in the bases of the two devices, which the casual purchaser would naturally discover. In the complainants' device there is a conspicuous slot in its base or body, which, it is said, performs the function of holding the ribbon in place, while in the alleged offending device there is no slot, but a solid base with three prominent and conspicuous stars thereon, which, it is said, perform the function of holding the ribbon in place.

It is quite true that the differences between the two things are slight, and if the object of the patent was something more substantial, the case might be made so strong as to justify judicial interference by way of restraint upon the ground of unfair competition. But in a case like this, when a plaintiff provisionally stands upon grounds independent of the scope of his patent, and goes to the proposition of unfair competition in trade, he prevails, if he prevails at all, under the general doctrines of equity, and where an injunction is sought which would operate as restraint in the mercantile field, it is a principle of equity, based upon considerations of caution, that to justify an injunction the case must be unmistakably clear and beyond question. That is a requirement of equity which we think the merits of the plaintiffs' case do not answer, and it results, therefore, that:

The decree of the District Court is affirmed, with costs of this court.

SINGER v. AMERICAN DRUGGISTS' SYNDICATE.

(District Court, E. D. New York. May 8, 1916.)

PATENTS ⇐328—VALIDITY AND INFRINGEMENT.

The Singer patent, No. 880,410, for a combined carton and display device, claims 1, 2, 3, and 4, construed, and *held* not anticipated valid and infringed.

In Equity. Suit by Joseph B. Singer against the American Druggists' Syndicate. On final hearing. Decree for complainant.

Goepel & Goepel, of New York City (C. P. Goepel, of New York City, of counsel), for plaintiff.

Robert B. Olsen, of New York City (Alfred C. Coxe, Jr., of New York City, of counsel), for defendant.

CHATFIELD, District Judge. The patent with which we are concerned in this case (No. 880,410, of February 25, 1908, on application

filed November 13, 1906) has recently been before the District Court in the Southern District, in an action charging infringement of claims 2, 3, and 4 thereof, which were held valid and infringed. The decision is reported in Singer v. Lamont, Corliss & Company, 227 Fed. 462, affirmed by the Circuit Court of Appeals, on the opinion of the court below, upon the 9th day of November, 1916.

It is unnecessary to restate the matters set forth in those opinions and the questions involved in the present suit, in so far as they were covered by the decision of the Court of Appeals, are conclusively settled for this court. The plaintiff is therefore entitled to a decree herein so far as claims 2, 3, and 4 are concerned, for such acts of infringement of those claims as may be shown to have occurred within this district. But the plaintiff has, *in this action,* included claim 1. The defendant attacks its validity and also denies infringement if claim 1 be limited in such a way as to present patentable ideas.

Claims 2, 3, and 4 involve the construction of a paper carton or box which affords a front display surface *and* a back display surface, so arranged as to allow of their being printed upon the same side of the sheet of paper from which the box is formed. These claims also cover the plan or shaping of the box so as to be folded from one sheet of paper, with the printing upon the one side and with the parts so arranged as to make a strong and convenient box for handling, which, when stacked, will sustain the weight and equilibrium of a pile of goods, and also one in which the various tongues or flaps are inserted into the folded edge when set up for display purposes.

These points are discussed in the opinions referred to, and should be borne in mind in reading claim 1, which is as follows:

"1. The improved carton and display device comprising a body having folded ends and slots in the upper edge of said ends, a back display surface attached to said body, brackets on the said back display surface, and tongues on the said brackets engaging the said slots in the said ends."

In the prior art submitted upon the trial of the case in the Southern District, patents such as Webb, No. 642,182, January 30, 1900, Wilcox, No. 615,417, December 6, 1898, Swiss letters patent, No. 24,957, October 4, 1901, Davis, No. 692,990, February 11, 1902, were cited, from which it appears that the making of a substantial box from one sheet of paper by so arranging and shaping the parts that the box can be constructed by folding alone, was well known. These patents show the folding over of one part to make a firm edge either for insertion between the contents and the side of the box, or between two folds of any side. They also show the use of folded sides to furnish rigidity and the telescoping of such parts of the box as might make uneven thickness and bulging sides, where the piling of goods requires a flat face.

The opinion in the Lamont, Corliss & Company Case also shows consideration of the Thayer box designed by one John F. Carver, of the Thayer Company, which is said to have been upon the market since January, 1902. This Thayer box shows what was of course an old idea, viz., the printing or placing of advertising and labeling matter upon different parts of the box containing any kind of merchandise.

It also shows an opening in the top of the box, closed by a folding cover, with wings folding to the front of and inside the cover. This cover, when placed in a vertical position, is held from closing by wings at each side. Each wing has a tongue which is inserted through a slit at the edge where the inside or false top is bent over from the ends. This Thayer box requires the pasting down of one edge of this false top. The tongues to the side wings do not hold the top from tipping backward beyond the vertical position, except to a very slight extent from the mere frictional contact of the tongue with the slot through which it passes.

The case in the Southern District recognized that the printing upon the inside of the top of the Thayer box was intended for advertising display, and in that sense that the Thayer box was to be used in exactly the same way and for the same purpose as that of the patent in suit. But novelty was found over the Thayer box and the patents above referred to, in that the patent in suit required no gluing or pasting, was so planned that all of the advertising matter presented on the display surfaces, which face the customer when the box is open, could be printed upon the same side of the blank from which the box was formed, and that the plan of the parts furnished in a *new way* a substantial and strong box which left an absolutely flat surface for piling when closed.

To this extent the present case involves exactly the same points, and it is conceded for the purposes of this case, by the defendants, that the final decision of the Court of Appeals has established patentable novelty in the particular combination (under claims 2, 3, and 4) in which a front folded display surface is present. These claims, therefore, have been infringed in this district by the exhibit box labeled "A D S Worm Lozenges," which contains all of the features found infringed by the case in the Southern District. The defendants have now, however, produced another box from the prior art, which differs from the Thayer box, in that it has less folds, and that more of the parts are pasted together, but is otherwise identical in form and principle therewith.

The testimony shows that this style of box was manufactured as early as the year 1903, and that the precise exhibit presented to the court was manufactured before the year 1905. This is definitely shown by the fact that a photograph is pasted into the box, which around that year was changed to a lithographed picture. Since that time no photographs have been used. The testimony shows satisfactorily and conclusively that this precise form of box (in which a gum called "Dentyne" was sold in packages) was openly sold on the market in considerable quantities more than two years before the application for the patent in suit. But this box presents no different defense than that of the Thayer box, for the parts in question are exactly alike with those of the Thayer box, both in shape, in arrangement, and in function, so far as the claims under discussion are concerned.

Some testimony was offered upon the present trial to show that the original style of Thayer box did not have tongues and wings separated or detached from the sides of the box, but that, on the contrary, these

wings were a part of the side and merely folded in so as to wedge up the top when the box was closed. The Thayer catalogue introduced in evidence and the Thayer exhibit seem to satisfactorily show that the wing and the side were not integral, and the presentation of the Dentyne box not only settles the question so far as the form of the Thayer box is concerned, but also makes immaterial the possibility that at some time the Thayer box might have been constructed with the wings and side all in one piece.

Neither the Thayer nor the Dentyne box has a front folded over display surface, and therefore they present an issue under claim 1 in addition to those of claims 2, 3, and 4. But, when we consider claim 1, we have presented to us most of the points of originality and improvement which led the court in the Lamont, Corliss & Company Case, supra, to find patentability over the prior art. In claim 1 the folded over front display surface is omitted. The front side of the box may consist of less thicknesses or may be left blank, as it is considered merely a part of the box and does not enter into the claim of invention.

The patentee shows by this claim, as based upon the specifications, a box differing from the Thayer or Dentyne boxes, in that there is present no false or inside cover. He thus causes the wings to pass down between the contents and the side of the box and allows the top to telescope or shut in, so as to present a flat surface when the boxes are piled upon each other.

The box constructed according to claim 1 provides for the display of advertising upon the inside of the cover, but holds this cover in place by inserting the tongue into a slit between two thicknesses of folded cardboard, against which the contents of the box come directly in contact until the articles at each end of the box are removed, and in which in any event the tongue is held with greater friction, so that the top does not go back of the perpendicular as easily as in the Thayer or Dentyne boxes.

The box constructed according to claim 1, also by its general design and by the folding over of the parts forming the ends, gives rigidity and strength without the pasting of a rim or false top. In one sense it presents an economy of material and in another a saving of labor. The possibility of arranging the printing, so as to use but one side of the box, while not in combination with a front display surface (as in claims 2, 3, and 4), is nevertheless recognized as one of the inherent features to which the design of the box must lend itself. In this respect, of course, the box constructed according to claim 1 would be no different from the Thayer box or the Dentyne box, and is the same as the form used by the defendants.

But it is not the mere idea of making the box from one piece of paper, or of making a box on which the printing can be all upon one side, which is presented as patentable novelty. The invention, if present at all, must be found in the idea of so combining the desired qualities and the necessary parts of the structure as to furnish an advantageous, commercially practical device, which differs from the structures of the prior art, and which shows in those very differences an

appreciation of the effect of certain changes in form, so as to retain the qualities of the old, and add thereto points of attractiveness when offered for commercial use. In this sense claim 1 of the patent does not seem to be anticipated, nor do the boxes presented from the prior art show any prior use of the precise idea which is embodied in claim 1. This idea seems to the court to be ingenious and practical enough to be treated as an invention and is plainly infringed by the defendant.

Analogy to the reasoning of the District Court and the Court of Appeals in the case of Singer v. Lamont, Corliss & Company, supra, leads to the conclusion that claim 1 would have been found valid and infringed if it had been included in that case. The decision of this court will be that claim 1 is valid as a separate invention, and that claims 2, 3, and 4 are valid as a combination of the device of claim 1 with the other parts added in by claims 2, 3, and 4.

The defendant infringes all four of the claims, and the plaintiff may have a decree.

UNITED STATES v. LOUISVILLE BRIDGE CO.

(District Court, W. D. Kentucky. May 20, 1916.)

1. CONSTITUTIONAL LAW ⟸291—EMINENT DOMAIN ⟸2(1)—"TAKING" OF PROPERTY—WHAT CONSTITUTES.

To require an owner of a bridge over a navigable river to alter it, so as to prevent obstructions to navigation, does not constitute a "taking" of property within Const. U. S. Amend. 5.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 870–876; Dec. Dig. ⟸291; Eminent Domain, Cent. Dig. §§ 3–8; Dec. Dig. ⟸2(1).

For other definitions, see Words and Phrases, First and Second Series, Taking.]

2. NAVIGABLE WATERS ⟸20(2)—OBSTRUCTION—BRIDGES—STATUTES.

A corporation which constructed a bridge across the Ohio river was organized under 2 Acts Ky. 1855–56, c. 747, and Acts 1861–63, c. 385, to construct a bridge so as not to obstruct navigation further than the laws of the United States and decisions of the Supreme Court of the United States should hold to be legal. The bridge was built under Act Cong. July 14, 1862, c. 167, 12 Stat. 569, and Act Cong. Feb. 17, 1865, c. 38, 13 Stat. 431. *Held*, that the requirement of the charter of the bridge corporation that it should not obstruct navigation further than allowed by the laws of the United States and decisions of the Supreme Court required the structure always to meet those conditions.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 74–82, 83; Dec. Dig. ⟸20(2).]

3. COMMERCE ⟸57—NAVIGABLE STREAMS—BRIDGES—POWERS OF CONGRESS.

Act March 3, 1899, c. 425, § 18, 30 Stat. 1153 (Comp. St. 1913, § 9970), authorizing the Secretary of War to require changes in bridges over navigable streams when navigation is unduly impeded, is valid in so far as it applies to a bridge constructed across the Ohio river under Acts Cong. July 14, 1862, and Feb. 17, 1865, authorizing the construction of bridges as part of post routes and referring to the right to construct the bridge as a privilege, though the acts made no provision for amendment, for

there was no express limitation on the power of subsequent Congresses, and such legislation is justified under the power to regulate interstate commerce.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 72–76, 88, 90, 92–102; Dec. Dig. ⊂⊃57.]

4. EMINENT DOMAIN ⊂⊃2(1)—NAVIGABLE WATERS ⊂⊃20(6)—BRIDGES—ALTERATIONS—COMPENSATION.

As Act Cong. March 3, 1899, § 18, authorizing the Secretary of War to require changes to be made in bridges over navigable streams, when navigation is unduly impeded, makes no provision for compensation for expense of changes, none can be allowed the bridge owners by the District Court, there being no taking of their property.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 3–8; Dec. Dig. ⊂⊃2(1); Navigable Waters, Cent. Dig. § 91; Dec. Dig. ⊂⊃20(6).]

5. EMINENT DOMAIN ⊂⊃2(1)—TAKING OF PROPERTY—COMPENSATION.

To entitle a person to compensation under Const. U. S. Amend. 5, prohibiting the taking of private property for public use without compensation, there must be an actual taking of property for public use, and not a mere injury to property without a taking.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 3–8; Dec. Dig. ⊂⊃2(1).]

6. NAVIGABLE WATERS ⊂⊃26(1)—INJUNCTION—FEDERAL COURTS—JURISDICTION—COURT OF CLAIMS.

Where, under Act Cong. March 3, 1899, § 18, a bridge company was required to reconstruct its bridge over a navigable stream, an injunction necessitating compliance will not be denied, upon the claim that the acts under which the bridge was constructed constituted a contract, or that the company was entitled to compensation, for those matters should be presented to the Court of Claims, under Judicial Code (Act March 3, 1911, c. 231) § 145, 36 Stat. 1136 (Comp. St. 1913, § 1136), or to Congress.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 135–143; Dec. Dig. ⊂⊃26(1).]

In Equity. Bill by the United States against the Louisville Bridge Company. Injunction granted.

Perry B. Miller, U. S. Dist. Atty., of Louisville, Ky.

Chas. H. Gibson and William W. Crawford, both of Louisville, Ky., for defendant.

EVANS, District Judge. By an act approved February 17, 1865 (13 Stat. 431, c. 38), authority was given the Louisville & Nashville Railroad Company and the Jeffersonville Railroad Company (stockholders in the Louisville Bridge Company) to construct a railroad bridge of a specified character over the Ohio river at the head of the Falls of the Ohio. The authority thus given was made subject to the provisions of a previous act approved July 14, 1862 (12 Stats. 569, c. 167).

Under its charter and the authority given by Congress the defendant constructed its bridge. After its completion in 1870 it was inspected by the Board of Engineers of the United States Army. When certifying the result to the government and to the defendant, among other things the Board said:

"The board have no changes to recommend in this bridge, which they consider a first-class structure throughout, and very much less an obstruction

than it might have been, had its builders limited themselves to giving only what they were compelled by law to give. On the contrary, they have chosen to build according to the highest of the three authorized plans, and have exceeded the heights and widths that even this plan required, spending $150,000 more than was necessary to comply with the letter of the law. Instead of a 300-foot opening at low water, one of their channel spans gives 380 feet, and the other 352¼ feet."

During the 45 years which have followed, the bridge, thus constructed, has been continuously used as a railroad bridge.

By the eighteenth section of the act approved March 3, 1899 (30 Stats. 1153, c. 425), making appropriations for the construction, repair, and preservation of certain public works on rivers and for other purposes, the Secretary of War was authorized, and it was made his duty, when he had good reason to believe that any railroad or other bridge then constructed or which might thereafter be constructed over any of the navigable waterways of the United States was an unreasonable obstruction to the free navigation of such waters, or was of insufficient height, or width of span, or otherwise, or where there was difficulty in passing the draw by rafts, steamboats, or other water craft, after giving the bridge owner reasonable opportunity to be heard, to give notice to such owner, specifying the changes required and the time within which they were reasonably to be completed. Penalties were prescribed for failure to make the changes required, etc.

It is conceded that all the preliminary steps required by the section were properly taken by the Secretary of War. Afterwards that officer in due course served upon the defendants a notice as follows:

"Form No. 6.

"War Department.

"Washington, D. C., December 12th, 1914.

"To Charles H. Gibson, President Louisville Bridge Company, 906 Realty Building, Louisville, Kentucky:

"Take notice that—Whereas, the Secretary of War has good reason to believe that the bridge of the Louisville Bridge Company across the Ohio river at Louisville, Kentucky (commonly known as the 'Ohio Falls' bridge), is an unreasonable obstruction to the free navigation of the said Ohio river (which is one of the navigable waterways of the United States) on account of (1) insufficient horizontal clearance of the channel span crossing the main navigable channel known as 'Indiana Chute,' and (2) insufficient width of opening in the existing swing span crossing the Louisville and Portland Canal.

"And whereas, the following alterations, which have been recommended by the Chief of Engineers, are required to render navigation through or under it reasonably free, easy, and unobstructed, to wit:

"(1) That the span of said bridge crossing 'Indiana Chute' be so changed as to provide a horizontal opening 600 feet wide in the clear.

"(2) That the existing swing span of said bridge across the Louisville and Portland Canal, be changed to a lift span giving a horizontal chearance of 200 feet, and a vertical clearance, when open, of 78 feet above pool level of 412 feet, U. S. datum.

"And whereas, three years from the date of service of this notice, is a reasonable time in which to alter the said bridge as described above:

"Now, therefore, in obedience to, and by virtue of, section eighteen of an act of the Congress of the United States entitled 'An act making appropriations for the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes,' approved March 3, 1899, the Secretary of War does hereby notify the said Louisville Bridge Company to alter the said bridge as described above, and prescribes that said alterations shall

be made and completed on or before three years from the date of service hereof. [Signed] Lindley M. Garrison, Secretary of War."

The response of the Bridge Company to this notice was as follows:

"Louisville Bridge Company.

"President's Office.

"Louisville, Nov. 26, 1915.

"To the Secretary of War, Washington, D. C.:

"In re Reconstruction of Superstructure of Louisville Bridge.

"Referring to the correspondence and conference heretofore had concerning the above matter, I beg to advise you that I am instructed to say:

"First. The Louisville Bridge Company claims and insists on the right to renew its superstructure on the existing masonry, without making any changes in the length of any of the existing spans, so that, when completed, it will not interfere with navigation any more than it does now.

Second. The company intends to at once commence and continue the work of renewing its superstructure as above stated, it being its purpose to first reconstruct the five northern spans of the bridge, including the span over the Indiana channel.

"If you desire it, detailed plans showing the proposed reconstruction will be furnished you.

"Very respectfully, [Signed] Chas. H. Gibson, President."

In this situation the United States filed its bill of complaint against the defendant, in which, having stated in substance that the defendant had failed and refused, and intended to continue to fail and refuse, to comply with the notice given by the Secretary of War, prayed the court to enjoin the defendant from erecting, or causing to be erected, or from taking any steps whatsoever towards the erection, or the causing of the erection, of a bridge contrary to the requirements set forth in the notice of the Secretary of War aforesaid, or from reconstructing the superstructure of its present bridge upon its present piers in such a manner as to leave a span contrary to the provisions of said order and notice of the Secretary of War, or from taking any steps whatsoever to that end, or from doing any of the matters or things which it threatens to do in its letter of November 26, 1915.

The defendant answered the bill, and the parties filed a stipulation agreeing that the material facts were as therein set forth; but we are stating only such of them as may be essential for present purposes. One clause in their agreement was in this language, namely:

"It is expressly agreed and here stipulated between complainant and respondent that the sole question to be determined in this case is the legality of the order of the Secretary of War as applied to the bridge of the respondent."

The case thus presented is of very great importance, alike to the defendant and to the public, and the general question upon which it is agreed the decision must turn, and various illustrative propositions supposed more or less to bear upon it, have been discussed with great earnestness and ability. While, in view of the certainty of an appeal, it is not necessary that we should go into much detail, we will, as briefly and clearly as may be, state the grounds upon which we rest our conclusion.

[1] Section 18 of the act of 1899 has often been under consideration by the Supreme Court. Its constitutionality has been called in

question, but the court distinctly held it to be constitutional in Union Bridge Co. v. United States, 204 U. S. 364, 388, 27 Sup. Ct. 367, 51 L. Ed. 523, Monongahela Bridge Co. v. United States, 216 U. S. 177, 30 Sup. Ct. 356, 54 L. Ed. 435, and Hannibal Bridge Co. v. United States, 221 U. S. 194, 31 Sup. Ct. 603, 55 L. Ed. 699.

While this general proposition must be regarded as settled, nevertheless attempted applications of the provisions of the section possibly might be subject to constitutional restriction. To illustrate: There is no clause in the act of 1862, or in that of 1865, either authorizing or forbidding renewals of the superstructure. There is no clause in either act reserving the power to amend its provisions, and there is nothing in section 18 of the act of 1899 which gives or contemplates the giving of compensation to the owner of a bridge in case the Secretary of War shall act under its provisions. In view of this condition of applicable legislation, the defendant insists that the Secretary's order, though within the letter of the statute, would, if enforced, be an unconstitutional violation of its rights, first, because, in the absence of the reservation of the right to amend the previous acts, Congress could not make section 18 of the act of 1899 applicable to this bridge; and, second, because to put the Secretary's order into effect would take the defendant's property to the extent of at least $450,000 for public use without compensation, in violation of the fifth amendment to the Constitution of the United States. The last of these propositions must be regarded as having been definitely foreclosed when the Supreme Court in Hannibal Bridge Co. v. United States, 221 U. S. 194, 205, 31 Sup. Ct. 603, 606 (55 L. Ed. 699), said:

"It is also firmly settled that such alterations of bridges over the navigable waters of the United States as the Chief of Engineers recommended, and as the Secretary of War required to be made after notice and hearing the parties interested, was not a taking of the property of the owners of such bridges within the meaning of the Constitution. Union Bridge Company v. United States, 204 U. S. 364 [27 Sup. Ct. 367, 51 L. Ed. 523]; Monongahela Bridge Co. v. United States, 216 U. S. 177 [30 Sup. Ct. 356, 54 L. Ed. 435]; Field v. Clark, 143 U. S. 649 [12 Sup. Ct. 495, 36 L. Ed. 294]; Buttfield v. Stranahan, 192 U. S. 470 [24 Sup. Ct. 349, 48 L. Ed. 525]."

[2, 3] But the question whether section 18 of the act of 1899 can be applied to this case, in the absence from the acts of 1862 and 1865 of any reservation of the right to amend them, and without providing for compensation, is of vital importance, and cannot be so easily disposed of. We may examine the general proposition from several standpoints.

The act of July 14, 1862 (12 Stat. 569, c. 167), is entitled "An act to establish certain post roads." In its first and second sections it declared two certain bridges authorized by state legislation to be lawful structures. By the third section it was made lawful for other railroad companies, pursuant to their respective charters, to build bridges across the upper Ohio river. The fourth section provided that "any bridge erected under the privileges of this act" may be built in the way prescribed in the section. By the fifth section it is enacted that bridges erected under the provisions of the act shall be lawful structures and known as post routes. The act of February 17, 1865, was, as we have seen, supplemental to the act of 1862, and amended it, so

"as to authorize" two certain railroad companies, stockholders in the Louisville Bridge Company, to construct the railroad bridge now in question. The defendant is a Kentucky corporation, its charter being an act of the Legislature of that state approved March 10, 1856, found in volume 2 of the Acts of 1855–56, at page 426, and which is therein declared to be a "public law." A proviso in the second section of the act is in these words:

"Provided, that said bridge shall be constructed so as not to obstruct navigation further than the laws of the United States and the decisions of the Supreme Court of the United States shall hold to be legal." [1]

By another act of the Kentucky Legislature (1 Acts 1861–63, p. 153) it was provided "that the charter of the Louisville Bridge Company, approved the 10th of March, 1856, be revived and confirmed to James Guthrie" [2] and others, who were invested with all the powers and rights conferred by the charter.

An act of the Legislature of Kentucky approved February 14, 1856 (1 Acts 1855–56, p. 15), reserved power in the Legislature "to amend or repeal charters and other laws." This was the first appearance of this character of legislation in a general law of the state, but it has been carried forward in all later compilations of our statutes, and it antedated all the legislation, either state or national, to which we have referred.

It will be observed that the act of 1862 speaks of bridges erected under the "privileges" of the act, and the act of 1865 so amends that of 1862 "as to authorize" certain railroads to build a bridge at the head of the Falls of the Ohio, and it is argued in behalf of the government that the grant of the privilege and authority thus given to the Kentucky corporation did not make a contract with it. Undoubtedly what was done by the acts of 1862 and 1865 was only to give the Bridge Company the privilege and authority to erect a bridge as contemplated by its charter, proviso included. This made the bridge a lawful structure—that is, a bridge built over a navigable stream under the sanction and authority of a law of the United States. The defendant was thus given a privilege indispensable to its existence, viz., that of permanently using for its own exclusive purposes part of the public domain extending from one bank of a navigable river to the other. In this way the defendant was enabled to erect and maintain a great and costly bridge, and has enjoyed the profitable privilege for many years. But do these facts bring into view anything which fills any definition of the word "contract"? It may not be possible to answer this question in the affirmative, in the absence from the acts of 1862 and 1865 of language which justifies the conclusion that Congress at the time had in contemplation either the making of a contract itself, or giving authority to the United States to make a contract in

[1] This proviso is substantially similar to that in the charter of the Union Bridge Company, which is found in 204 U. S. at page 367, 27 Sup. Ct. 367, 51 L. Ed. 523, and in that of the Monongahela Bridge Co., found in 216 U. S. 187, 30 Sup. Ct. 356, 54 L. Ed. 435.

[2] Mr. Guthrie was then president of the Louisville & Nashville Railroad Company.

the premises, which could not be altered or changed without the consent of the Bridge Company.

That clause of the Constitution which inhibits state (though not federal) legislation impairing the obligation of contracts has been the subject of consideration in innumerable cases, and the wisdom and justice of it have been vindicated beyond the possibility of further doubt. Beginning probably with the Dartmouth College Case, the Supreme Court has made many decisions annulling state laws, which, in one way or another, had infringed this constitutional provision. Among those decisions were such as had applied it to state charters of corporations. Such charters were held to be contracts which could not, without the consent of the corporation, be changed, unless power to do so had been reserved.

Resulting from this situation it became almost universally customary in state legislation to reserve such power either in the charter itself or in the general laws, as was done in Kentucky by the act of February 14, 1856, supra. The custom thus fixed from necessity in state legislation began in 1869 out of abundant caution to manifest itself in congressional enactments respecting authority to build bridges over navigable waters, and in many of the cases against bridge companies such reservations simplified the questions to be decided. We cannot suppose, however, that this custom has been exalted into constitutional sanctity, nor that it has in any wise diminished or affected that power of Congress which finds its warrant in the provision that "the Congress shall have power * * * to regulate commerce with foreign nations, and among the several states"—words which, decided cases will possibly show, have developed greater and more varied potentialities than any similar number of words ever uttered by man.

While in many instances Congress, had it seen fit to do so, might have ameliorated and softened some apparently harsh results by provisions requiring compensation therefor, it has not done so in section 18 of the act of 1899. Many instances of the ruthless results of legislation under the commerce clause of the Constitution have appeared where the courts, and especially the Supreme Court, have found no power to avoid them. The case of Louisville & Nashville R. R. Co. v. Mottley, 219 U. S. 467, 31 Sup. Ct. 265, 55 L. Ed. 297, 34 L. R. A. (N. S.) 671, is one of the most striking of these. There Mottley and his wife, in 1871, having been severely injured while traveling on one of the trains of the Railroad Company, made a contract with the Railroad Company whereby the parties settled the claims for compensation for the injuries inflicted by agreeing that the Railroad Company should give the injured persons passes over its entire line of railroad during their natural lives respectively. This contract continued in force for nearly 40 years, when the Railroad Company sought to annul it under the provisions of the Interstate Commerce Act of 1887, as amended in 1906 (Act June 29, 1906, c. 3591, 34 Stat. 584), and the court held that that must be the result, because the contract must be considered to have been entered into in contemplation of the possibility that Congress might, at some future time, if the public interest demanded it, exert its power to annul it under the

commerce clause of the Constitution. Many instances were cited where similar principles were applied, and the court particularly emphasized what it had held in Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, and quoted from page 228, 20 Sup. Ct. 96, at page 102 [44 L. Ed. 136], where, among other things, it had said:

"The reasons which may have caused the framers of the Constitution to repose the power to regulate interstate commerce in Congress do not, however, affect or limit the extent of the power itself. In Gibbons v. Ogden, supra [9 Wheat. 1, 6 L. Ed. 23], the power was declared to be complete in itself, and to acknowledge no limitations other than are prescribed by the Constitution. Under this grant of power to Congress, that body, in our judgment, may enact such legislation as shall declare void and prohibit the performance of any contract between individuals or corporations, where the natural and direct effect of such a contract will be, when carried out, to directly, and not as a mere incident to other and innocent purposes, regulate to any substantial extent interstate commerce (and when we speak of interstate we also include in our meaning foreign commerce). We do not assent to the correctness of the proposition that the constitutional guaranty of liberty to the individual to enter into private contracts limits the power of Congress and prevents it from legislating upon the subject of contracts of the class mentioned. The power to regulate interstate commerce is, as stated by Chief Justice Marshall, full and complete in Congress, and there is no limitation in the grant of the power which excludes private contracts of the nature in question from the jurisdiction of that body."

The general principle applied in the Mottley Case has, as the opinion shows, controlled several other cases, where it was held that the power of Congress to regulate commerce was unlimited, unless some provision in the Constitution itself could be found which interposed a barrier. These general principles have a strong bearing upon the case before us.

[4, 5] Whether or not there is a contract, express or implied, between the United States and the defendant, arising out of the acts of 1862 and 1865, and the erection, on the faith thereof, of the defendant's bridge, can the government alter or withdraw the privilege or authority given by those acts, and enforce against the defendant the provisions of section 18 of the act of 1899, without giving defendant compensation to be measured by the increased cost? Certainly nothing can be found in the language of either of the acts which indicates that Congress intended either to bind itself or to bind the United States not to modify or withdraw the privilege or authority given the defendant, or to require the United States to make compensation in case the Secretary of War acted under section 18.

Nevertheless Judge Jackson, of the District Court of West Virginia, in United States v. Parkersburg, etc., R. R. Co., 134 Fed. 969, 972 (the Parkersburg Bridge Case), held that relief similar to that here sought by the United States could not be granted without giving the defendant compensation. In support of this view he cited McGahey v. Virginia, 135 U. S. 693, 10 Sup. Ct. 972, 34 L. Ed. 304, though that case was one of many cases where the sole question involved was whether state legislation could impair the obligation of a contract. The judgment of Judge Jackson was affirmed by the Circuit Court of Appeals (Fourth Circuit) in 143 Fed. 224, 74 C. C. A.

354. The syllabi to that report correctly show the points decided to be as follows:

"1. The right of a railroad company which constructed a bridge over a navigable stream, in conformity to the requirements of an act of Congress authorizing the same to maintain such bridge as a lawful structure, includes the right to repair or to renew the superstructure when necessary to its safe use, and where it is at all times, both during and after the alteration, kept and maintained in conformity to the act, the courts have no power to enjoin the work or to abate the structure as a nuisance, on the ground that it is an unlawful obstruction to navigation.

"2. A railroad bridge over a navigable stream, built under authority of an act of Congress which contained no reservation as to repeal, modification, or alteration, can only be required to be removed or replaced by a new bridge constructed, in accordance with Act March 3, 1899, c. 425, 30 Stat. 1121, by an act of Congress authorizing the same and providing for just compensation."

The learned court, in its opinion, alluded to the case of Bridge Co. v. United States, 105 U. S. 470, 26 L. Ed. 1143, but said it was not applicable. Besides several cases decided by the lower federal courts, it cited the case of United States v. Cincinnati, etc., Co., 134 Fed. 353, 67 C. C. A. 335, decided by the Circuit Court of Appeals of the Sixth Circuit, and which arose under an act approved April 2, 1888 (25 Stat. 74, c. 53), the only important question being whether the replacement of a wooden bridge by an iron one was the erection of a new bridge, and this was decided in the negative. The court (143 Fed. 224, 74 C. C. A. 354) also cited two cases decided by the Supreme Court, the earliest of which was Monongahela Navigation Co. v. United States, 148 U. S. 312, 13 Sup. Ct. 622, 37 L. Ed. 463. That was a proceeding under an act of Congress for the condemnation by the United States for public use of property known as the "upper lock and dam" owned by the Navigation Company, and of course compensation was allowed. The other case cited by the court was United States v. Lynah, 188 U. S. 445, 23 Sup. Ct. 349, 47 L. Ed. 539, in which Lynah had sued the United States to recover the value of certain land taken and appropriated by the government for the construction of dams in the Savannah river. The court held that there was an implied contract to pay the value of the land taken and affirmed the judgment in favor of the plaintiff therefor.

Whether or not the cases cited support the rulings in the Parkersburg Bridge Case, we do not feel free to follow those rulings, because of what has been said in many later cases, although in United States v. Baltimore & Ohio R. R. Co., 229 U. S. 244, 254, 33 Sup. Ct. 850, 853 (57 L. Ed. 1169), the Supreme Court said:

"How far, if at all, the grant of the right to build the bridge under the terms specified in the act of 1862, with no reservation of the right to alter or amend, will operate to limit the power of Congress to directly legislate on the subject of the removal or alteration of the bridge, is a question we are not here concerned with, and therefore express no opinion upon it"

—and although practically the same reservation was made in Bridge Co. v. United States, 105 U. S. 476, 26 L. Ed. 1143. While the question did not concern the court in those cases, in other cases, decided since that of the Parkersburg Bridge, it was given what we must suppose are such strong indications of its views as sufficiently to point

the course we must take; that is to say, it has laid down general rules upon general principles that must be accepted by this court as controlling in this instance.

In the Hannibal Bridge Case, already cited, 221 U. S. 205, 31 Sup. Ct. 603, 55 L. Ed. 699, the court distinctly ruled that requiring alterations in a bridge was not a taking of private property for public use. To the same effect had been its decisions in Union Bridge Co. v. United States, 204 U. S. 388, 27 Sup. Ct. 367, 51 L. Ed. 523. It likewise so held in Monongahela Bridge v. United States, 216 U. S. 177, 193, 194, 30 Sup. Ct. 356, 360 (54 L. Ed. 435). In the latter case the court said:

"Although the Brownsville Bridge was originally constructed under the authority of the commonwealth of Pennsylvania, and may not, at the date of its erection, have been an illegal structure or an unreasonable obstruction to navigation, in the condition, at that time, of commerce and navigation on the Monongahela river, the bridge must be taken as having been constructed with knowledge, on the part of all, of the paramount power of Congress to regulate commerce among the states, and subject to the condition or possibility that Congress might, at some time after its construction, and for the protection or benefit of the public, exert its constitutional power to protect free navigation as it then was against unreasonable obstructions; that the mere silence of Congress and its failure to directly interfere and prevent the original construction of the bridge, under the authority of Pennsylvania, imposed no constitutional obligation on the United States to make compensation for subsequent changes or alterations, which the public good, in its judgment, required to be made."

In that case we find no reservation by the state of the right to amend the Bridge Company's charter. The charter of the Bridge Company, however, contained a proviso similar to that in defendant's charter. 216 U. S. 187, 30 Sup. Ct. 356, 54 L. Ed. 435.

In the case of Union Bridge Co. v. United States, 204 U. S. at page 400, 27 Sup. Ct. 367, 51 L. Ed. 523, and in Hannibal Bridge Co. Case, 221 U. S. at page 207, 31 Sup. Ct. 603, 55 L. Ed. 699, the court used language in substance the same as that we have extracted from 216 U. S. 193, 194, 30 Sup. Ct. 356, 54 L. Ed. 435. The lesson we take from this is that the general principle thus stated will ultimately be applied indiscriminately to cases where there was such reservation and to those where there was none, and that the question reserved in United States v. Baltimore & Ohio R. R. Co., 229 U. S. 254, 33 Sup. Ct. 850, 57 L. Ed. 1169, and in Bridge Co. v. United States, 105 U. S. 476, 26 L. Ed. 1143, will be so determined as definitely to support the paramount authority of Congress over the navigable waters of the United States, regardless of the apparent injustice and hardship which the courts may be compelled to inflict, in the absence of an exercise by Congress of its exclusive power to provide for compensation to owners of bridges situated as is the defendant in this case. Hard as this result may be, it cannot be harder than that of nullifying contracts of great importance between individuals, as was done in the Mottley Case and many others.

Clauses reserving power in Congress to amend a law granting authority to construct bridges over navigable waters seem first to have been noticed by the Supreme Court in Bridge Co. v. United States, 105

U. S. 470, 476, 26 L. Ed. 1143. Speaking of it as a "new provision," Chief Justice Waite said that its first appearance in congressional legislation on the subject of bridges is in the act of February 19, 1869 (15 Stat. 272, c. 37), passed at the same session of Congress as the act then under consideration. Of course such provisions make the task of the courts easier, but it does not necessarily follow that we must hold that one Congress can prevent a succeeding Congress from exercising its power to regulate commerce by any failure to make the reservation in acts like those of 1862, 1865, or 1899. This strikes us as being especially essential to the unfettered exercise by each succeeding Congress of the right to regulate commerce and to adjust legislation for that purpose to new exigencies and conditions as they arise. If this power does not exist almost without limitation, we have read in vain rulings like those in Louisville & Nashville R. R. Co. v. Mottley, 219 U. S., at page 480, 31 Sup. Ct. 265, at page 269 (55 L. Ed. 297, 34 L. R. A. [N. S.] 671), where it is said:

"There are certain propositions at the base of this inquiry which we need not discuss at large, because they have become thoroughly established in our constitutional jurisprudence. One is that the power granted to Congress to regulate commerce among the states and with foreign nations is complete in itself, and is unrestricted except by the limitations upon its authority to be found in the Constitution. Gibbons v. Ogden, 9 Wheat. 1 [6 L. Ed. 23]; Brown v. Maryland, 12 Wheat. 419 [6 L. Ed. 678]; Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 229 [20 Sup. Ct. 96, 44 L. Ed. 136]; Scranton v. Wheeler, 179 U. S. 141, 162, 163 [21 Sup. Ct. 48, 45 L. Ed. 126]; C., B. & Q. R. R. Co. v. Drainage Com'rs, 200 U. S. 561 [26 Sup. Ct. 341, 50 L. Ed. 596, 4 Ann. Cas. 1175]; Union Bridge Co. v. United States, 204 U. S. 364, 400 [27 Sup. Ct. 367, 51 L. Ed. 523]; Atlantic Coast Line, etc., v. Riverside Mills, 219 U. S. 186, 202 [31 Sup. Ct. 164, 55 L. Ed. 167, 31 L. R. A. (N. S.) 7]."

In the last of the cases quoted, on page 202 of 219 U. S., page 169 of 31 Sup. Ct. (55 L. Ed. 167, 31 L. R. A. [N. S.] 7), the court said:

"Undoubtedly the United States is a government of limited and delegated powers, but in respect of those powers which have been expressly delegated, the power to regulate commerce between the states being one of them, the power is absolute except as limited by other provisions of the Constitution itself."

We find no provision in the Constitution which can in any wise limit the operation of the commerce clause in this connection, unless it be that one in the fifth amendment which requires compensation to be made when private property is taken for public use. If such property be directly taken by the government in order to accomplish some purpose of its own in the regulation of commerce, such, for example, as the building of a dam or harbor, the fifth amendment would require compensation to be made to the owner.

We take it, however, that compensation in every case must depend upon the concurrence of two essential facts: First, there must be an actual taking of property by the government; and, second, such taking must be for public use. Each of these factors is essential, though we may assume that the government would not take property for other than public uses. The Supreme Court, as we have seen, has frequently held that requiring a bridge company to change its superstructure over a navigable river, so that it will not unreasonably ob-

struct navigation, is not a "taking" of property by the United States at all. The government in such cases takes no property and gets none. What it does, in this instance, and what it has done in others, is to require the Bridge Company to comply with the promise it made when it accepted its charter, namely, to so construct its bridge as not to obstruct navigation further than the laws of the United States made it legal. The obligation of this promise is, we think, continuous; and section 18 of the act of 1899 is as operative upon defendant's bridge as it is upon any other within its purview.

[6] Besides, the defendant's bridge, like others, must be considered as having been built in contemplation of the possibility of the exercise by Congress of its constitutional right and duty to require alterations when necessary for the regulation of commerce. But if the Bridge Company, either upon an implied contract to compensate it or upon any equitable ground, has any claim against the United States growing out of the acts of the Secretary of War, it can sue in the Court of Claims under section 145 of the Judicial Code, and always it can appeal to Congress. In order that we may not obstruct in any way those avenues to relief, we express no opinion as to whether or not any obligation upon the United States can be implied from the facts developed in this case. We think, indeed, that, whether there was a contract or not, section 18 must be enforced, leaving the question of compensation to be settled elsewhere—this court being powerless, though, if the court had been convinced that any sort of contract had been made which required compensation by the United States in case its powers were exercised under that section, it possibly was within the court's discretion to refuse an injunction until the equity arising out of that situation had been done by the government, thus leaving each party to its remedies at law.

It may further illustrate our views to add the suggestion that if proposed legislation, fairly considered, is a regulation of interstate or foreign commerce, the constitutional power of Congress to pass it cannot be affected by anything a previous Congress may have done short of express contract or pledge of public faith, though such previous action may greatly affect the question of the wisdom or the justice of the proposed measure in the estimation of those who are to vote upon it.

At the argument many cases were cited by one side or the other bearing upon illustrative contentions, but we think none of them should modify the conclusions we have reached. They do not, therefore, seem to require further notice, though they have not been overlooked.

After very careful consideration of the laws of the United States, the charter of the defendant, and the decisions of the Supreme Court in connection with the stipulated facts we have been forced to conclude:

First. That, although there was no reservation of the right to amend the acts of 1862 and 1865, it was, under the Constitution, within the power of Congress to enact section 18 of the act of 1899, and other similar legislation affecting bridges over navigable waters.

Second. That carrying into effect the order of the Secretary of War will not constitute the taking of any of the property of the defendant by the government for public use.

Third. That, as Congress has made no provision for compensation to the bridge owner in such cases, this court has no power over the subject.

Fourth. That the charter of the defendant required it to construct its bridge so as not to obstruct navigation further than the laws of the United States and the decisions of the Supreme Court should hold to be legal, which, we think, means that the construction shall always meet those requirements; and

Fifth. That, whether or not there is a contract between plaintiff and defendant, the order of the Secretary of War is enforceable, leaving Congress, or the Court of Claims, to determine the question of compensation; they alone, in their respective spheres, having power over it.

We therefore hold that the order of the Secretary of War is a legal order as applied to defendant's bridge, and that the injunction prayed for should be granted. What should be the precise form of the order can be carefully considered, but it should provide that granting the injunction is without prejudice to the defendant's right to seek or sue for any compensation to which it may be entitled.

CRESCENT MFG. CO. v. WILSON, State Com'r of Agriculture.

(District Court, N. D. New York. May 12, 1916.)

1. COMMERCE ⇐8—POWER OF STATE TO MAKE REGULATIONS—DISCLOSURE OF INGREDIENTS.

Congress not having legislated on that subject, it is within the police power of a state to require food products sold therein to be so marked as to disclose their ingredients, in addition to the requirements of Food and Drugs Act June 30, 1906, c. 3915, 34 Stat. 768 (Comp. St. 1913, §§ 8717–8728), so long as the formula for their preparations or compounding is not required to be disclosed.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 5; Dec. Dig. ⇐8.]

2. COMMERCE ⇐8—STATE REGULATIONS—CONSTRUCTION OF STATUTE.

Agricultural Law (Consol. Laws N. Y. c. 1), as amended by Laws 1914, c. 494, in case of mixtures and combinations forming proprietary food products, and which do not contain any added poisonous or deleterious ingredient, compels the disclosure by label, brand, or tag of their character and constituents, and in such respect is not in conflict with the federal Food and Drugs Act.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 5; Dec. Dig. ⇐8.]

In Equity. Suit by the Crescent Manufacturing Company against Charles S. Wilson, Commissioner of the Department of Agriculture of the State of New York. On application for preliminary injunction. Denied.

Application for a preliminary injunction on order to show cause. This is a suit in equity to restrain the defendant, commissioner of agriculture of the

state of New York from carrying out and enforcing a threatened course of action having for its object, it is alleged, the exclusion from the state of New York of "Mapleine," a food product made by complainant in the state of Washington, and extensively transported in interstate commerce into the state of New York, and there supplied to complainant's customers.

William T. Byrne, Albany, N. Y., for complainant.

Egburt E. Woodbury, Atty. Gen., of Albany, N. Y. (Charles M. Stern, Deputy Atty. Gen., of Albany, N. Y., of counsel), for defendant.

RAY, District Judge. The complainant is a corporation of the state of Washington, U. S. A., and now and for some years has been engaged in the manufacture and sale of various food products, including spices, flavoring extracts, coffee, baking powder, and a proprietary food product known and sold as "Mapleine," and labeled:

"Crescent (Trade-Mark) Crescent Mapleine. Reg. U. S. Pat. Office. Mapleine. Contains no maple sugar, syrup nor sap, but produces a taste similar to maple. Made only by Crescent Mfg. Co., Seattle, U. S. A."

The registered trade-mark consists of a crescent and the words therein "(Trade-Mark) Crescent Mapleine." It is alleged, and not denied, that this Mapleine is a food product, and that it contains no ingredient in any way unwholesome, or injurious, or deleterious to health; is not an imitation of, or offered for sale under, the distinctive name of another article; is not mixed, colored, powdered, or stained in a manner whereby damage or inferiority is concealed, so that when sold or offered for sale it deceives or tends to deceive the purchaser; that the package and carton containing it does not bear any statement regarding the ingredients or the substances contained therein which is false or misleading in any particular; and that the same is branded in such manner as to show the city and state in which it is manufactured and produced. It is also alleged, and not denied, that the complainant is the sole owner and proprietor of the trade formula for compounding same, and that the disclosure of such trade formula would operate to take away the complainant's property therein without due process of law. It is also alleged that the complainant, in manufacturing and selling such food product, and in transporting same in interstate commerce, has complied and now complies with the several acts of Congress relating thereto.

The defendant, Charles S. Wilson, the commissioner of the department of agriculture of the state of New York, claims to justify and defend his action thus far taken, and his threatened action, on the ground that "Mapleine," or "Crescent Mapleine," is not a "distinctive name," but is made up of the word "Maple" with a suffix "ine" tending to leave the impression that the substance, whatever it may be, is the product of "maple"; also that, this "Mapleine" being a compound or mixture and not falling within any of the exceptions to the law, the complainant should label or brand or tag the containers or cartons so as to show the actual *character and constituents* thereof. I do not see that it is proposed to compel the complainant to disclose its formula for mixing and compounding these ingredients. This

disclosure of the constituents and their character is exactly what the complainant does not desire or wish to do, as such disclosure, it contends, would destroy the value of its secret formula and its trade in such article. The chemist employed by the state has made an analysis of "Mapleine," and says it contains alcohol by volume 19.87 per cent., solids 29.8 per cent., and specific gravity of 1.097. He does not state further as to the contents, but there is no claim or contention that there is any deleterious, or unhealthful, or unwholesome ingredient contained therein, or that it is not a food product. The main claim is that the name tends to give the impression it contains or is made from "maple," when it is not, and that the state in the exercise of its police power has the right to compel disclosure of the ingredients.

[1] It may be regarded as settled that the federal Constitution prohibits a state from regulating interstate commerce. Foote v. Maryland, 232 U. S. 494, 34 Sup. Ct. 377, 58 L. Ed. 698. But it is also settled that "*Regulating* the sale of food for *domestic* animals is properly within the scope of the state police power, and the vendors of such food are not deprived of their property without due process of law by a regulation requiring disclosure of ingredients and minimum percentage of fat and proteins, disclosure of the *formula* for combination *not being required.*" Savage v. Jones, 225 U. S. 501, 528, 539, 32 Sup. Ct. 715, 56 L. Ed. 1182; Standard Stock Food Co. v. Wright, 225 U. S. 540, 32 Sup. Ct. 784, 56 L. Ed. 1197. If the state may do this as to foods for domestic animals, it may do the same as to foods for human consumption. "Where an act of Congress, relating to a subject on which the state may act also, *limits* its prohibitions, it leaves the subject open to state regulation as to the prohibitions which are unenumerated." Savage v. Jones, supra. "Although the Food and Drugs Act prohibits misbranding it does not require publication of ingredients, and in that respect the field is left open for state legislation." Savage v. Jones, supra; Anderson v. Pacific Coast S. Co., 225 U. S. 187, 32 Sup. Ct. 626, 56 L. Ed. 1047 (pilotage laws); Atlantic Coast Line v. Georgia, 234 U. S. 280, 34 Sup. Ct. 829, 58 L. Ed. 1312 (safety devices); Sligh v. Kirkwood, 237 U. S. 52, 35 Sup. Ct. 501, 59 L. Ed. 835 (citrus fruits). In Foote v. Maryland, supra, the court says:

"The Constitution prohibits a state from regulating interstate commerce, but at the same time authorizes the collection of the necessary expenses of its inspection laws with the result that interstate commerce is to that extent lawfully burdened. Inspection is intended to determine the weight, *condition*, quantity, and quality of merchandise to be sold within or beyond the state's borders."

If it be proper for the state to ascertain the *quality*, why may it not know the *constituents?* In Sligh v. Kirkwood, supra, a law of the state of Florida (chapter 6236, § 1, Laws Fla. 1911 [Comp. Laws 1914, § 1143p]) prohibits the delivery for shipment of citrus fruits immature or otherwise unfit for consumption, and by the Supreme Court of the United States this law was held not unconstitutional as an attempt to regulate interstate commerce, and also that:

"The provisions of the federal Food and Drugs Act relating to shipment in interstate commerce of fruit in filthy, decomposed, or putrid condition do

not apply to fruit unfit for consumption because green or immature. *Congress has not covered the latter field.*"

It would seem clear that Congress has not covered the field of disclosure of the ingredients of a food product designed for human consumption and moved or moving in interstate commerce from one state into the state of New York or any other state for sale there, and that the several states in the exercise of the police power are at liberty and free to legislate on that subject, and lawfully provide by law for a disclosure of the name of the ingredients entering into the composition or compounding of such food mixtures, so long as the disclosure of the formula for compounding such food mixture is not required.

The defendant also claims that the word "Mapleine" is not a distinctive name as applied to a food compound. I know of no food product known as or having the name or designation "maple." We have maple trees, sap of the maple trees or maple syrup, maple sugar or sugar of maple. Maple is the name of a genus of tree, and not the name of a food, and we have near a hundred of the species, such as the red, scarlet, or swamp maple tree, and the silver leaf maple. A regulation of the United States Department of Agriculture defines a distinctive name, saying:

"A distinctive name is a trade, arbitrary, or fancy name which clearly distinguishes a food product, mixture, or compound from any other food product, mixture, or compound."

In this case we have diversity of citizenship and an amount or value in controversy in excess of the sum of $3,000 exclusive of interest and costs, and the bill charges that the defendant is arbitrarily and unlawfully denouncing the complainant's trade in and sale of this food product in the state of New York as unlawful, and threatening its customers with suits and prosecutions if they continue to deal in or sell such product, and that defendant justifies such conduct on the sole ground that the complainant's food product, "Mapleine," is not so labeled as to show the various ingredients of the mixture. The defendant has no right, by virtue or color of his office, or otherwise, to interfere with complainant's sales of such food product, unless authorized so to do by some statutory authority, and to justify the conduct complained of it must appear that the defendant has the right under the laws of the state of New York to compel the disclosure of the ingredients composing all proprietary food products which are mixtures or compounds, combinations, imitations, or blends, placed on the market and sold or offered for sale in said state, irrespective of any claim of adulteration or misbranding, otherwise than by simply failing by label thereon to disclose the ingredients of the food compound. This is what this case comes to under the allegations of the bill and the answering affidavits.

[2] This leads us to a consideration of the New York Agricultural Law (chapter 494, Laws of 1914), and entitled "An act to amend the Agricultural Law in relation to adulterated or misbranded food." The title of the act indicates its purpose. It is intended to reach to misbranding and adulteration of food products. The act prohibits the sale or the offering or exposure for sale of "any article of food which

is adulterated or misbranded within the meaning of this article" (the law referred to). "Food" is defined to be all articles used for food, confectionery, or condiments, by man, whether simple, mixed, or compound. Section 201 of the act (Consol. Laws, c. 1) provides:

"*Definition of Adulterated or Misbranded Food.* * * * In the case of food an article shall be deemed to be adulterated:

"1. If any substance or substances has or have been mixed or packed with it so as to reduce or lower or injuriously affect its quality or strength, so that such product, when offered for sale, shall deceive or tend to deceive the purchaser.

"2. If any substance or substances has or have been substituted wholly or in part for the article, so that the product, when sold or offered for sale, shall deceive or tend to deceive the purchaser.

"3. If any valuable constituent of the article has been wholly or in part abstracted, so that the product, when sold or offered for sale, shall deceive or tend to deceive the purchaser.

"4. If it contains any added poisonous ingredient or any ingredient which may render such article injurious to the health of the person consuming it.

"5. If it consists in whole or in part of a filthy, decomposed or putrid animal or vegetable substance, or any portion of an animal unfit for food, whether manufactured or not, or if it is the product of a diseased animal, or one that has died otherwise than by slaughter.

"6. If it contains methyl or wood alcohol, in any of its forms, or any methylated preparation made from it.

"An article of food shall be deemed to be misbranded:

"1. If it be an imitation of or offered for sale under the distinctive name of another article.

"2. If it be mixed, colored, powdered or stained in a manner whereby damage or inferiority is concealed, so that such product, when sold or offered for sale, shall deceive or tend to deceive the purchaser.

"3. If the package containing it or its label shall bear any statement regarding the ingredients or the substances contained therein, which statement shall be false or misleading in any particular, or if the same is falsely branded as to the state or territory in which it is manufactured or produced or if it shall be contained in, or served in or from any bottle or receptacle falsely marked, labeled or branded as to the name of the person, persons or corporations manufacturing the same; provided, that an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded in the following cases:

"First. In the case of mixtures or compounds which may be now or from time to time hereafter known as articles of food, under their own distinctive names and not included in definition first or third of misbranded articles of food in this section.

"Second. In the case of articles labeled, branded or tagged so as to plainly indicate that they are mixtures, compounds, combinations, imitations or blends: provided, that the same shall be labeled, branded or tagged so as to show the character and constituents thereof: and provided further, that nothing in this article shall be construed as requiring or compelling proprietors or manufacturers of proprietary foods which contain no unwholesome added ingredients to disclose their trade formulas, except in so far as the provisions of this article may require to secure freedom from adulteration or imitation."

According to the bill of complaint there is no pretense by defendant of any act which will deceive or tend to deceive the purchaser of this food article, or of the adding of any poisonous or deleterious ingredient, or of any ingredient which may make same injurious to the health of the consumer, or that it contains any filthy decomposed or putrid animal or vegetable substance, or any portion of an animal unfit for food or that it is the product of any animal, or that it con-

tains methyl or wood alcohol in any of its forms, or any methylated preparation made from it. Therefore defendant makes no *claim* that the complainant's food product is adulterated. The bill of complaint alleges that defendant makes no claim that the food product is an imitation, or offered for sale under the distinctive name of another article, or that it is mixed, colored, powdered, or stained in any manner whereby damage or inferiority is concealed, so as to deceive or tend to deceive a purchaser.

According to the allegations of the complaint defendant does not claim that the package containing this food, or its label, bears any statement which is false or misleading in any particular, or that it is falsely branded as to the state or territory where produced, or that it is contained in any receptacle falsely marked, etc., as to the name of the manufacturer. Now comes the proviso that an article of food which does *not* contain any added poisonous or deleterious ingredients should *"not* be deemed to be adulterated or misbranded in the following cases": First, in the case of mixtures or compounds which may be now or from time to time hereafter known as articles of food, under *their own distinctive names* and *not* included in definition first or third of misbranded articles of food in this section. Clearly this food product is sold under its own distinctive name, "Mapleine," and is not an imitation of or offered for sale under the distinctive name of another article. Clearly this food product is not included in definition third. Inasmuch as it does *not* contain any added poisonous or deleterious ingredient and being a mixture, compound or combination, it is not deemed adulterated if labeled, branded, or tagged so as to plainly indicate it is a mixture, compound, combination, imitation, or blend (and this is so labeled), except that in such case *(provided it would otherwise be deemed misbranded?)* it is not so regarded if labeled, branded, or tagged so as to show the *character and constituents thereof;* and it is then further provided that nothing in the act shall be construed as requiring or compelling proprietors or manufacturers of proprietary foods which contain no unwholesome added ingredients to disclose their trade formulas, *except in so far as the provisions of this article may require to secure freedom from adulteration or imitation.* It comes to the proposition whether or not a food mixture or compound *is regarded* as misbranded and *so declared* unless labeled so as to show *the character and constituents thereof* when the state commissioner of agriculture decides it is necessary to have a disclosure of the ingredients for the purpose of *securing* freedom from adulteration or imitation.

It seems to me clear that when the commissioner of the department of agriculture of the state of New York decides that a disclosure to him of the ingredients of a mixture constituting a proprietary food product on sale in the state of New York is necessary to secure freedom from adulteration or imitation he has the right and power to require such disclosure and to enforce his decision in all lawful ways. If the constituents of such a food product are disclosed, the formula, or mode and manner of mixing and proportions, is not necessarily disclosed to him, and certain it is that the chemical formula is not neces-

sarily disclosed. It may be and may not be in effect disclosed, but this is far from a disclosure to the general public by label.

I am of the opinion that the Agricultural Law of the state of New York has entered the domain of the adulteration and misbranding of food products, and has lawfully gone beyond what the Congress of the United States has done or attempted to do, and has provided that in the case of mixtures or compounds known as foods under their own distinctive names they are misbranded, if labeled, branded, or tagged so as to plainly indicate they are mixtures, compounds, combinations, imitations, or blends, but are not also so labeled, branded, or tagged as to show the character and constituents thereof, and declared that if this is not done such mixtures or compounds are deemed and declared misbranded, even when they contain no added poisonous or deleterious ingredients. True, the construction and wording of the statute is peculiar. It is not directly declared that food products made up of mixtures or compounds, or of combinations or blends, and containing no added poisonous or deleterious ingredient, shall be deemed misbranded unless so labeled, branded, or tagged as to show they are such, and also the character and the constituents thereof. If this was intended, it would have been easy to so say in clear and unambiguous terms. The requirement, if it exists, is found in the proviso declaring in what cases foods shall *not* be deemed misbranded. I do not find that the courts of the state of New York have construed this statute in this aspect, and my attention is not called to any decision on this particular question.

This statute is capable of two readings: (1) That an article of food which does not contain any added poisonous or deleterious ingredients, and hereinbefore declared adulterated or misbranded, shall not be deemed to be adulterated or misbranded in the case of articles labeled, branded, or tagged so as to plainly indicate that they are mixtures, compounds, combinations, or blends, in which case the same, if within the definition of adulterated or misbranded articles heretofore given, shall be labeled, branded, or tagged so as to show the character and constituents thereof or be deemed misbranded, and (2) after affirmatively defining misbranded articles, *except* that an article of food which does not contain any added poisonous or deleterious ingredients shall *not* be deemed to be adulterated or misbranded in the case of articles so labeled, branded, or tagged as to plainly indicate that they are mixtures, compounds, combinations, imitations, or blends, except or provided that in such case the same *shall be* labeled, branded, or tagged so as to show the character and constituents thereof or be deemed misbranded. This last construction would make it imperative that all food mixtures, compounds, combinations, imitations, and blends not containing added poisonous or deleterious ingredients be not only so labeled, branded, or tagged as to show they are mixtures, etc., but also the character and constituents thereof.

Again, the exceptions may be regarded as adding to the list of misbranded food combinations or compounds all mixtures, compounds, combinations, imitations, or blends so labeled, branded, or tagged as to show they are mixtures or compounds, etc., but which are not so

labeled as to show their character and constituents. This statute either declares what foods are misbranded, and then by exception declares what foods are not misbranded, if otherwise within the definition of misbranded food articles, or it first declares what foods are misbranded, and then provides by way of exception that certain foods are not misbranded, and then by way of another exception adds to the prior list of misbranded foods those which consist of mixtures, compounds, combinations, imitations, or blends which are *not* so labeled, branded, or tagged as to show the character and constituents thereof. If this is done, it is accomplished in a blind, back-handed, and equivocal manner, and not by plain language. If done, it is by inference, and we must read the statute as first declaring certain articles of food misbranded, and then as declaring that certain articles of food are not misbranded *"in the following cases,"* and then in one of those cases where the food is declared *not* misbranded declaring and enacting that it *is misbranded* unless it is (in the case of a mixture, etc.) so labeled, branded, or tagged as to show, not only that it is a compound or mixture, but the character and constituents thereof.

I am uncertain as to the construction that should be placed on this statute, but am constrained to the view that the New York statute, in the case of mixtures and combinations forming a proprietary food product and which do not contain any added poisonous or deleterious article compels the disclosure by label, brand, or tag of their character and constituents. This statute, as seen, is not in conflict with the federal statute. People v. Butler, 134 App. Div. 151, 118 N. Y. Supp. 849, and People v. Luke, 122 App. Div. 64, 68, 106 N. Y. Supp. 621, throw little, if any, light on the question involved here, although Judge McLennan, in People v. Luke, supra, 122 App. Div. 68, 106 N. Y. Supp. 624, does say:

"Where articles of food are labeled, branded, or tagged so as to indicate that they are compounds, combinations, imitations, or blends, there is no liability under the statute, provided the same shall be labeled, branded, or tagged so as to show the character and constituents thereof."

If I am correct in my conclusions, the defendant in his official capacity has the right to enforce the law by notice, demand, and appeals to the courts, so long as he does not seek to compel a disclosure of the formula, and only seeks to compel the affixing of a brand or tag which discloses the character and constituents of the mixture.

I find nothing in McDermott v. Wisconsin, 228 U. S. 115, 33 Sup. Ct. 431, 57 L. Ed. 754, 47 L. R. A. (N. S.) 984, Ann. Cas. 1915A, 39, in conflict with this conclusion. There it was held:

"Conceding to the state the authority to make regulations consistent with the federal law for the further protection of its citizens against impure and misbranded food and drugs, we think to permit such regulation as is embodied in this statute is to permit a state to discredit and burden legitimate federal regulations of interstate commerce, to destroy rights arising out of the federal statute which have accrued both to the government and the shipper, and to impair the effect of a federal law which has been enacted under the constitutional power of Congress over the subject.

"To require the removal or destruction before the goods are sold of the evidence which Congress has, by the Food and Drugs Act, as we shall see, provided may be examined to determine the compliance or noncompliance with

the regulations of the federal law, is beyond the power of the state. The Wisconsin act which permits the sale of articles subject to the regulations of interstate commerce only upon condition that they contain the exclusive labels required by the statute is an act in excess of its legitimate power. * * *

"The legislative means provided in the federal law for its own enforcement may not be thwarted by state legislation having a direct effect to impair the effectual exercise of such means.

"For the reasons stated, the statute of Wisconsin, in forbidding all labels other than the one it prescribed, is invalid, and it follows that the judgments of the state court affirming the convictions of the plaintiffs in error for selling the articles in question without the exclusive brand required by the state, must be reversed."

Injunction denied.

HOGG v. MAXWELL et al.

(District Court, S. D. New York. May 23, 1916.)

1. DIVORCE ⟸240(1)—HUSBAND AND WIFE ⟸298(1)—SEPARATION—MAINTENANCE.

Where a husband and wife separate, the wife is not absolutely entitled to one-third of her husband's income, nor does this rule apply to the granting of alimony; every case standing on its own facts.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 675, 680; Dec. Dig. ⟸240(1); Husband and Wife, Cent. Dig. § 1093; Dec. Dig. ⟸298(1).]

2. HUSBAND AND WIFE ⟸278(5)—SEPARATION—SEPARATION AGREEMENT.

Where a husband and wife separated, and, neither desiring an action in the courts, entered into a contract whereby the husband was to pay the wife $5,200 per year during her natural life or until her remarriage as a separate maintenance, and the wife was represented by able and zealous counsel, such agreement will not be disturbed, after the death of the husband, on the ground that the husband's income entitled her to a greater sum; it appearing before the settlement that the wife, who was represented by counsel, asserted the husband was a millionaire, and that the husband and his counsel made the offer accepted, stating that it might be accepted or the wife would have to seek redress in the proper forum.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1052; Dec. Dig. ⟸278(5).]

In Equity. Bill by Caroline F. Hogg against Lascelles C. Maxwell and Thomas Y. Crafts, as executors of Charles B. Hogg, deceased, and others. Bill dismissed.

Wood, Cooke & Seitz, of New York City (William G. Cooke, of New York City, of counsel), for plaintiff.

Henry W. Simpson, of New York City (Thomas L. Hughes, of New York City, of counsel), for defendants.

MAYER, District Judge. This is the third litigation involving practically the same subject-matter. Hogg v. Lindridge, 151 App. Div. 514, 135 N. Y. Supp. 928; Hogg v. Lindridge, 151 App. Div. 885, 136 N. Y. Supp. 1137; Hogg v. Lindridge, 206 N. Y. 743, 100 N. E. 1128; Hogg v. Maxwell, 215 Fed. 360, 131 C. C. A. 502; Hogg v. Maxwell,

218 Fed. 356, 134 C. C. A. 164; Hogg v. Maxwell, — C. C. A. —, 229 Fed. 113.

In the instant suit, the bill alleges that on October 26, 1873, plaintiff and Charles B. Hogg were married; that they lived together until the latter part of 1904; that for a long period prior thereto Hogg had been guilty of conduct entitling plaintiff to a separation under the laws of New York; that on or about September 10, 1904, plaintiff employed counsel to obtain a decree of separation and alimony; and that on or about November 10, 1904, plaintiff left Hogg, and they never lived together thereafter. It is further alleged that, for the purpose of inducing plaintiff to refrain from beginning the separation suit and making application for alimony, Hogg agreed that if plaintiff would so refrain he would enter with her into an appropriate written agreement under seal which would secure her all the freedom a court judgment could give, and that Hogg "would in said instrument secure to her an annual allowance by way of alimony during her natural life of an amount equal to one-third of his annual income." At this time, plaintiff alleges, she did not know and had no means of ascertaining Hogg's property or income; that Hogg represented that he was a man of moderate fortune, with an income of not more than $15,000 per annum; that, relying on these representations, she consented "to accept as one-third" of Hogg's income the sum of $5,200 and executed an agreement accordingly; that after Hogg's death in January, 1911, it appeared that at the time of his representations his estate was worth $1,000,000, and his annual income was between $70,000 and $100,000 per annum.

After other necessary formal allegations, plaintiff prays: (1) That the separation agreement be adjudged fraudulent and void; (2) that it be reformed, so that its provisions shall be in specific performance "of the oral agreement theretofore made and hereinbefore set forth, whereby it was agreed that the plaintiff should receive annually during her lifetime or until her remarriage an amount equal to one-third of said Charles B. Hogg's income from the 28th day of January, 1905"; (3) that if, by reason of Hogg's death or any other cause, such relief cannot be afforded, then damages shall be awarded; (4) and (5) that other and further relief as may be just and equitable may be had.

The separation agreement, dated January 28, 1905, contained the provisions usual in such instruments, with the recital:

> "Whereas, divers disputes and differences have arisen between the said parties by reason whereof they have consented and agreed, and do hereby consent and agree, to live separate and apart from each other in the future and during their natural lives, unless they shall mutually agree to vacate this agreement."

It was also provided that, in case plaintiff brought any action "to compel or induce him [Hogg] to pay or allow * * * her" any alimony, except as herein provided, then at the option of Hogg the agreement shall become "null, void, and of no effect." Plaintiff was also allowed to do with her personal and real property as she wished. Nowhere in the agreement was there any representation as to Hogg's property, income, or financial ability.

Hogg's will showed that he had a deep affection for his relatives and friends and a just regard for his children, for, after bequests to his brother, nephews, nieces, sons-in-law, and friends, he devised and bequeathed his property in trust in equal shares for the benefit of his three daughters, with usual provisions over to their children. These daughters were children of a former marriage. Plaintiff and Hogg had no issue.

It is stipulated that Hogg was worth $1,000,000 in January, 1905, and then had an income of $50,000 per annum. At the time of the negotiations infra, plaintiff had left her husband and was not living with him, as appears from her own allegation in the bill and from the testimony. The attorneys who represented her were Frederick D. Philips and Charles K. Carpenter, of the firm of Daly, Hoyt & Mason, while Freling H. Smith represented Hogg.

There is a difference of recollection between these gentlemen as to certain parts of the conversations which took place between them, but, fortunately, that difference does not affect the result. I have long known Mr. Philips and Mr. Carpenter, and have implicit confidence in them. Mr. Smith is an old-time practitioner at our bar, who has now retired, and whose integrity of statement is likewise unquestioned. It would, indeed, be embarrassing if a question of veracity were involved. However, it is not easy to separate conversations from impressions and conclusions, and it often happens in a delicate negotiation that one man means one thing, and the other draws his own and a different conclusion than it was intended he should, and both men are entirely honest in their recollection of what took place.

At the outset it is clear that no such representation as to $5,200 being one-third of his income, as is alleged in the bill, was made by either Hogg or his attorney Smith. Had such a definite statement been made and relied upon by plaintiff, a court of equity would go far to overcome technical obstacles in order to remedy the wrong. But what did take place was a negotiation at arm's length, conducted for plaintiff by her attorneys and for Hogg, in the main, by his attorney. It appears that Mr. Carpenter saw Hogg at the Standard Oil office in January, 1905. He testified:

"Mr. Hogg stated that they had had considerable trouble; and he told me a number of facts, as he alleged them, which constituted their difficulties from his point of view. He said he was entirely desirous of giving his wife ample support; that he did not want a separation by litigation, but would prefer to have a separation by agreement, if that became necessary; that he desired to provide for his wife, in every way, and that he was not a wealthy man, but would have to limit his provision in accordance with his means. He referred me to his attorney Mr. Freling H. Smith. He said he would notify Mr. Smith of my call upon him, and that we could get in touch with Mr. Smith."

It will be noted that at the beginning Hogg gave his version of the situation from his point of view, though what the matrimonial difficulties were is not disclosed anywhere in the testimony. Continuing and summarizing the testimony adduced on behalf of plaintiff (as fairly set forth in defendants' brief), Carpenter subsequently had an interview with Smith and Hogg, at which Philips was present. Carpenter

at that time told the others that his client would prefer a separation by agreement, and there was no contest by Hogg and Smith over that proposition as to there being a separation. The discussion resolved itself into a question of the amount of the allowance which would be made under the articles of separation. Smith then stated that Hogg would make an agreement and provide for the payment of about $5,000 a year to plaintiff. Carpenter says he stated that it was not in accordance with their ideas and was dependent upon Hogg's income. He says it was told to them in some form that Hogg was not a wealthy man; that $5,000 was all that he would do. Philips suggested that it should be at least $10,000, and that amount they refused, with a statement that it was a larger sum than Hogg could afford, and was a larger sum than was the usual appropriate share which a wife would receive out of her husband's income upon such an agreement; that provision would be made in Hogg's will for a continuation of the agreed allowance.

The terms of the proposition were not accepted at that time. Carpenter and Philips reported the facts of the interview to plaintiff. Carpenter's recollection is that they stated that $10,000 was more than the usual share which a wife would have out of her husband's income; but he has no recollection so that he can testify that a specific proportion was mentioned. His recollection is that at one point of the interview the statement took the form that the amount of $10,000 was more than they would be able to recover in an action for separation. Philips was present at the interview of January 12th to which Carpenter referred. His recollection is that the proposed separation was reviewed, and also the fact that no serious objection would be raised to a separation accomplished through an agreement, instead of through a decree. He says that either Carpenter or he explained that they had been given to understand that Hogg was a man of some means, that his income was in the neighborhood of $30,000, and, that being so, an allowance by way of alimony in the neighborhood of $10,000 would be reasonable and fair, and that proposition was presented, and thereupon a statement was made by Smith that their information in regard to Hogg's financial ability was incorrect, that instead of being a man of large property he did not possess large means, and that $5,000 would be a very fair allowance by way of alimony under the agreement, and that no sum in excess of $5,000 could be recovered by plaintiff if she undertook to litigate and investigated the facts in regard to Hogg's property. Philips says that Hogg said that he was not a man of large property.

Philips saw Smith later and tried to get a modification of the offer at $7,500, which Smith declined to entertain. He said that Smith would do nothing further, except possibly to increase the previous offer from $5,000 to $5,200, and again stated that, if the matter were litigated, no other result could be accomplished. He says that Smith called his attention to the fact that plaintiff herself possessed a few shares of Standard Oil stock in her own right. Philips says that he telephoned to Smith later that the offer was inadequate and tried to get it modified, and Smith told him that the offer of $5,200 was final

Philips told Smith that if that was the best they were willing to do plaintiff was not solicitous of having the matter placed in litigation and the offer would be accepted. Philips says that he cannot remember the exact language used as to Hogg's financial ability, but it was to the effect that he was a poor man in the ordinary sense of the word; that an allowance of $5,000 as alimony for his wife was all that Hogg could be forced to pay if an action for a separation had been brought and the ability of Hogg to pay had been subjected to a financial test.

Philips says that at the first interview he did not know where he got the information, but submitted the proposition for $10,000 allowance on the assumed basis of an income of $30,000; that he went into that proposition "on the proposition that Mr. Hogg was a man of considerable wealth." He says that in taking up the question Philips told Smith that they had been informed that he was a man of large means, that his income was in the neighborhood of at least $30,000, and they therefore suggested alimony of say $10,000 to be inserted in the agreement. Philips was asked by the court:

"Was anything said at that time, either the first or second interview, by either Mr. Hogg or Mr. Smith, that if you—in substance or effect, if you could not come to terms, you have to fight it out in court?"

And answered:

"Oh yes, that was said; and their attitude was one of more or less indifference as to what we did. That is the way—my recollection of the thing is, that we could either take this or go without. That was their general attitude."

Philips says that the merits of the separation situation were not discussed. Carpenter says that his recollection is that nothing whatever was said about the merits of the case at any of the interviews, and that the entire subject of the inquiry was the amount of the alimony. Carpenter testifies that the amount offered was a definite proposition, and that if they did not take it they could go ahead and sue. He says that the position of Hogg and Smith was that plaintiff must take the amount that was offered or she could litigate; it was put in such words as to affect an attitude of indifference on their part as to which they did. Carpenter days the question as to which could prevail on the merits in a litigation was not mentioned in any way or form.

In plaintiff's deposition she says she believed what Carpenter told her, and that she signed the agreement, relying upon the truth of the statements reported to her by Carpenter as having been made by Hogg and Simpson (possibly Smith was meant). She signed the papers, believing her husband told her the truth. It appears that Carpenter says he told plaintiff the facts of the interview.

Without detailing all the particulars in which Smith's testimony differed from that of Philips and Carpenter, Smith is positive that he said:

"Mr. Hogg will not pay Mrs. Hogg $7,500 a year. He will give her $5,200 a year, which is $100 a week. Mrs. Hogg has no legal claims whatever on Mr. Hogg. She has left his home; refuses to return, although he asked her to do so. The fact is that Mr. Hogg is in a position, if he saw fit, to get a limited divorce from Mrs. Hogg; but he does not care for it, and does not wish it. He thinks $5,200 a year, with what he has already given her, is

ample, and more than ample, for her wants; and if you don't care to take that you can leave it."

And that Carpenter said:

"We will accept it."

Finally, at the end of the trial, Philips testified in rebuttal:

"The proposition that was put up to us was this: That we could accept the $5,000 offer, or we could take a lawsuit; but, if we did take a lawsuit, we could not recover any more than we would have received under the agreement. That was the proposition that we received; the proposition that was submitted to Mrs. Hogg; the proposition on which the basis of the alimony settlement of $5,200 was made."

It is perfectly plain that Hogg nowhere admitted that plaintiff was entitled to a separation as matter of right, and that he had his own point of view of the troubles between his wife and himself, and told it to Carpenter at their first interview. It is equally plain that he was willing to enter into a separation agreement, rather than have a court controversy, and such it may fairly be inferred was also plaintiff's view and desire. It is also established by the testimony of both sides that Hogg and his attorney refused to raise their offer, either were indifferent or assumed that attitude, and unequivocally took the position that, if the offer was not accepted, the plaintiff must resort to the courts. There is a sharp conflict as to the statements made as to Hogg's financial condition at the interviews at which Smith was present; but it is entirely certain that Smith never raised the figures beyond $5,200, and the conclusion cannot be drawn, as plaintiff contends, that the only open question from Hogg's and Smith's point of view, if the case went to court, would be the amount which the court would award.

On the contrary, if Hogg had been advised or believed that plaintiff would win an action for limited divorce, it is hardly conceivable that he would have risked a lawsuit when he knew that his financial ability must become the subject of judicial inquiry.

[1, 2] What, therefore, this court is asked to do is to remake the agreement between the parties without knowing the true inwardness of their marital troubles, without knowing the stability or sources as would then have appeared of Hogg's financial condition, his personal and business needs, his obligations, legal or moral, to his female children, either as they were or as he believed them to be, and the numerous other details which a court should have before it in order to fix a just allowance by way of alimony. While often the courts award to a wife one-third of the husband's income, there is not and cannot be a set rule, for every case stands on its own facts. Daniels v. Benedict, 97 Fed. 367, 38 C. C. A. 592; Walker v. Walker Ex'rs, 9 Wall. 743, 19 L. Ed. 814; Schmoltz v. Schmoltz, 116 Mich. 692, 75 N. W. 135.

Further, what was it upon which plaintiff relied? Presumably she was informed by her attorneys of all that took place, including, in effect, the challenge to litigate if she did not accept her husband's terms. Besides, she had said her husband was a millionaire, and evidently their life at the New Jersey home was comparatively luxurious. I do not construe literally her observation as to her husband being a millionaire,

but it indicates that she thought him a wealthy man, and therefore capable of allowing her more than $5,200 per annum.

Who can say what operated on her mind? She may have shrunk from the publicity of a matrimonial lawsuit, as do all self-respecting people. She may have felt that, even though she believed her cause just, the contingencies of litigation might spell defeat; for courts do not allow separations for mere incompatibility or petty differences which fall short of the statutory requirements of the New York Code, § 1762. She may have concluded that $5,200 per annum, plus the income from her Standard Oil stock and her father's allowance, met her requirements. On the other hand, who shall say that the dead man's provision was unjust? He is not here to tell us what influenced him, whether he thought that he was without fault and that the fault was entirely hers. She had left his home. Was she right or wrong in so doing? He kept his agreement with her to the letter, including the disposition by will. He must have had a deep affection for his children, if his will gives a true indication, and may have felt that he should secure them in an income to which, as his children, he thought they were entitled. What were his views as to his financial security and his future health, for he was no longer a young man?

It would, indeed, be a dangerous precedent if, after a man's death, a separation agreement could be set aside which was arrived at, not by a dominant control of a strong man over an inexperienced woman, not by a definite representation, such as one-third, followed by an urgent insistence on acceptance, but by a series of interviews between skilled counsel, in which a "take it or leave it" proposition, made and not receded from, is finally deliberately accepted.

Such would be my conclusion if the case were one of first impression, but upon this I need not solely rely: for on the various questions of law involved there is abundant authority in favor of defendants' position. Johnson v. Johnson, 206 N. Y. 561, 100 N. E. 408, Ann. Cas. 1914B, 407; Schmoltz v. Schmoltz, 116 Mich. 692, 75 N. W. 135; Hogg v. Lindridge, 151 App. Div. 513, 135 N. Y. Supp. 928; Hegerich v. Keddie, 99 N. Y. 258, 1 N. E. 787, 52 Am. Rep. 25.

The bill is dismissed.

THE ROYAL.

(District Court, E. D. New York. April 24, 1916.)

NAVIGABLE WATERS ⊂=20(8)—INJURY TO VESSEL FROM COLLISION WITH BRIDGE —NEGLIGENT OPERATION OF DRAW.

A tug approaching a drawbridge maintained by the city over the Harlem River signaled for the opening of the draw and a following tug with a tow signaled immediately afterward. On receiving an assenting signal from the bridge, both tugs proceeded, and the first passed in safety; but when the second was within the draw it began to close, and before she could escape her tow was struck and injured. When the draw was open the bridgetender could not see up or down the river, and a lookout, usually kept on duty, was not at his post. *Held*, that the absence of such lookout was negligence, which rendered the city liable for the injury; that under the circumstances the tug was not in fault for

assuming the bridge signal was intended for her, as well as the preceding boat, and proceeding accordingly.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. § 96; Dec. Dig. ⟸20(8).]

In Admiralty. Suit by Charles W. Peterson against the City of New York, with the tug Royal impleaded. Decree for libelant against the city.

Foley & Martin, of New York City, for libelant
George P. Nicholson, of New York City, for City of New York.

CHATFIELD, District Judge. In the forenoon of June 6, 1914, at about 10:25, in clear weather, the tugboat Defiance approached from the south the Broadway bridge over the Harlem River. This bridge has a draw 272 feet in length, turning upon a centerpin, which protected a bulkhead, 52 feet from side to side. The iron drum around the centerpin containing the machinery of the draw is 40 feet in diameter, while the total length of the breakwater or pier upon which the draw rests when swung up and down the river, is 328 feet. At the time in question, a strong tide was running up or toward the Hudson river and the Defiance approached upon the Bronx or north side of the channel, also going toward the Hudson river, and making with the tide some 7½ or 8 miles per hour.

The Defiance had a boat alongside and blew three whistles. It appears that the bridge is operated by electricity, which is obtained from the subway system of railroad. One deck of the bridge carries subway trains, while the upper deck carries street traffic. Before the bridge can be opened, signals in the subway have to be set against the subway trains, and then, through an independent set of signals and electric connections, power is furnished from the subway to the bridge mechanism. The bridgetender or engineer is then notified that his machinery is furnished with power, and that he may proceed to open the bridge. He in turn has to set signals indicating that the bridge is ready to open, when the gates are closed, and the draw is swung so that the north or Harlem end moves toward the west, coming to rest upon the centerpin and then turning back. The actual motion of the bridge, passing through an arc of 90 degrees, occupies about 60 seconds and about 8 seconds are occupied in closing or opening the gates, etc. The Defiance blew a three-whistle signal to notify the draw that it wished to pass through. The engineer of the bridge replied by a three-whistle signal, thus indicating that danger signals had been set against the subway trains, that he had received the signal indicating the furnishing of power for the turning of the bridge, and that the bridge would open.

We are not concerned in this case with the situation which would have existed if the bridge had not responded to the signal to open the draw. It will be observed that, from the time of the three-whistle signal by the bridge, trains could not pass in the subway until the bridgetender indicated that the bridge was again closed or at rest, and ceased from making any use of the power, which would then be shut off, so as to safeguard the passage of trains in the subway.

The frequent passage of trains in the subway requires the operation of opening and closing the bridge to be performed as quickly as possible. The bridgetender has the duty imposed upon him of operating the bridge in such a way as to allow any boat attempting to use the open draw a safe passage, and at the same time to avoid undue delay or waiting for any boat that is not close enough to the draw to pass through safely and within a reasonable time. The duty also devolves upon the bridgetender, as in the case of any other drawbridge, not to close the draw in the face of a boat which has by signal, or by actual approach to the open draw, reached a position where it cannot safely remain or maneuver, if the draw be closed.

Upon the occasion in question the Defiance passed through safely, and the captain of the Defiance, after this boat had cleared the upper end of the draw by some 25 feet, and after that end of the draw had started to return to the Bronx abutment, heard alarm whistles and, looking around, saw a tug, the Royal, with a boat alongside, somewhere within the space alongside the center abutment and some 300 feet behind the Defiance.

At that time the engineer upon the drawbridge was shut off from a view through the draw, by the circular iron sides of the structure containing the machinery of the draw. He had an outlook toward the Bronx shore and toward the New York shore, but could not, without leaving his levers, see up or down the river. The assistant (or lookout, on ordinary occasions) was at that time attending to the machinery in another part of the bridge. The engineer testifies that he heard no signal from the Royal, that he knew nothing of her presence until the blowing of the alarm whistles, and that then he attempted to stop the draw, but did not succeed in bringing it to rest until almost in position upon the abutments.

The Royal in the meantime had been unable, under reversed engines, to extricate herself from the draw, and the mast upon the barge alongside of the Royal came in contact with the beams of the draw, lifting it out of that boat and allowing the boats to drift against the side of the bridge. Action was brought by the owner of this boat against the city, and the city has brought in the tug Royal, alleging that it was in fact responsible for the injuries.

The question of responsibility in the case comes down to a dispute as to the position of the Royal at the time when the Defiance blew for the bridge and when the Royal signaled to the bridge that it would follow the Defiance through. The testimony of the captain of the Royal is to the effect that the Defiance, "when she came to the turn," blew three for the bridge, "and, as soon as he stopped, I also blowed three for the bridge, the bridge, immediately after I blowed, opened, the Defiance started ahead, and I followed." As the Royal came alongside of the draw, which was then resting upon the centerpin, the captain of the Royal noticed that the lower end of the bridge was swinging away from him, and that the upper end was closing toward him. He then blew the alarm signals and reversed his engines.

The city has called a witness, who testifies that he was upon the New York shore, and that the Royal was down around the bend in the river, which according to the chart is some 800 or 900 feet away,

when the Defiance whistled and the Royal also whistled and started to catch up with the Defiance, so as to go through the draw at the same time.

The city charges that the Royal was at fault in not indicating her desire to pass through the draw, in such a way and from such a position as to allow the bridge to receive her signals and to answer an acceptance before the Royal put herself in a position from which she could not withdraw.

The city alleges that the Royal, under circumstances which indicated to her captain that the bridge was opening for the Defiance and was not intending to stay open for the Royal, rushed into danger, and is therefore responsible for her own injury. The Royal, on the other hand, charges that the maintenance by the city of a structure from which approaching objects cannot be observed when the drawbridge is open, unless a lookout be maintained, and the failure to have a lookout for the protection of approaching boats, is neglect giving the Royal the right to recover.

Both of these propositions are correct as matters of law. It rested upon the Royal to use reasonable precautions in obtaining the right to pass through the draw before the Royal reached a point where she could not stop if the draw should be closed. This is the ordinary rule of law with respect to the operation of drawbridges, and the Royal certainly would not be relieved from any part of that duty, if she knew in fact that the city was operating a bridge so constructed that the position of the Royal might not be ascertained in time to keep the draw open, or if she knew that the lookout was not attending to his duty.

Under such circumstances, the Royal should insist upon an answer to her own signal to the bridge, and to make sure that she had the attention of the bridge before getting into a position where the tide would carry her against the draw. In the present case the city goes so far as to charge that the Royal did not realize the height of the boat alongside, and that she disregarded the necessity of having the draw opened for her passage. This is not borne out by the testimony, and the Royal evidently navigated, relying upon the whistle which she had blown to the bridge and the assumption that the answer of the bridge to the whistle of the Defiance was intended for the Royal as well, and was an answer to the whistles which she had blown.

The real question of fact, so far as the Royal is concerned, is whether she showed negligence in approaching the bridge, having blown a whistle at a point down close to the bend in the river, and then having hurried after the Defiance, in order to save the time which would be lost in waiting for the bridge to again open after the Defiance had passed through. If the Royal was negligent in so approaching the draw, then she would be partially responsible for the accident; but at the same time it would seem that the city would be liable as well.

The maintenance of a bridge, in such form and with such attendance that the bridge engineer can observe no other boats up or down the river than the one which is directly at the side of the engine house as it turns, and which shuts out from his view any boat coming

around the bend, just as soon as the drawbridge commences to turn, would place upon boats seeking to use the draw, not only the duty of giving proper signals and relying upon an answer from the bridge, but estimating whether or not the draw had turned to a sufficient extent so as to shut off the view of the engineer, and whether the lookouts were performing their duties before the boat could conclude that the draw would be kept open for its passage.

But in this case the Royal cannot be held responsible for the failure of the city to observe an approaching boat, which apparently had given the proper signal to the bridge, whose signal had apparently been answered, and which was in a position where danger might be caused by the closing of the bridge, when that closing followed from complete failure to observe that the boat was in a dangerous position, after the boat had reached a point where it could not extricate itself, and where it was entitled to watchfulness on the part of those operating the bridge, before the draw was closed.

The other questions, viz., whether the Royal was negligent in putting herself in the position where carelessness on the part of the bridge would result in her injury, and in hurrying to pass through the bridge before she had some indication or proof that the bridge saw her as well as the Defiance must also be answered in favor of the Royal. She evidently whistled before the whistle from the bridge that the draw was to open. She may not have been at that time within the direct range of vision of the bridge engineer, but she continued to approach the bridge while the draw was opening, and actually got into the space at the side of the draw before the draw started to close.

It cannot be held that such an action was contributory negligence, or that the Royal should have remained down the river until the bridge opened a second time, for she certainly had the right to rely upon care as to all boats within the zone of danger when the bridge started to close, and she was already within that zone of danger before the bridge gave indications of closing. To hold the Royal responsible for contributory negligence would be to excuse the bridge from all care, except with reference to the particular boat which the bridgetender had in mind when he began to open the draw, and when his vision was shut off by the sides of the engine room. To do this would be to make the Royal responsible for estimating what the bridgetenders had seen and heard instead of what they should see and hear. If a boat gives a signal in time to have it answered, and apparently receives an answer, then it cannot be held responsible for the action of the bridge, if the bridge is negligent on its own part and was really answering the signal of a different boat.

There is no persuasive evidence that the Royal failed to blow a signal to the bridge until after the bridge had answered the signal of the Defiance, or that the Royal attempted to signal to the bridge and then to rush through the draw without answer, after the bridge apparently indicated by its failure to respond to the whistle signal of the Royal that it was going to allow the Royal through. Under the circumstances shown by the testimony, the Royal had reached a position where the mere turning of the draw was the cause of the injury.

The facts indicate that the Royal's signal anticipated the answer of the bridge to the Defiance, and the accident resulted from the inability of the bridge engineer to take into account the actual position of the Royal at the time he began to return the draw to its closed position.

The libelant may have a decree.

JONES et ux. v. WESTERN UNION TELEGRAPH CO.

(District Court, S. D. California, S. D. June 5, 1916.)

No. 463.

1. TELEGRAPHS AND TELEPHONES ⟸68(2)—DELAYING MESSAGE—MENTAL ANGUISH.

Damages purely for mental anguish caused by negligence in transmission of a message cannot be recovered.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 69; Dec. Dig. ⟸68(2).]

2. TELEGRAPHS AND TELEPHONES ⟸68(1)—DELAYING MESSAGE—MENTAL ANGUISH.

Where mental anguish resulting from negligence in the transmission of a telegram caused plaintiff physical illness, such illness is the result of the mental anguish, and no recovery can be had therefor.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 69; Dec. Dig. ⟸68(1).]

3. TELEGRAPHS AND TELEPHONES ⟸70(1)—NEGLIGENCE IN TRANSMISSION OF MESSAGE.

Where a telegraph company, in transmitting a message, garbled it so that the addressee understood her father had died, and for that reason took a long journey, she may recover the necessary expenses of such journey.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 72; Dec. Dig. ⟸70(1).]

4. REMOVAL OF CAUSES ⟸102—REMAND.

Where, after removal to the federal court on the ground of diversity of citizenship, a demurrer was sustained to one of the causes of action, and the remaining cause of action was for less than the jurisdictional amount, the federal court will of its own motion remand the case to the state courts.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 218–220, 223, 224; Dec. Dig. ⟸102.]

At Law. Action by Julius W. Jones and wife against the Western Union Telegraph Company, a corporation, begun in state court and removed on account of diversity of citizenship. On demurrer. Sustained as to one count of the complaint, and action remanded to state court, from whence it was removed.

Plaintiffs, husband and wife, brought suit in the state court, claiming damages in the aggregate sum of $3,050; $2,500 being laid in the first cause of action in the complaint, and $550 being laid in the second cause of action. On the ground of diversity of citizenship the cause was removed to this court, and the matter is before the court on a general demurrer only, interposed by the defendant to each of the two separate causes of action.

In the first cause of action it is alleged that in July, 1915, the plaintiffs were residing in Los Angeles, and that in that month defendant delivered a tele-

gram to plaintiff Elvira Jones, purporting to come from her brother, then living in the town of Hammond, state of Louisiana. The telegram as actually delivered to plaintiff read: "Father died this morning, will be buried to-morrow." As actually delivered to the defendant by the sender thereof, the telegram read: "Norman died this a. m., will be buried to-morrow." Plaintiffs allege that immediately upon the receipt of the telegram, worded as first above set forth, the wife took steps to make the trip from the city of Los Angeles to said town of Hammond, in the state of Louisiana; that she left Los Angeles on the following day, and in due course arrived at her destination. Upon her arrival there she found that her father had not been ill, and that no telegram had ever been sent by any one to her in the words or terms hereinabove set forth, but that the defendant had, as above stated, incorrectly transmitted the message to her, and had been grossly negligent in that regard, and had not exercised the necessary, or proper, or any, care in the transmission of the telegram delivered to it by plaintiff's brother. Plaintiff alleges that she would not have made said trip to said town of Hammond, save that she believed her father to have been dead, and also alleges "that by reason of the gross negligence and want of care on the part of the said defendant in transmitting the message hereinabove mentioned the plaintiff did undergo grievous mental suffering and anguish of mind and was rendered sick; her father was very dear to her, and she, the said Elvira Jones, was prostrated upon receiving notice of his death; that by reason thereof plaintiff Elvira Jones has suffered damage in the sum of $2,500."

In the second cause of action plaintiffs refer to the paragraphs with respect to the sending of the telegram as hereinabove recited, and in addition allege that, during the time plaintiff Elvira was engaged in making the trip to and from the said town of Hammond, her husband was compelled and did employ a nurse for the purpose of caring for the minor son of plaintiffs, and did pay therefor the sum of $20; that during said trip, and in consequence thereof, she was compelled to and did spend money for meals, car fare, and other incidental expenses necessarily incurred on said trip, amounting in all to the sum of $30, and in addition it is alleged that during the time the plaintiff was engaged in making said trip her husband, plaintiff Julius W. Jones, lost the services of the said wife and the comfort and convenience of her society, in consequence of which it is alleged he has been damaged in the sum of $500.

There is no ground of demurrer other than that no cause of action is stated in either count of the complaint.

Courtney Lacey and A. G. Bongiorno, both of Los Angeles, Cal., for plaintiffs.

Beverly L. Hodghead, of San Francisco, Cal. (Albert T. Benedict, of New York City, of counsel), for defendant.

BLEDSOE, District Judge (after stating the facts as above). [1] With respect to the first cause of action, it is apparent that the only damages claimed are based upon the fact that, because of the wrongful delivery of the message referred to, plaintiff Elvira did "undergo grievous mental suffering and anguish of mind," and "was rendered sick," and "was prostrated." It is clear that in all these allegations plaintiffs have but enlarged upon the term first employed, to wit, "mental suffering." No physical violence or injury to the person of plaintiff Elvira is claimed, and no physical disability or impairment is set forth, save that which must have arisen because of the intense mental suffering, grief, and anguish brought upon plaintiff because of the receipt by her of the information that her father had died.

The digests and many of the text-books unfortunately (Francis v. Western Union Telegraph Co., 58 Minn. 252, 59 N. W. 1078, 25 L. R. A. 406, 49 Am. St. Rep. 507) abound with references to cases

emanating from different courts of last resort in the United States holding that damages may be recovered for mental suffering induced by the wrongful transmission and delivery, or failure of delivery, of telegraphic dispatches. Beginning with a decision of the Supreme Court of the state of Texas rendered in 1881 (So Relle v. Western Union Telegraph Co., 55 Tex. 318, 40 Am. Rep. 805), and thence extending to various other states, it has been held that damages under such circumstances could properly be allowed. In every state where the so-called "Texas doctrine" has been followed, a veritable flood of litigation apparently has resulted, and in consequence, measured by mere multiplicity of citation, there is small wonder that members of the profession have been misled into the belief that such a frequently referred-to rule had developed into a general doctrine of approved standing. The genesis and growth of the doctrine, together with the limitations of necessity imposed upon it, and the embarrassment brought into being by it, are succinctly set forth in Western Union Telegraph Co. v. Choteau, 28 Okl. 664, 115 Pac. 879, 49 L. R. A. (N. S.) 206, Ann. Cas. 1912D, 824, and further reference thereto, in the light of the rulings quoted in that decision, is unnecessary.

By far, however, the preponderance of authority of courts of last resort, as is shown by citations in the Choteau Case, is to the effect that damages are not recoverable as for mere mental anguish, save as an accompaniment to some injury to person or property. This was but declaratory of the common-law rule. Allsop v. Allsop, 5 H. & N. Rep. 534; Lynch v. Knight, 9 H. of L. Cases, 592. In the light of the recent decision of the Supreme Court of the United States, decided April 3, 1916, entitled Southern Express Company v. John Byers, the question in the federal courts may now be considered as completely foreclosed, and the so-called "Texas doctrine" expressly and completely disavowed. That case, it is true, did not concern the allowance of damages as arising from negligence in the transmission or delivery of a telegraphic message, but the decision and the reasoning are applicable to, and conclusive of, such a situation, and announce in no uncertain language the attitude of the courts of the United States with respect to this much controverted point. It is to be hoped that the profession will govern themselves accordingly.

[2] Plaintiffs, however, though conceding the force and effect of the decision in the Byers Case, in so far as mere mental suffering or anguish of mind is concerned, contend that the case at bar is not controlled by that decision, in that it is alleged that, because of the wrongful conduct of the defendant complained of, plaintiff Elvira was "rendered sick," and in connection with this contention reliance, apparently, is placed upon a quotation used by Mr. Justice McReynolds in announcing the decision of the court in the Byers Case, and taken from Cooley on Torts (3d Ed.) page 94, wherein it was said that the rule denying recovery for mental suffering only rested "upon the elementary principle that mere mental suffering and anxiety are too vague for legal redress where no injury is done to person, property, *health,* or reputation." The argument rests upon the proposition that the Supreme Court apparently considered that an injury done to health (e. g., resulting "sickness"), even though it flow from mere

extreme mental suffering, is without the terms of the rule forbidding compensatory damages in cases based upon mental suffering alone. That point was in no wise involved, however, in the Byers Case; nothing but mere mental suffering had been relied upon therein. In addition, aside from what may have been intended by the precise language used by Judge Cooley in his text, both reason and authority to me seem to indicate that, before compensation may be had, there must have been that which gives rise, not to mere mental suffering or anguish, but to an actual injury to the person or property of the complaining party. Tyler v. Western Union Tel. Co. (C. C.) 54 Fed. 634; Western Union Tel. Co. v. Foy, 32 Okl. 801, 124 Pac. 305, 49 L. R. A. (N. S.) 343; Curtin v. Western Union Tel. Co., 13 App. Div. 253, 42 N. Y. Supp. 1109; Kagy v. Western Union Tel. Co., 37 Ind. App. 73, 76 N. E. 792, 117 Am. St. Rep. 278, 284. See, also, Westwater v. Grace Church, 140 Cal. 339, 73 Pac. 1055.

Within the limits of the rule as thus announced, sickness which is merely a sequel of mental suffering or anguish cannot be differentiated from mental suffering or anguish itself. To a person of unusual sensibilities or refinement, comparatively slight mental anguish might cause serious illness; but it would be obviously impossible to draw the line of demarcation between mere mental suffering on the one hand, and resulting illness or sickness upon the other, and consequently impossible to adopt any standard by which a jury could be guided in the allowance of relief. If the sickness be but an aggravated form of mental suffering, it would still be but mental suffering, and therefore not a basis for damages; if some entirely distinct form of sickness should ensue, still it could not reasonably have been anticipated, and consequently could not be said to have been a proximate result of the original negligence. Curtin v. Telegraph Co., supra. The idea is most aptly stated, in my judgment, in Mitchell v. Rochester Railway Co., 151 N. Y. 107, 109, 45 N. E. 354 (34 L. R. A. 781, 56 Am. St. Rep. 604) where it is said:

"If it be admitted that no recovery can be had for fright occasioned by the negligence of another, it is somewhat difficult to understand how a defendant would be liable for its consequences. Assuming that fright cannot form the basis of an action, it is obvious that no recovery can be had for injuries resulting therefrom. That the result may be nervous disease, blindness, insanity, or even a miscarriage, in no way changes the principle. These results merely show the degree of fright or the extent of the damages. The right of action must still depend upon the question whether a recovery may be had for fright. If it can, then an action may be maintained, * * * no matter how grave or serious the consequences. Therefore the logical result of the respondent's concession would seem to be, not only that no recovery can be had for mere fright, but also that none can be had for injuries which are the direct consequences of it."

This case, together with that of Nelson v. Crawford, 122 Mich. 466, 81 N. W. 335, 80 Am. St. Rep. 577, are both very persuasive in their holdings and reasoning that such a tort as is here complained of, resulting only in mental suffering and its more acute consequences, is not actionable. The demurrer, therefore, to the first cause of action is sustained, without leave to amend.

[3, 4] Actionable elements of damage are set forth in the second cause of action, in my judgment. If, because of the negligence of the

defendant, in the behalf mentioned, plaintiffs were compelled to, or in the natural course of events actually did, incur expense, it would seem, upon familiar principles, that they should be entitled to a recovery therefor. The total damages claimed in the second cause of action, however, amounting to only $550, are not within the jurisdiction of this court, in a proceeding removed from a state court, because of diversity of citizenship. It would seem proper, therefore, that the court, having determined that no cause of action is stated in the complaint as to any matter of which this court has jurisdiction, suo motu should remand to the state court, the proper tribunal for its trial, the cause of action set forth in the second count of the complaint.

An appropriate order, therefore, will be entered, sustaining the demurrer to the first cause of action, without leave to amend, and remanding the cause, in so far as the second cause of action alone is concerned, to the court from which removal was originally had.

WINSLOW v. STAAB et al.

(District Court, S. D. New York. March, 1916.)

1. BANKRUPTCY ⊂=175—FRAUDULENT CONVEYANCES—WHAT CONSTITUTES.
A conveyance by a bankrupt to his daughter *held* one in fraud of creditors, which might be set aside.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 247, 248; Dec. Dig. ⊂=175.]

2. TRIAL ⊂=396(4)—EVIDENCE—FAILURE TO INTRODUCE.
Where defendant rested on the evidence introduced by plaintiff, she cannot complain that the court found the facts against her in accordance with plaintiff's evidence.
[Ed. Note.—For other cases, see Trial, Cent. Dig. § 935; Dec. Dig. ⊂=396(4).]

3. BANKRUPTCY ⊂=303(1)—FRAUDULENT CONVEYANCES—BURDEN OF PROOF.
A defendant, asserting the validity of a conveyance by one in failing circumstances, who thereafter became a bankrupt, has the burden of proving it was not in fraud of creditors.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 458, 459; Dec. Dig. ⊂=303(1).]

4. BANKRUPTCY ⊂=279—COURTS OF BANKRUPTCY—JURISDICTION.
Under Bankr. Act July 1, 1898, c. 541, § 23b, 30 Stat. 552, as amended by Act Feb. 5, 1903, c. 487, § 8, 32 Stat. 798, and Act June 25, 1910, c. 412, § 7, 36 Stat. 840 (Comp. St. 1913, § 9607), declaring that suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt whose estate is being administered, might have brought or prosecuted them, except suits for the recovery of property under section 70, subd. "e" (section 9654), providing for the avoidance of preferential and fraudulent transfers, the trustee in bankruptcy may sue in the bankruptcy court to set aside a conveyance in fraud of creditors.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 419–424; Dec. Dig. ⊂=279.]

In Bankruptcy. Action by Francis A. Winslow, trustee in bankruptcy, against Frederick H. Staab and others, to set aside a fraudulent conveyance. Decree for plaintiff.

Maurice P. Davidson, of New York City, for plaintiff.
Milo J. White, of Mt. Vernon, N. Y., for defendants.

THOMAS, District Judge. This is an action brought by the trustee in bankruptcy of the estate of Frederick H. Staab to set aside a conveyance of real estate under the provisions of section 70, subdivision "e," of the Bankruptcy Act. On June 24, 1913, Frederick H. Staab was adjudicated a bankrupt. About 11 months prior thereto and while considerably indebted, he conveyed, by proper deed, the property described in the complaint to his daughter, Effie O. Staab, who then was, and ever since has been, a member of his household. The property thus conveyed was known as the store property, and was the place where the defendant conducted his business.

The complaint alleges that the transfer was without consideration, and was made for the purpose of hindering, delaying, and defrauding creditors.

[1, 2] The facts disclosed by the evidence show that at the time of the transfer the bankrupt, the owner and proprietor of the property and the business, was engaged in conducting a small retail liquor business at Mt. Vernon, N. Y., which he had been carrying on for a period of about 20 years. He was then owing his creditors upwards of $4,000, and was finding it difficult to meet his bills in due course, and one firm of creditors at least were then, and had been for some time, pressing him for payment of their claim, which was quite a large one, although it had been materially reduced from its original amount. This firm had previously compelled the bankrupt to execute a written acknowledgment of his indebtedness to them, and had also required the bankrupt's wife to personally execute a written guaranty for its payment. It was stipulated at trial that the value of the property conveyed was $9,500, and that it then was subject to a mortgage of $5,000 in favor of the Yonkers Savings Bank. The bankrupt's business was not in a prosperous condition, and aside from the transferred property his only assets consisted of the stock in trade, book accounts, and fixtures, which did not exceed $3,600 in value according to his own estimate, which seems to me very much larger than their actual value. In addition to this he claimed to own some legacy which, though valued by him at $1,500, was entirely uncertain and contingent, and nothing which could be considered a tangible asset. No attempt was ever made by him to raise any money on it with which to satisfy the insistent demands of creditors, whose accounts had been long overdue and running for a long period of time and in a very unsatisfactory condition.

The only consideration bankrupt received from his daughter at the time the deed was executed was $80, which amount was, as he testified, "all she then had in the house." For some reason—yet unexplained—notice of the fact that the bankrupt had transferred this property was never published in the local publication of real estate conveyances, mortgages, etc., to which the public were then accustomed to look for such notices, and because of this fact and the fact that the bankrupt directed the attention of creditors, from time to time after the transfer was made, to the value of the equity in his property as amply sufficient to meet all demands, the creditors were misled as to his actual financial condition or worth until within a few days of bankrupt's adjudication. They had been led to believe that the bankrupt

was the owner of this property, as well as another piece of property, known as the home property, which has been the subject of another suit of a similar character, which suit was decided by this court adversely to the trustee at the conclusion of the trial. Subsequent to these two transfers, the first made about 15 months, and second, as stated, about 11 months prior to adjudication, creditors called several times to collect their accounts and to insist that something must be done to reduce the indebtedness, and one account of something like $800 was in the hands of a local attorney for collection, who was threatening legal proceedings, which were avoided by the promise of the bankrupt to pay $50 a month on the account, which promise was kept only intermittently. During this period of time, in discussing the accounts with cerditors, the bankrupt mentioned a possible sale of either one or both properties so as to enable him to pay up his indebtedness, and in this way his creditors were further misled and deceived as to the title ownership of his real estate.

In his bankruptcy schedules he listed his assets (inclusive of exempt property) as of the value of $2,048.28 and his liabilities as of the amount of $5,942.34, but it appears that the assets have so shrunk that the amount now available for dividends in the hands of the trustee is but $684.84. While the bankrupt and his daughter, in their answers to the complaint, specifically denied the allegations as to the transfer being without consideration, and made for the purpose of hindering, delaying and defrauding creditors, they affirmatively pleaded that the transfer was for a valuable consideration and made without intent to hinder, delay, or defraud creditors of the bankrupt. Nevertheless they declined the opportunity at the hearing to introduce any evidence to sustain these affirmative allegations and rested their case on plaintiff's evidence.

The facts brought out at the trial as to the financial condition of bankrupt at the time of the transfer—the inadequacy of the consideration passing from the grantee to him, the situation of the parties as part of one household, the subsequent statements made by the bankrupt as to why the transfer had been made, the failure of the real estate record to publish notice of this transfer, the consequent ignorance of creditors as to the transfer having been made, and the failing condition of bankrupt's business as subsequent events disclosed—all tend to the conviction that the transaction was not a bona fide one, but, on the contrary, was intended to prevent the equity in the property from being used by creditors to satisfy their claims. And in view of an entire absence of evidence tending to explain away the facts peculiar to the transaction, the conclusion becomes absolute that the conveyance was in fact without consideration and made in bad faith. True, it may be, as intimated, that the daughter had previously advanced moneys to the bankrupt in aid of his business, which, when taken in connection with the $80 claimed by her father to have been paid him at the time the deed of conveyance was executed, would have been sufficient to show that an adequate consideration had in fact been paid for the equity in the property, but such facts should have been shown by evidence at the hearing, and as the principal defendant saw fit to rest

upon the prima facie case presented by the plaintiff, she cannot now be heard to complain if the issues are here decided against her. From all the evidence I am satisfied that the bankrupt at the time of the transfer was fearful that he would eventually become a bankrupt, and that he and the members of his family had long before realized that, because of the falling off of his business, as time wore on he would find it more and more difficult to meet his bills in the regular way; that he and his wife considered the methods pursued by some of his creditors as harassing, and in consequence were angered, and finally resolved upon making the transfer of this property to their daughter for the purpose of preventing creditors depriving the bankrupt of the benefits to be derived from the ownership of the equity in this real estate; and that the transfer had the effect of making the bankrupt insolvent beyond any question.

[3] When the daughter filed her affirmative defense, she assumed a burden which she failed to sustain by any evidence whatsoever. This, together with the evidence adduced at the trial, makes it necessary for me to find that the conveyance was in fact fraudulently made without adequate consideration and should be set aside as prayed for by the plaintiff in his bill of complaint. First Nat. Bank v. Miller, 163 N. Y. 164, 57 N. E. 308; Klinger v. Hyman et al. (C. C. A. 2d Cir.) 34 Am. Bankr. Rep. 338, 223 Fed. 257, 138 C. C. A. 499; Starin v. Kelly, 88 N. Y. 421; Read v. Williams, 125 N. Y. 560, 26 N. E. 730, 21 Am. St. Rep. 748; Billings v. Russell, 101 N. Y. 226, 4 N. E. 531; Bentley v. Young (D. C. N. Y.) 31 Am. Bankr. Rep. 506, 210 Fed. 202.

[4] Upon return of this case to court, counsel representing the bankrupt and his daughter entered a general appearance. Yet when the case was about reached for hearing they sought to only appear specially for the purpose of pleading to the jurisdiction of the court, and when the case was later called for trial moved for its dismissal on the ground that the court lacked jurisdiction because all of the parties thereto were residents of the state of New York and defendants had not given their consent. The motion was denied and the case proceeded to trial. In the brief presented counsel again make the claim that the court is without jurisdiction, and quote from Collier on Bankruptcy (10th Ed.) in support of their contention. A reference to the same authority (page 475) will disclose that the author, when commenting on the purpose of the amendments of February 5, 1903, and June 25, 1910, to the Bankruptcy Act of 1898 (section 23b), says:

"The direct result of the case of Bardes v. Bank [178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175] was * * * to deprive the District Court of jurisdiction of a suit brought by the trustee for the recovery of property in the hands of an adverse claimant. It had an appreciable effect upon analogous provisional and summary remedies. The amendment of 1903 added to section 70e a clause conferring upon the court of bankruptcy jurisdiction of a suit to recover property which has been transferred in fraud of creditors, and which any creditor might have avoided. Amendments, restoring concurrent jurisdiction, at least as to suits to recover property, became imperatively necessary and were very generally demanded. This demand was met by the changes made in this subsection and in sections 60b, 67e and 70e by the act of 1903. But the amendatory act failed to include in clause "b" of this section suits

for the recovery of property under section 70e. This was evidently a defect. It at once raised a doubt whether a suit to recover property transferred more than four months before the bankruptcy could be instituted other than in a state court. The failure to include suits for the recovery of property under section 70e was obviously an inadvertence. It was at least recognized as such by Congress in enacting the amendment of 1910, which included a reference to suits brought under section 70e, and, as the law now stands, suits for the recovery of property transferred in fraud of creditors prior to the four months' period may be brought in District Courts."

In Loveland on Bankruptcy (4th Ed., 1912), at page 1043, will be found this statement:

"The trustee may bring a suit to recover property transferred in fraud of creditors or as a preference in a court of bankruptcy, or a state court, having jurisdiction of the parties and subject matter. In respect to this class of suits the courts of bankruptcy and the state courts now have concurrent jurisdiction * * * without the defendant's consent."

The same view expressed as to the amendment of June 25, 1910, conferring jurisdiction on District Courts to hear and determine causes when it appears that a trustee in bankruptcy is seeking to recover for the estate property claimed to have been conveyed away by the bankrupt in fraud of his creditors, prior to the four months' period next preceding the commencement of bankruptcy proceedings, seems to have been adopted by Judge Elliott in Newcomb v. Biwer (D. C. S. Dak.) 29 Am. Bankr. Rep. 15, 199 Fed. 529, decided October 15, 1912, and by Judge Lacombe, of the Circuit Court of Appeals for the Second Circuit, in Milkman v. Arthe, decided April 13, 1915, and reported in 34 Am. Bankr. Rep. 536, 223 Fed. 506, 139 C. C. A. 55. The motion to dismiss is therefore overruled.

This will make unnecessary any discussion as to whether the appearance entered by counsel for defendants was special or general.

Decree accordingly.

PALMER v. DOULL MILLER CO., Inc.

(District Court, S. D. New York. May 20, 1916.)

1. MONEY RECEIVED ⇐1—ACTION—NATURE OF ACTION.

The action for money had and received is based upon equitable principles.

[Ed. Note.—For other cases, see Money Received, Cent. Dig. § 1; Dec. Dig. ⇐1.]

2. TRIAL ⇐10—DOCKETS—EQUITABLE PRINCIPLES.

Act March 3, 1915, c. 90, 38 Stat. 956, provides that, when a suit is brought on the wrong side of the court, it shall be transferred to the appropriate side. The trustee in bankruptcy of a corporation sued a factor, who acted for such corporation, to recover part of the commissions paid the factor, alleging that in violation of Penal Law N. Y. (Consol. Laws, c. 40) § 439, the factor paid and agreed to pay part of the commissions to the corporation's president, and that the commissions allowed were in excess of the usual rate. *Held*, that as the suit was one to recover money had and received, and, whether an action at law or a suit in equity, was governed by equitable principles, defendant cannot complain that it was instituted on the equity side of the federal court.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 27; Dec. Dig. ⇐10.]

3. BANKRUPTCY ⊂=154—ACTION BY RECEIVER—RIGHT TO SET-OFF.
In a suit by the trustee in bankruptcy of a corporation to recover a portion of commissions paid a factor on the ground that the factor, in violation of Penal Law N. Y. § 439, secretly made payments to the president of the corporation, the factor cannot offset claims made up of indebtedness upon drafts accepted for the benefit of the corporation and indebtedness growing out of a deficiency judgment against the corporation in favor of holders of its bonds, of which defendant was one, for that would tend to prejudice bona fide creditors.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 451–455; Dec. Dig. ⊂=154.]

4. BANKRUPTCY ⊂=154—ACTION BY RECEIVER—RIGHT TO SET-OFF.
In such case, as the agreement with the factor was void and unenforceable, the set-off will not be allowed either in law or equity, but the law will leave the factor in the condition it found him.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 451–455; Dec. Dig. ⊂=154.]

In Equity. Suit by Archibald Palmer, as trustee in bankruptcy of the Venus Silk Glove Manufacturing Company, Incorporated, bankrupt, against the Doull Miller Company, Incorporated. On motion to strike out a counterclaim contained in the answer. Motion granted.

David Harr, of New York City, for the motion.

Kellogg, Emery & Cuthell, of New York City (Earle L. Beatty, of New York City, of counsel), opposed.

MAYER, District Judge. This is a motion made by plaintiff to strike out the counterclaim contained in the answer of defendant to the amended bill of complaint, on the ground that the same does not contain facts sufficient to constitute a set-off in equity.

The suit is brought by plaintiff, as trustee in bankruptcy of the Venus Silk Glove Manufacturing Company Incorporated, a New York corporation, to recover certain moneys, alleged to amount to about $24,000, received by defendant under certain contracts which are alleged to be illegal and void by virtue of section 439 of the New York Penal Law. The bankrupt corporation was organized in December, 1913, for the purpose of engaging in the manufacture and sale of silk gloves and similar articles. Upon its incorporation it succeeded to the business of a Pennsylvania corporation which had been organized for the purpose of carrying on a similar business. Defendant corporation was accustomed to act as a factor for enterprises engaged in businesses of this nature.

The bill of complaint sets forth two causes of action. In the first cause of action it is alleged that in or about December, 1913, defendant entered into a contract with the bankrupt corporation whereby it agreed to perform for the bankrupt the services of a factor in consideration of the payment by the bankrupt to defendant of a commission of 10 per cent. of the gross income derived by the bankrupt from all of its sales. It is further alleged that contemporaneously therewith, and in violation of section 439 of the New York Penal Law, the defendant, for the purpose of procuring the making of such contract by the bankrupt, agreed with Wunsch, president and principal stock-

holder of the bankrupt, to pay him, from the 10 per cent. commission received by defendant, a commission of 6 per cent., which arrangement is alleged to have been made without the knowledge of the bankrupt.

In the second cause of action it is alleged that in or about the month of August, 1911, defendant entered into a similar contract with the predecessor Pennsylvania corporation, to the rights of which the bankrupt corporation had succeeded. It is alleged that at the time of the making of such contract an arrangement was made to pay Wunsch, president and principal stockholder of the Pennsylvania corporation, a similar commission of 6 per cent. from the 10 per cent. commission which was received by the defendant corporation.

Plaintiff, after offering to permit defendant to retain what plaintiff alleges to be just compensation for defendant's services as a factor, viz., 4 per cent. of the 10 per cent. commission received by it, prays that it be adjudged and decreed—

"that all moneys received by the defendant pursuant to the contracts herein complained of, over and above its equitable compensation for services rendered, belong as of right to the bankrupt estate, * * * and that it be adjudged and decreed that defendant hold the sum of $24,000 in trust for the bankrupt, and that it be further adjudged and decreed that the defendant pay to complainant, as trustee for creditors of said bankrupt, the said sum of $24,000. * * *"

Defendant sets up "a set-off or counterclaim to the causes of action attempted to be set forth in the amended bill of complaint." Defendant alleges that the entire assets which have come into the hands of the plaintiff trustee are wholly insufficient to pay any dividends upon the claims of creditors of the bankrupt; that defendant has duly filed its proofs of claims, showing that the bankrupt is indebted to it in the sum of $23,609.12, and that these claims are made up of an indebtedness upon drafts accepted and paid by defendant for account of the bankrupt and an indebtedness growing out of a deficiency judgment entered against the bankrupt in favor of the holders of certain of its bonds, of which the defendant was the holder of $10,000, principal amount.

Defendant has not moved to dismiss the bill; its counsel stating that such a motion was at first contemplated, but that it was decided that the same result could be reached by the equitable set-off pleaded in the answer.

[1, 2] It is urged by defendant that, if there is any action by the plaintiff, such an action is on the law side and not in equity. The attention of counsel is called to chapter 90 of United States Statutes at Large of 1915, being the amendment of March 3, 1915, by which a suit brought on the wrong side of the court can be transferred to the appropriate side of the court. Whether this suit should be on the law side or the equity side is not important for the purposes of this decision, because the same result must be reached in either event.

Judge Cardozo in Schank v. Schuchman, 212 N. Y. at page 358, 106 N. E. at page 128, calls attention to the proposition that:

"The action for money had and received is based, however, upon equitable principles."

As the bill is framed, it may be construed as setting forth a cause of action for money had and received, even though the pleader in the prayer has inserted the additional theory of a trust. I think the defendant misconstrues the meaning of Schank v. Schuchman, supra. The question there was whether the amended complaint stated a cause of action. Plaintiffs there seem to have relied solely upon the wrongful act which they charged against defendant. In that case plaintiffs had bought of defendant wagons and parts of wagons, and had also employed him to make repairs. Two employés of plaintiffs, whose duty was to inspect purchases and repairs, received a secret bonus from defendant; the allegation being that this payment was made to these two employés "with intent to influence their action in relation to the business of the plaintiffs." Plaintiffs sued to get back all the money paid by them to defendant, without deduction or condition. The wagons and parts of wagons could not be restored, and were worn out and useless. There was no allegation showing the disparity between the value of these chattels and the price paid for them by plaintiffs. So far as the complaint in that case disclosed, plaintiffs got their money's worth, notwithstanding the secret bonus paid to their employés. The court held, inter alia:

"The plaintiffs must show that it is against good conscience for the defendant to keep the money. * * * They do not show this, where they have consumed what they have received, unless the money exceeds the fair value of that which the defendant gave them. If the defendant's work and wares were paid for at fair prices, the plaintiffs have had a just return for every dollar they have parted with, and the defendant, therefore, can keep the money with good conscience." Schank v. Schuchman, supra, 212 N. Y. at page 358, 106 N. E. at page 128.

In the case at bar, however, it appears that the customary charge of a factor was 4 per cent., and that, if plaintiff's allegations are true, defendant was guilty of the offense denounced by section 439 of the New York Penal Law. There was, therefore, a wide disparity between the value of the services and the price which was agreed upon as the result of the commission of 6 per cent. to Wunsch on the side.

Whether, therefore, the complaint is looked at as setting forth a cause of action in equity or at law, the result is that plaintiff is suing defendant for money had and received, to wit, the amount over and above what may be the fair and reasonable value of the services of defendant as a factor. It may be that plaintiff could have sued to recover back the full 10 per cent.; but I express no opinion upon that proposition, because plaintiff has taken the better course, and, believing himself in equity, has followed the thought of the case of Schank v. Schuchman and offered to let defendant retain what would be fair compensation for its services.

[3] In the first place, I am of the opinion that the set-off alleged by defendant is not in the same right and does not fall within the provisions of section 68 of the bankruptcy statute. Act July 1, 1898, c. 541, 30 Stat. 565 (Comp. St. 1913, § 9652). But I need not stop to discuss this point in detail, because I can put my conclusion upon much broader grounds. In my opinion, a court of equity should not permit a set-off of this kind, where the party urging the set-off has been guilty

of the violation of a penal law and of the kind of conduct which is morally unsound and tends to undermine the integrity of modern business. To permit such a set-off would amount to an encouragement of practices of this character. If this defendant can in effect escape its wrongdoing by setting off the debt due it, when other creditors must take their chances by proving their claims in bankruptcy, the honest merchant may well inquire how it is that courts postpone him until the dishonest merchant escapes the consequences of his wrongdoing.

[4] In the next place, whether in law or in equity, the set-off cannot be availed of. It was distinctly held in Sirkin v. Fourteenth Street Store, 124 App. Div. 384, 108 N. Y. Supp. 830, that an agreement of the kind here discussed was void and unenforceable, and therefore that there could be no recovery for goods sold by bribing buyer's agent. This view was inferentially approved in Schank v. Schuchman, supra, where the court said (212 N. Y. at page 359, 106 N. E. at page 129):

"If the defendant were suing the plaintiffs for the price, and the court were to deny him relief, its refusal would not rest upon the ground that it would be against good conscience for him to have the money. The basis of its refusal would rather be that because of his illegal acts the law would leave him where it found him. Oscanyan v. Arms Co., 103 U. S. 261 [26 L. Ed. 539]; McMullen v. Hoffman, 174 U. S. 639 [19 Sup. Ct. 839, 43 L. Ed. 1117]."

So here I think the defendant should be left where in law it placed itself. If, for instance, the commissions had not been paid, defendant could not have sustained an action for and obtained recovery of such commissions. That, however, is precisely what it is attempting to do by this set-off, which constitutes an affirmative defense.

It seems to me that, from whatever point of view the question is approached, the result is that the set-off cannot be entertained. I deem it desirable, however, to point out that defendant denies that the transactions were of the sinister and improper character alleged by plaintiff, and that in describing the transactions I have, of course, merely referred to them in the manner set forth in the complaint. I make this note because some stranger reading this memorandum might form an opinion of defendant which in fact might be unjust and unsupported on the trial of the case.

Motion granted.

UNITED STATES v. FRIEDBERG.

(District Court, E. D. Pennsylvania. June 12, 1916.)

No. 4184.

1. SEARCHES AND SEIZURES ⊂⊃7—DOCUMENTS UNLAWFULLY TAKEN—RETURN.
The rule that, upon trial of a criminal prosecution, the courts will not, as to evidence clearly competent, reject it because of the means by which it was procured, does not apply to a petition before trial for return of papers seized upon an unlawful search.

[Ed. Note.—For other cases, see Searches and Seizures, Cent. Dig. § 5; Dec. Dig. ⊂⊃7.]

⊂⊃For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

2. SEARCHES AND SEIZURES ⊂⊃7—UNLAWFUL SEARCH—RETURN OF PAPERS.
Const. U. S. Amend. 4, declares that the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue but upon probable cause, supported by oath and affirmation, and particularly describing the place to be searched and the persons and things to be seized. Amendment 5 declares that no person shall be compelled in any criminal case to be a witness against himself. Under a search warrant authorizing the search of petitioner's place of business for leaf tobacco, as to which it was claimed a fraud upon the internal revenue laws was being effected, petitioner's private papers, both at his place of business and at his residence, were examined and seized. Before the trial on the charge of violating the internal revenue laws petitioner demanded return of such papers. *Held*, that the search was unreasonable and the papers should be returned, though desired for use in the prosecution; the warrant not describing petitioner's residence, nor providing for search and seizure of private papers.

[Ed. Note.—For other cases, see Searches and Seizures, Cent. Dig. § 5; Dec. Dig. ⊂⊃7.]

Morris Friedberg was charged with violating the internal revenue laws. Upon petition and rule for order on United States agents to return books and papers. Rule absolute.

John H. Hall, Asst. U. S. Atty., and Francis Fisher Kane, U. S. Atty., both of Philadelphia, Pa.

Pierce Archer, Jr., of Philadelphia, Pa., for defendant.

THOMPSON, District Judge. The books and papers, which are the subject of the present rule, were seized by internal revenue officers of the United States under a search warrant issued by a United States commissioner which reads as follows:

"Commissioner's Court of the United States Eastern District of Pennsylvania.

"Search Warrant.

"To H. C. Dietterich, Internal Revenue Officer of the United States, and to his Deputies, or Any of Them—Greetings:

"Whereas, complaint on oath, and in writing, has been made before me, Charles Welsh Edmunds, a United States commissioner for the Eastern district of Pennsylvania, by H. C. Dietterich, alleging that he has reason to believe and does believe that a fraud upon the revenue of the United States is being committed upon the revenue law as to leaf tobacco, has been and is being committed by person or persons unknown upon the premises known as 234 North Third street, Philadelphia, in the Eastern district of Pennsylvania.

"You are therefore hereby commanded, in the name of the President of the United States, to enter said premises, with the necessary and proper assistance, and there diligently investigate and search said premises for the said leaf tobacco, as also for the ingredients thereof and utensils used in the manufacture of same, and that you secure the same and bring the person or persons in whose custody they may be found before me in my office in Philadelphia, then and there to be examined and further to be dealt with according to law.

"Given under my hand and seal on this twenty-fourth day of March A. D. 1916. Charles Welsh Edmunds,

"United States Commissioner, Eastern District of Pennsylvania."

The warrant was apparently issued under the provisions of section 3462, Revised Statutes (Comp. St. 1913, § 6364). The facts in con-

nection with the search and seizure are set out in the petition for the rule and are not denied. Briefly stated, they are as follows:

On the 24th day of March, 1916, the revenue officers, during the absence of the petitioner, made a search of the petitioner's office, his private desks, his files, and his safe at the premises 234 North Third street, named in the warrant, and compelled the petitioner's clerk to disclose and deliver to them all the petitioner's private papers and books, including his private correspondence, files, bills of lading for tobacco shipped to him, certificates of tobacco in bonded warehouses, his daybook, ledger, invoice book, sales book, cashbook, memorandum books, bills, and many other papers having to do only with the petitioner's private and financial transactions, and these books and papers were gathered together and carried away with them. On the following day, two of the revenue officers gained access to the petitioner's private residence at No. 1516 Moyamensing avenue, violated the privacy of his dwelling and family, searched the entire house, including the bedrooms of the female members of his family, and carried away a leather suit case packed with his private papers. The revenue officers brought all the articles to the Federal Building, and, in spite of the petitioner's protests and requests, have answered that all the books and papers were in the custody of the United States, have refused to give them back, and have informed the petitioner that the books and papers were to be used as evidence against him and others for the purpose of placing him under arrest for a crime against the United States and for forfeiting his property.

On April 27, 1916, the petitioner was placed under arrest upon a warrant based on an information sworn to by one of the revenue officers for certain violations of the internal revenue laws and was held in bail for a hearing. The petitioner claims that the search and seizure were in violation of his rights under the Fourth and Fifth Amendments to the Constitution, and prays for an order for the return of the books and papers.

[1, 2] The respondents appeared by the United States attorney in answer to the rule. The Fourth Amendment declares that:

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath and affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fifth Amendment, among other things, declares that no person "shall be compelled in any criminal case to be a witness against himself." The Fourth Amendment makes clear the constitutional requirements of a search warrant. It provides that the warrant shall particularly describe, first, the place to be searched; and, second, the persons or things to be seized. The warrant describes the place to be searched as 234 North Third street, Philadelphia, and the thing to be seized as "leaf tobacco, the ingredients thereof, and utensils used in the manufacture of the same." The warrant did not describe the petitioner's private residence at No. 1516 Moyamensing avenue; neither did it describe any books or papers of the petitioner.

The present rule is not to be determined upon the authority of the cases holding that, upon objection to the introduction of testimony clearly competent as tending to establish the guilt of one on trial for a criminal offense, the courts do not stop to inquire as to the means by which the evidence was obtained. So that, if evidence is obtained by means of a search warrant, the fact that, in the search for what was lawfully included within its terms, other papers which are incriminating are incidentally taken, the court will not, where the question is first raised at the trial, inquire into the method by which the prosecution came into the possession of the incriminating documents. This is the rule, as I understand it, laid down in the case of Adams v. New York, 192 U. S. 585, 24 Sup. Ct. 372, 48 L. Ed. 575.

The question now before the court is not as to the admission of evidence, but as to whether the books and papers have been unlawfully seized in violation of the constitutional rights of the defendant. As stated by Mr. Justice Day in the opinion in the Adams Case, the question there was not raised in the attempt to resist an unlawful seizure of the private papers of the plaintiff in error, and it was stated that the question solely was:

"Were the papers found in the execution of the search warrant, which had a legal purpose in the attempt to find gambling paraphernalia, competent evidence against the accused?"

I think the question as to what is an unreasonable manner of search and seizure, where the question is raised, as here, in resisting a seizure of papers by demand for their return, must be determined by the terms of the Fourth Amendment itself, which provides the requisites for a warrant. A search, to be lawful, and therefore reasonable, must be confined to the place, and the seizure to the things, particularly described. If it were not the case that the place to be searched and the things to be seized must be those particularly described, the effect would be that a search warrant providing for the search of a particular place and the seizure of particular things would become a general warrant when placed in the hands of the government officers. The history of the Fourth Amendment by Mr. Justice Bradley in Boyd v. United States, 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746, is reviewed in the opinion of Mr. Justice Day in Weeks v. United States, 232 U. S. 383, 34 Sup. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177, and, as there shown, it took its origin in the determination of the framers of the amendments to provide for the Constitution a Bill of Rights, securing to the people those safeguards which had grown up in England to protect the people from unreasonable searches and seizures, such as were then permitted under general warrants issued under the authority of the government. By this practice there had been invasions of the home and privacy of the citizens and seizure of their private papers in support of charges, real or imaginary, made against them, and it is stated in the opinion that such practices had also received sanction under warrants and seizures under the so-called writs of assistance, issued in the American colonies. The emphasis which is laid upon the wrongs permitted under general warrants indicates that it was not the intention of the framers

of the amendment to permit, under a warrant particularly describing a place and things, a search of other places and a seizure of other things than those particularly described. As was said by Mr. Justice Bradley in the Boyd Case, the essence of the offense against the constitutional amendment "is the invasion of his indefeasible right of personal security, personal liberty, and private property, where that right has never been forfeited by his conviction of some public offense."

The rights of the petitioner in this case have not been forfeited by conviction, and, as in the case of Weeks v. United States, without awaiting his trial, he has made timely application to the court for an order for the return of his books and papers. In the Weeks Case the papers had been seized by the United States marshal without a warrant upon sworn information and without describing with reasonable particularity the thing for which the search was to be made, so that the question differed from that presented here, in that here the officers of the United States were acting under a warrant lawfully issued. To the extent that the execution of the warrant came within its particular terms, the petitioner is entitled to make no complaint and makes none. I think the question as to whether the seizure in the present case of the private papers of the petitioner is unreasonable as to the subject of seizure is answered in the case of Boyd v. United States:

"The search for and seizure of stolen or forfeited goods, or goods liable to duties and concealed to avoid the payment thereof, are totally different things from a search for and seizure of a man's private books and papers for the purpose of obtaining information therein contained, or of using them as evidence against him. The two things differ toto cœlo. In the one case, the government is entitled to the possession of the property; in the other it is not. The seizure of stolen goods is authorized by the common law; and the seizure of goods forfeited for a breach of the revenue laws, or concealed to avoid the duties payable on them, has been authorized by English statutes for at least two centuries past; and the like seizures have been authorized by our own revenue acts from the commencement of the government."

"When examined with care, it is manifest that there is a total unlikeness of these official acts and proceedings to that which is now under consideration. In the case of stolen goods, the owner from whom they were stolen is entitled to their possession; and in the case of excisable or dutiable articles, the government has an interest in them for the payment of the duties thereon, and until such duties are paid has a right to keep them under observation, or to pursue and drag them from concealment. * * * Whereas, by the proceeding now under consideration, the court attempts to extort from the party his private books and papers to make him liable for a penalty or to forfeit his property."

In the Boyd Case, the court, through Mr. Justice Bradley, cites and reviews Lord Camden's criticism of the power claimed by the Secretary of State for issuing general search warrants. As Lord Camden says in his opinion:

"Our law has provided no paper search in these cases to help forward the conviction."

Mr. Justice Bradley says:

"The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employés of the sanctity of a man's home and the privacies of life."

In so far as the revenue officers searched the premises at 1516 Moyamensing avenue and seized books and papers there, they were acting without the authority of any warrant describing the premises or the things there seized and in violation of law. The books and papers seized at the premises 234 North Third street were not and could not be claimed to be within the description of the "things to be seized" upon those premises.

The government seeks to justify the seizure entirely upon the ground that the papers are to be used as evidence upon which the government intends to prove the guilt of the defendant in a criminal prosecution and to forfeit his property in the proceedings in rem contemplated under section 3453. The papers seized are not forfeitable, and hence not subject to seizure. In the seizure, the revenue officers were acting clearly beyond the authority of the warrant, without authority of law, and in violation of the petition's constitutional rights. The exigency of necessity for obtaining evidence in a particular case does not justify the tendency which has grown up to proceed by "raid" of the house and property of a supposed offender, rather than by the orderly process provided by law and guaranteed by the Constitution.

The rule will be made absolute.

In re HOSMER.

(District Court, S. D. Iowa, C. D. May 26, 1916.)

1. BANKRUPTCY ⟸346—PRIORITIES—TAXES.

Under Bankr. Act July 1, 1898, c. 541, § 64, subsec. "a," 30 Stat. 563 (Comp. St. 1913, § 9648), declaring that the court shall order trustee in bankruptcy to pay all taxes legally due and owing by the bankrupt in advance of payment of dividends to creditors, and subsection "b," cl. 5, declaring that debts owing to any person who by the laws of the state is entitled to priority shall have priority, the priority given tax claims which have not become a lien applies only to the general assets, and not to property subject to a lien.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 535; Dec. Dig. ⟸346.]

2. BANKRUPTCY ⟸347—PRIORITIES—TAXES.

In administering a bankruptcy estate, costs have priority in distribution of general assets over taxes not a lien.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 538; Dec. Dig. ⟸347.]

3. BANKRUPTCY ⟸346—PRIORITIES—PROPERTY SUBJECT TO LIEN.

Under Bankr. Act, § 67, subsec. "d," as amended by Act June 25, 1910, c. 412, § 12, 36 Stat. 842 (Comp. St. 1913, § 9651), declaring that liens given or accepted in good faith and not in fraud of the act, shall not be affected by bankruptcy, property subject to a landlord's lien is unaffected, and though the trustee in bankruptcy was allowed to dispose of the property, yet as the disposal did not result in any equity for the bankrupt's creditors, the county by reason of the priority of a tax claim, not a lien, to other claims payable out of the general assets, cannot assert a prior lien on such proceeds, for, unless disposal of the property subject to the lien resulted in a surplus, there was nothing which passed to the estate.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 535; Dec. Dig. ⟸346.]

In Bankruptcy. In the matter of the bankruptcy of Julius A. Hosmer. The claim of Polk County to priority for taxes on property subject to liens was denied by the referee, and the county petitioned for review. Order of referee reversed.

A. G. Rippey, of Des Moines, Iowa, for Trustees of F. M. Hubbell Estate and Des Moines Union Ry. Co.

Howard J. Clark, of Des Moines, for Howard J. Clark, Trustee.

Don B. Shaw, of Des Moines, Iowa, for Polk County.

WADE, District Judge. Certain personal property of the bankrupt was subject to landlord's liens, and this property has been sold by the trustee, and the liens of the holders have been properly established against the proceeds thereof. Polk county, not questioning the liens of the holders, nor the proceedings by which they have acquired the right to subject the proceeds of the property in payment thereof, asserts its right to a prior claim by reason of taxes upon the property upon which the holders' liens existed.

[1] It is not claimed by Polk county that it has perfected any lien upon said property, but it asks preference under section 64 of the Bankruptcy Act (Comp. St. 1913, § 9648), which provides, among other things:

"(a) The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, state, county, district, or municipality in advance of the payment of dividends to creditors."

Subsection "b":

"5. Debts owing to any person who by the laws of the states or the United States is entitled to priority."

The claim for taxes is asserted under either one of the foregoing provisions; not out of the general assets of the estate, as to which there could be no question, but out of the proceeds of the property covered by the liens. I hold that the provisions of section 64 with relation to the payment of taxes, costs, filing fees, costs of administration, wages due to employés, and debts owing to any person entitled to priority, all pertain to the general assets of the estate, and have no relation to property which by reason of liens never became any part of the bankrupt estate.

[2, 3] The trustee does not administer property fully covered by liens, or the proceeds of such property, as assets of the bankrupt estate. The lienholder does not have to establish his lien in the bankrupt court; he has the right to assert it in any court having jurisdiction. If the lienholder does not object, the trustee may take possession of the property covered by the lien, and sell the same, but should not do so unless there is a fair prospect of securing a surplus over the lien, which surplus would be part of the general assets.

"When the property of a bankrupt is subject to valid liens or mortgages, the trustee is entitled to pursue one of two courses: He may, if in his judgment the equity in the property is of value and will yield any benefit to the estate for the unsecured creditors, take possession of the property and bring it to sale free of the mortgage lien, in which event the lien will attach to the proceeds in his hands, and the lien on the property be discharged; or he may sell the equity of redemption. He will exercise his best judgment, with the approval of the bankrupt court. In neither case can he, without the assent of the lien creditor, reduce the value of the security by attaching to the proceeds of the property liability for the cost of administration in bank-

ruptcy. The correct rule, as I apprehend, in such cases, is stated by Judge Hook in In re Harralson, 179 Fed. 490, 103 C. C. A. 70, 29 L. R. A. (N. S.) 737. 'A court of bankruptcy should not assume charge of incumbered property and liquidate the liens on it, unless there are reasonable grounds for believing some advantage will accrue to the bankrupt's estate. If the validity of the liens is unquestioned, and their amount is such that there is probably no excess of value in the property, it should be surrendered to the lienholders, or others entitled, unless some other reason appears for retaining control. A court of bankruptcy is not a court of general jurisdiction for the adjudication of controversies or the administration of assets in which the bankrupt's estate is in no wise interested. If, however, cognizance is taken, it should be assumed some benefit or advantage was expected to accrue to the general creditors; and if it results otherwise it is equitable to make the general estate bear the cost of the proceeding. Here the proceeds of sale did not equal the admitted incumbrance, and the deficiency should not be further increased by deducting the commissions of the officers, if there is a general estate against which they can be charged. This is in analogy to the general practice in equity in foreclosure.'" In re Cutler & John (D. C.) 228 Fed. 771.

Judge Connor in this case further reviews many authorities, all of which are applicable to the question involved. The following quotations are in point:

"Here the only action taken by the mortgagees was to file their claim, asserting their right to the proceeds of the property. Certainly they did not, by simply asserting the right to the proceeds of the mortgaged property, subject themselves to a liability for the entire cost of the proceeding in bankruptcy, amounting to some 15 per cent. of the proceeds. They were not asking the aid of the court to foreclose their mortgages."

"In Re Goldsmith (D. C.) 118 Fed. 763, cited by counsel for the trustee, it is held that secured creditors, whose property has been taken and sold by the trustee, are not required to prove their claims and have the proceeds paid them as a dividend, but may, in any appropriate manner, intervene and demand the payment to them of the proceeds of the property upon which they have a valid lien. This opinion, and authorities, may be examined with profit."

"The mortgagees are entitled to be paid the amount of their debts, to the extent of the proceeds of the property covered by the mortgages, without any diminution by reason of cost or expenses incurred in the proceeding in bankruptcy."

To the same effect is In re Rauch (D. C.) 226 Fed. 982, in which it is said:

"By the words 'of estates,' in section 62, supra [Comp. St. 1913, § 9646] and 'bankrupt's estates' in section 64, subsec. 'b,' supra, is meant the unincumbered assets generally of a bankrupt, properly administrable in bankruptcy, as distinguished from that of the property of a bankrupt dedicated by law to the payment of a particular obligation, or upon which there is a specific lien. The last-named section is intended particularly to give the order to be observed by trustees in the payment of such unincumbered estate."

Section 67 of the Bankruptcy Act (Comp. St. 1913, § 9651), provides:

"d. Liens given or accepted in good faith, and not in contemplation of, or in fraud upon this act, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall, to the extent of such present consideration only, not be affected by this act."

The rule which applies to the costs of administering the bankrupt estate must apply with reference to the payment of taxes, where the tax is not a lien. In fact, the costs are given precedence by the act.

In Prince v. Walter (D. C.) 131 Fed. 546, it is specifically held that taxes which were not a lien could not be given precedence over a mortgage in the distribution of the proceeds of the mortgaged property.

If Polk county had a lien upon the property sold by the trustee, it would then present a case of a contest between two lienholders, and the court would have to determine priority of liens; but in this case no such question is presented. If the landlords had chosen to proceed in the state courts to enforce their liens, I do not apprehend that it would be contended that the county could, before acquiring a lien under the statutes of Iowa, come into court and ask to have the taxes first paid from the proceeds of the property when sold under the landlord's lien, and the mere fact that the landlords have permitted the trustee to dispose of the property cannot change their rights, or lessen their interest under their mortgage.

If there be general assets in this estate, of course the taxes will be given preference "in advance of the payments of dividends to creditors," as provided by section 64a; but in the absence of a lien this is the only priority to which the claim for taxes is entitled. It cannot be held that the act of turning over the proceeds of the sale to the lienholders is the payment of a dividend. The trustee is simply transferring to them the proceeds of their property which he has sold.

The authorities relied upon by counsel for Polk county largely relate to cases in which by statute taxes were made a lien.

The order of the referee will be reversed, and the case is referred back to the referee for further proceedings in compliance with this order.

CHURCHWARD INTERNATIONAL STEEL CO. v. BETHLEHEM STEEL CO.

(District Court, E. D. Pennsylvania. May 22, 1916.)

No. 1491.

On Motion to Produce.

1. DISCOVERY ⟸8—RIGHT TO.
Generally speaking, neither party is compelled to have his proofs submitted for inspection in advance of the trial, though they are proved by oral testimony or written documents.

[Ed. Note.—For other cases, see Discovery, Cent. Dig. §§ 8, 9; Dec. Dig. ⟸8.]

On Motion to Strike Out Affirmative Defenses.

2. EQUITY ⟸264—PRACTICE—MOTION TO STRIKE.
Equity rule 33 (198 Fed. xxvii, 115 C. C. A. xxvii) forbids exceptions to an answer for insufficiency, but rules 29 and 30 (198 Fed. xxvi, 115 C. C. A. xxvi), authorize motions to dismiss bills for insufficiency and permit defendants by answer to make any counter complaints against complainant which might be the subject of a bill relieving them of the necessity of resorting to a cross-bill. In a suit to prevent infringement of letters patent, defendant answered denying complainant's right because of its assignment of the letters patent. *Held*, that such answer set up a defense by way of confession and avoidance, and therefore, though a motion to strike might be applicable where the answer sets up an affirmative defense, such motion is inapplicable.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 536–540; Dec. Dig. ⟸264.]

3. EQUITY ⟸264—PRACTICE—TRIAL QUESTIONS.
In a suit to prevent infringement of letters patent, the question whether complainant by release to a third party had deprived itself of the right to sue, is a trial question, which cannot be adjudicated on motion to strike.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 536–540; Dec. Dig. ⟸264.]

In Equity. Bill by the Churchward International Steel Company against the Bethlehem Steel Company. Sur motions to produce documents and to strike out affirmative defenses of answer. Both motions denied.

Gill & Linn, of Philadelphia, Pa., and Duell, Warfield & Duell, of New York City, for plaintiff.

Clarence D. Kerr and Fish, Richardson, Herrick & Neave, all of New York City, and Fraley & Paul, of Philadelphia, Pa., for defendant.

Sur Motion to Produce.

DICKINSON, District Judge. [1] It would not infrequently be of great convenience, and often of great advantage, to a defendant to have the plaintiff's proofs submitted for inspection in advance of

trial. A plaintiff might be required to so submit them. Even-handed justice would, however, demand that the defense be, in like manner, required to show its hand. The principle would follow the anticipated course of the trial through all its stages, rebuttal and surrebuttal. Whatever merits such a practice might in its broad statement present, it is clear the securement of these promised advantages would be impracticable. When a fact is pleaded, there is in this aspect no distinction between proofs which are presented through oral testimony and written evidence. The production of any paper writing which a party desires to offer in evidence may, generally speaking, be compelled. Again, generally speaking, neither party is required to submit its evidence in advance of trial. There may be exceptions to each of these rules. It has not been shown that this motion rests upon any such exception, and it is dismissed.

Sur Motion to Strike Out Affirmative Defenses of Answer.

This motion is based upon the exception in rule 33 abolishing exceptions to answers for insufficiency. The main purpose of the bill is to invoke protection against infringement by the defendant of its averred proprietary rights under certain patents. As part of the recital of title it avers in paragraph 6 an assignment to the Carnegie Steel Company of certain limited rights to manufacture under the claimed patents, but reserving all its rights against all infringers up to June 23, 1914. It avers in paragraph 8 infringement by the defendant before and up to the date mentioned and infringement of those of its rights not so assigned since that date. The defendant by paragraph 15 of its answer sets up a denial of any right in the plaintiff because of the averred fact that it had by the assignment referred to parted with all its rights in the patents. By paragraph 16 of the answer it is averred that the plaintiff had granted the full right to the Carnegie Steel Company and its vendees under said agreement to vend the material covered by the product claims of said patents and that what the defendant has sold was what it had bought under the right thus given to the Carnegie Steel Company to sell.

[2] The general question of the right of plaintiff to have these facts of the answer stricken out divides itself into several subsidiary questions.

(1) Is plaintiff within rule 33 (198 Fed. xxvii, 115 C. C. A. xxvii)? Exceptions to an answer for insufficiency are by that rule forbidden. Rule 29 (198 Fed. xxvi, 115 C. C. A. xxvi) permits motions to dismiss bills "for insufficiency," and rule 30 (198 Fed. xxvi, 115 C. C. A. xxvi) permits defendants by answer to make any counter complaints against plaintiffs which might be made the subject of a bill and relieves them of the necessity of resorting to a cross-bill. It might, in consequence, be that a defendant would ask in his answer for the allowance of affirmative relief against a plaintiff. As a further consequence the defendant should, so far as his answer was affirmative of any cause of complaint he had against the defendant by way of

counterclaim or otherwise, be subject to the same attack upon the affirmative features of his answer to which the complaint was subject. If such be the meaning of "affirmative defense," plaintiff is not within rule 33, because no affirmative defense in this sense is set up by the answer. It is nothing more than a denial of plaintiff's right by a plea in confession and avoidance.

[3] (2) It may be said that it is not entirely clear that defendant cannot avail himself of the legal effect of the contract brought into the case as part of plaintiff's title. Defendant may be within the exceptions to the principle invoked by plaintiff. If the legal effect of a release executed by a plaintiff to a third party is to release the defendant of the claim made against him, it may in a proper case be pleaded in an action at law and certainly a defendant in equity may avail himself of a like defense. Moreover, such a defense may go directly to the cause of action. The vendor of property, who had divested himself of all rights therein, might readily be found without the right to maintain an action affecting that property. Whether defendant is within or without the principle invoked can best be determined as a trial question, and, it may be, can only be so determined.

(3) There is also involved the practice question of the propriety of piecemeal rulings in causes, and perhaps a like piecemeal appellate relief. The courts have always and properly frowned upon this. If a defense attempted to be set up by answer were struck out, this might be deemed so far a final decree as to give a right of appeal. Nothing could be ruled on such an appeal, which could not at least as well, and perhaps with more, satisfaction be ruled as a trial question entering into the entry of the decree disposing so far as the trial court is concerned of the whole case on final decree.

The disposition made of the present motion is to hold it to be ruled as a trial question, and until then the motion is denied.

THE ADA.

(District Court, D. Maryland. May 5, 1916.)

SHIPPING ⊂=49(2)—FREIGHT—CONTRACT OF AFFREIGHTMENT.

A subcharterer of a steamship, which had agreed to prepay a lump sum as freight for the carriage of a cargo, became bankrupt before the ship was fully loaded. It had accepted and loaded a shipment for libelant at an agreed freight, for which libelant had given a check, but upon which it stopped payment on the bankruptcy. Libelant tendered prepayment to the ship at the agreed rate, which was refused, and libelant refused to pay more. The ship remained in port for several days, and then sailed with the shipment on board, and at the port of destination enforced payment of the freight at a higher rate. *Held* that, by failing to discharge the shipment at the port of loading after knowledge of the contract under which it was loaded and of libelant's refusal to pay a higher rate of freight, it became bound by such contract, and was liable to libelant for the excess collected.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 193; Dec. Dig. ⊂=49(2).]

In Admiralty. Suit by the Union Petroleum Company against the Swedish steamship Ada. Decree for libelant.

Conlen, Brinton & Acker, of Philadelphia, Pa., and Daniel H. Hayne, of Baltimore, Md., for libelant.

Engel Bros., of New York City, and Harry N. Abercrombie, of Baltimore, Md., for respondent.

ROSE, District Judge. Four hundred barrels of oil belonging to the libelant, a Delaware corporation, were carried by the Swedish steamship Ada from the port of New York to Marseilles. At the latter port the freight demanded by the steamship, viz., $1,639.45, was paid under protest; the libelant claiming that such sum was $374.88 more than the steamship was entitled to demand. The libelant also seeks to recover $37.64 for various expenses for cablegrams, etc., resulting, as it alleges, from the excessive demand made by the steamship.

There is no dispute as to facts. On the 29th of July, 1915, the libelant entered into a contract with the Inter-Ocean Transportation Company of America, Incorporated, by which the latter undertook to transport for the libelant the oil in question, from New York to Marseilles, for the sum of $1,264.59. At the time the contract was made the parties expected it to be fulfilled by the shipment of the oil on a steamer in no wise connected with the respondent or its owners. For some reasons such shipment was not made on such other steamer. The Ada, during all the time in which the transactions in controversy took place, was under a time charter to one Robert F. Monahan. On the 3d of September he made a subcharter to the Inter-Ocean Transportation Company of America, Incorporated, by which the latter agreed to supply a full and complete cargo of general merchandise to the Ada for the lump sum of $37,500, which was to be paid directly to the owners of the ship upon the issuance of the bills of lading, or

to the authorized agent of the ship upon signed bills of lading signed by the captain; such bills of lading to constitute a lien upon the ship, the amount of prepaid freight to be and remain a lien against the cargo until the freight was paid, according to the charter party. After making such subcharter, and before September 16, 1915, the Inter-Ocean Transportation Company of America, Incorporated, with the consent of the libelant, loaded the 400 barrels of oil in question upon the Ada; the libelant accepting that steamship in lieu of the Astoria, under its agreement of July 29, 1915.

On the 16th of September, 1915, the libelant gave the Inter-Ocean Company its check for $1,264.59, in full payment of the freight, receiving therefor a bill of lading for the 400 barrels of oil, signed by an employé of the Inter-Ocean Company, but not by the owners, master, or charterers of the Ada. Four days before such payment of freight and signing of bills of lading, Monahan demanded of the Inter-Ocean Company the payment of $37,500, and offered upon payment of such sum to deliver to the Inter-Ocean Company bills of lading for cargo, and on September 16th, the very day on which such check was given by the libelant to the Inter-Ocean Company, Monahan notified libelant in writing that the Ada would sail the next day, and the owner and master of the ship would be at the office of Monahan's attorneys in New York at 10 o'clock in the forenoon of such day, ready to sign and deliver bills of lading for the shipment. The notice stated that all freight was to be prepaid, and asked that the shipper be good enough, when he called for bills of lading, to bring with him check to cover freight.

On the 17th of September a petition in bankruptcy was filed against the Inter-Ocean Company, and on that day libelant stopped payment on the check for $1,264.59, theretofore given to the Inter-Ocean Company. The loading of the Ada was completed by Monahan, the charterer; the Inter-Ocean Company having left it unfinished. On the 17th of September, the Ada left her berth and went to anchorage in New York Harbor. Thereafter, and before her sailing on the 23d of September, the libelant more than once tendered Monahan $1,264.59. He declined to receive this sum, demanding more. The oil was duly carried to Marseilles, and there delivered upon payment, under protest, as already stated, of the sum of $1,639.45.

Libelant claims that, the Inter-Ocean Company being duly authorized by the ship to accept cargo for shipment upon it, the ship is bound by the agreements made by the Inter-Ocean Company with reference to such cargo as was actually placed on board the steamship, with the consent of the master, irrespective of whether the Inter-Ocean Company performed its agreement with the steamship or with Monahan, its charterer.

The ship's view is that no bills of lading were ever signed by its master, and that by the terms of the charter party none were to be signed by him until the lump sum due from the Inter-Ocean Company was fully paid. It relies on Gracie v. Palmer, 8 Wheat. 605, 5 L. Ed. 696, to sustain the contention that in such a case the shipper was put upon inquiry as to whether there was a charter, and, if so, what were its terms and conditions, and upon Ralli v. Paddington Steamship

Company, 5 Times Commercial Cases, 125, in which some of the facts were quite similar to those at bar.

The libelant cites many authorities for the contention that a charterer in possession of the vessel may bind it to the cargo received on board. I do not think it necessary in this case to go into any discussion of such questions. Before the ship sailed it knew that the libelant had never promised to pay more than $1,264.59, and that it was not willing to pay more. It is true that it did not demand that its goods be returned to it, but it reiterated its refusal to pay a higher price. Under such circumstances the ship, if it was not willing to carry the cargo at the only rate to which libelant ever agreed, should have discharged it. There is nothing in the agreed statement of facts to show that such discharge would be impracticable. The ship could not make a contract with libelant to which libelant had never consented.

It follows that the libelant may have a decree for the amount claimed.

THE SOUTH COAST.

(District Court, N. D. California, First Division. June 7, 1916.)

No. 15959.

MARITIME LIENS ⊜21—LIENS FOR REPAIRS AND SUPPLIES—EFFECT OF CHARTER.

A charter of a vessel required the charterer to furnish all supplies, to redeliver her free from all liens, and to save the owners harmless from all liens and costs or expenses which they might sustain in consequence of liens. *Held*, that such provisions did not prevent the master appointed by the charterer from creating liens on the vessel for supplies under Act June 23, 1910, c. 373, 36 Stat. 604 (Comp. St. 1913, §§ 7783–7787), nor was notice by the owners to a furnisher effective to prevent the attaching of such liens.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. § 26; Dec. Dig. ⊜21.]

In Admiralty. Suit by J. C. Rudbach against the steamer South Coast; the South Coast Steamship Company, claimant. Decree for libelant.

Ira S. Lillick, of San Francisco, Cal., for libelant.

Marcel E. Cerf, H. W. Glensor, and Charles H. Sooy, all of San Francisco, Cal., for respondent and claimant.

DOOLING, District Judge. Libelant furnished supplies at various times to the steamer South Coast in the harbor of San Pedro, each time on the order of the person then her master. The vessel was, during this period, being operated by one Levick under a charter from the owners, which charter was also in the nature of a conditional bill of sale, or option to purchase. Libelant, before furnishing any of the supplies in question, was informed that the vessel was under charter to Levick, and had been warned by the owners of the vessel not to have any bills go on the ship's account, and had also been advised that Levick and Oliver would pay the bills. To this he replied that it was immaterial to him who paid the bills, but that he would not sell any

goods to the ship in any other way than by charging them to the ship and her owners, and if they did not want it that way he would not deliver any goods. This was stated by him to one Mills, who first informed him that Levick was operating the ship, and who had been directed by the owners to give him warning not to sell on the credit of the ship. He was also warned by Mr. Sooy, one of the owners, not to deliver any goods on the credit of the ship. So that, if the owners, after the delivery of the ship to the charterers, had any power to prevent the attaching of a lien for supplies by warning the libelant not to furnish such supplies on the credit of the ship, such warning was clearly and definitely given.

The charter in question contains the following provisions:

"Fifth. It is understood that this charter is a charter of the bare vessel, and that the party of the second part [Levick] shall furnish the crew, pay their wages, victual them, furnish all deck and engine room and saloon stores, and supplies of every kind and nature, pay for all fuel, fresh water, port charges, wharfages, customs charges, customs fines, or government fines, pilotages, overtime of crew, agencies, commissions, consular charges, dry-docking, painting of the hull of said vessel, furnishing all lines and slings, and pay all charges whatsoever of every nature, whether of the same kind as hereinabove enumerated or otherwise, that may be incurred in or about the use of said vessel during the term of this charter."

"Tenth. Said party of the second part further covenants * * * that if said payments [charter hire] be not made, then at the option of the first party said vessel will be delivered to the said party of the first part * * * free from all liens and claims of every kind or description whatsoever during the term of this charter party, except the lien for any salvage services that may be rendered to said vessel, and that he, the said party of the second part, will hold and save harmless the said party of the second part from all liens, claims, or demands upon or against the said vessel that may be preferred against the said party of the first part or against the said vessel, and arising or created during the term of this charter party, except any claim for salvage services that may be rendered to said vessel, and further will save said party of the first part harmless from all liens, losses, damages, costs, or expenses that said party of the first part may sustain or be put to in consequence of such liens, claims, or demands, or in respect to any litigation arising out of or in respect thereto or connected therewith."

While these provisions require the charterer to pay all expenses incurred in operating the vessel, they do not deprive him of authority to bind the vessel therefor. Indeed, they seem rather to concede to him such authority by providing that he shall save the owners harmless from all liens against the vessel arising or created during the term of the charter party. The act of June 23, 1910, gives a maritime lien to any person furnishing supplies to a vessel, whether foreign or domestic, upon the order of the owners, which lien may be enforced without alleging or proving that credit was given to the vessel. It also provides that the managing owner, ship's husband, or master, appointed by a charterer, or an agreed purchaser in possession of the vessel, shall be presumed to have authority from the owner to procure such supplies. The only condition upon which such lien may not be created is found in the following words of the act:

"But nothing in this act shall be construed to confer a lien when the furnisher knew, or by the exercise of reasonable diligence could have ascertained, that because of the terms of the charter party, agreement for sale of the vessel, or for any other reason, the person ordering the supplies was without authority to bind the vessel therefor."

But by the charter in the instant case the person ordering the supplies—that is to say, the master—was not without authority to bind the vessel therefor. And while the owners took every precaution to warn the furnisher of the supplies not to have any of them go on the ship's account, they did not take the essential and fundamental precaution to provide by the terms of the charter that the charterer, or the master appointed by him, should be without authority to bind the vessel therefor. The case presented here is different from that of The Eureka, 209 Fed. 373, because in that case the option to purchase provided that the holder of the option, though given possession of the vessel, should not incur any lien upon her, nor make any purchases on her account. The present charter contains no such provision, but on the contrary by its very terms contemplates that the charterer should have authority to bind the vessel, and the owners, having executed such a charter and delivered the vessel thereunder, were thereafter without power to prevent the creation of the liens provided for by the act above mentioned; their remedy being against the charterer upon his agreement to hold them harmless from such liens.

A decree will be entered for the amount prayed for.

WRIGHT v. BARNARD et al.

(District Court, D. Delaware. December 21, 1915.)

No. 338.

1. EQUITY ⇐162—PRACTICE—DISMISSAL.

Under Equity rule 29 (198 Fed. xxvi, 115 C. C. A. xxvi), declaring that pleas and demurrers are abolished, and that every defense in point of law arising upon the face of a bill, whether for misjoinder, nonjoinder, or insufficiency of fact to constitute a cause of action, which previously should have been by demurrer or plea, shall be made by motion to dismiss or in the answer, a court of equity may in its discretion, when promotive of justice, refuse to decide a case on motion to dismiss, but may require the defense to be made by answer; the practice being the same as in case of a demurrer, as to which the court had the same discretion.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 393; Dec. Dig. ⇐162.]

2. EQUITY ⇐46—JURISDICTION—ADEQUATE REMEDY AT LAW.

Equity has jurisdiction of a suit, unless the law furnishes a complete and adequate remedy.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 151, 152, 157, 159-163; Dec. Dig. ⇐46.]

3. TRIAL ⇐11(3)—PRACTICE—TRANSFER TO LAW SIDE.

Despite equity rule 22 (198 Fed. xxiv, 115 C. C. A. xxiv), declaring that, if a suit commenced in equity should have been brought as an action at law, it will be transferred, a suit on the equity side will not be transferred because complainant also seeks as to one item relief which could be granted by a court of law, where the complaint as a whole states a cause of action in equity; rule 23 declaring that if, in a suit in equity, a matter ordinarily determinable at law arises, such matter shall be determined without sending the case to the law side of the court.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 30; Dec. Dig. ⇐11(3); Action, Cent. Dig. § 312.]

In Equity. Bill by Herman L. Wright against Cynthia E. Barnard, executrix of the last will and testament of Remsen C. Barnard, deceased, and others. On defendants' motions for dismissal of the bill, and for transfer of the case to the law docket. Motions denied.

Andrew E. Sanborn, of Wilmington, Del., for complainant.
Robert H. Richards, of Wilmington, Del., for defendants.

BRADFORD, District Judge. [1] The defendants have filed two motions; one for the dismissal of the bill, and the other for the transfer of the case to the law side of the court. The motion for the dismissal of the bill is made under rule 29 of the equity rules (198 Fed. xxvi, 115 C. C. A. xxvi), which provides, among other things, as follows:

"Demurrers and pleas are abolished. Every defense in point of law arising upon the face of the bill, whether for misjoinder, nonjoinder, or insufficiency of fact to constitute a valid cause of action in equity, which might heretofore have been made by demurrer or plea, shall be made by motion to dismiss or in the answer."

A motion to dismiss under the above rule is in the nature of a general demurrer. It is well settled that it is within the sound discretion of the court sitting in equity, when promotive of justice, to decline to decide a suit on demurrer to a bill and to overrule the demurrer and require an answer, reserving to the defendant the right to claim and take by answer whatever advantage might otherwise have been secured by the demurrer. The motion to dismiss having taken the place of a demurrer, by parity of reasoning the above principle is applicable to the motion equally as it formerly was in the case of a demurrer. I am satisfied that under the circumstances disclosed in the bill the doing of even justice as between the parties is more likely to be secured by leaving the merits of the case to be disposed of after the making of answer than by now dealing with the merits as disclosed in the bill. The case is not sufficiently developed at this stage to allow the questions involved in the motion to dismiss now to be satisfactorily determined. The motion to dismiss must, therefore, be denied, reserving to the defendants the right to take by answer whatever advantage might otherwise have been secured by the motion.

[2, 3] The motion to transfer the case to the law side of the court is based upon rule 22 of the rules in equity (198 Fed. xxiv, 115 C. C. A. xxiv) which provides:

"If at any time it appear that a suit commenced in equity should have been brought as an action on the law side of the court, it shall be forthwith transferred to the law side and be there proceeded with, with only such alteration in the pleadings as shall be essential."

With the exception of the balance of salary claimed by the complainant, I am not prepared to hold that the subject-matter of the suit as disclosed by the bill is not properly cognizable in equity. Unless the law furnishes a complete and adequate remedy, jurisdiction in equity exists. Boyce's Executors v. Grundy, 3 Pet. 210, 215, 7 L. Ed. 655; Watson v. Sutherland, 5 Wall. 74, 78, 18 L. Ed. 580; Insurance Co. v.

Bailey, 13 Wall. 616, 620, 20 L. Ed. 501; Lewis v. Cocks, 23 Wall. 466, 470, 23 L. Ed. 70; Drexel v. Berney, 122 U. S. 241, 252, 7 Sup. Ct. 1200, 30 L. Ed. 1219; Allen v. Hanks, 136 U. S. 300, 311, 10 Sup. Ct. 961, 34 L. Ed. 414. In Lewis v. Cocks it was said:

"To bar equitable relief the legal remedy must be equally effectual with the equitable remedy, as to all the rights of the complainant."

In Kilbourn v. Sunderland, 130 U. S. 505, 514, 9 Sup. Ct. 594, 596 [32 L. Ed. 1005] it was said:

"The jurisdiction in equity attaches unless the legal remedy, both in respect to the final relief and the mode of obtaining it, is as efficient as the remedy which equity would confer under the same circumstances."

The fact that the complainant seeks to recover a balance of salary which, considered in and by itself, is a legal demand, is immaterial on the question of jurisdiction in equity. Rule 23 of the equity rules (198 Fed. xxiv, 115 C. C. A. xxiv) provides:

"If in a suit in equity a matter ordinarily determinable at law arises, such matter shall be determined in that suit according to the principles applicable, without sending the case or question to the law side of the court."

The dominant factor in determining the question of jurisdiction is to be found in the general scope and nature of the case as made by the bill, and a decision on the question of the balance of salary is but an incident of a suit properly on the equity side of the court. Accordingly the motion for a transfer of the case must be denied.

Pursuant to rule 29 of the equity rules the defendants will be required to answer the bill within five days from the entry of the orders denying the above motions.

UNITED STATES v. CRANDOL.

(District Court, E. D. Virginia. June 9, 1916.)

PERJURY ⊂=5—OFFENSES—NATURE OF OFFENSE.

Penal Code (Act March 4, 1909, c. 321) § 125, 35 Stat. 1111 (Comp. St. 1913, § 10295), declares that whoever, having taken an oath in any case in which a law of the United States authorizes an oath to be administered, that he will testify truly, who shall willfully and contrary to such oath state or subscribe any matter which he believes untrue, shall be guilty of perjury. The Civil Service Act (Act March 3, 1871, c. 114, 16 Stat. 495) authorizes the President, with the aid of the Civil Service Commission, to prescribe such regulations for the admission of persons into the civil service as will best promote the efficiency thereof, while Act Aug. 23, 1912, c. 350, § 1, 37 Stat. 372 (Comp. St. 1913, § 3273), authorizes members of the civil service and its duly authorized representatives to administer oaths to witnesses in any matter depending before the commission. An applicant for a position in the civil service made false statements in an application under oath before the recorder. *Held* that, as the civil service commission was entitled to make inquiries concerning the applicant's qualifications, such false testimony constituted perjury; the right to administer oaths, in matters depending before the commission not being limited to witnesses at formal hearings.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. §§ 4–6, 35; Dec. Dig. ⊂=5.]

Carl Crandol was indicted for perjury. On demurrer to indictment. Demurrer overruled.

Richard H. Mann, U. S. Atty., of Petersburg, Va., and Hiram M. Smith, Asst. U. S. Atty., of Richmond, Va.

Bowden & Heard, of Norfolk, Va., for defendant.

WOODS, Circuit Judge. The defendant Edward Crandol, alias Carl Crandol, demurs to an indictment charging him in the first count with a violation of section 125 of the Penal Code, in that he falsely stated in an application required by the Civil Service Commission of the United States "that he had never been indicted for or convicted of any crime or misdemeanor, or arrested upon any charge," and in the second count charging him with a violation of the same section in that he falsely stated in his application "that he had never been in the military or naval service of the United States." The oath is alleged to have been taken before F. M. Brewer, recorder.

The demurrer to the indictment must be overruled for these reasons: The statute authorizes the President of the United States, with the aid of the Civil Service Commission "to prescribe such regulations for the admission of persons into the civil service of the United States as may best promote the efficiency thereof, and ascertain the fitness of each candidate in respect to age, health, character, knowledge, and ability for the branch of service in which he seeks to enter." Comp. St. 1913, § 3213. The regulations thus authorized may embrace the requirement that an applicant shall answer under oath questions bearing on his fitness in the respects mentioned in the statute. The questions propounded in the application in this case were authorized by the regulations prescribed by the President in accordance with law. The act approved August 23, 1912, provides:

"Members of the Civil Service Commission and its duly authorized representatives are hereafter authorized to administer oaths to witnesses in any matter depending before the Civil Service Commission." 37 Stat. 372.

To hold, as is contended, that the words "any matter depending before the Civil Service Commission" are restricted in meaning to matters involving formal hearings, would be to limit unduly the meaning of the words and distort their natural sense. When one becomes an applicant for a position in the civil service of the United States, his application is a matter depending before the Civil Service Commission.

The position taken that "witnesses" means in the statute those testifying in a judicial or other formal inquiry is also unsound. The word "witnesses" is used in its ordinary sense, and includes all persons whose declarations under oath are received for any legal purpose, and embraces deponents in affidavits. The recorder is a representative of the Civil Service Commission, duly authorized by it to administer oaths of witnesses, and is therefore a person authorized by the laws of the United States to administer oaths.

A number of authorities have been cited by counsel on both sides more or less pertinent to the questions involved, but the latest and highest authority I think clearly supports the conclusion reached.

United States v. Smull, 236 U. S. 405, 35 Sup. Ct. 349, 59 L. Ed. 641. In a well-considered opinion, the Court of Appeals of the District of Columbia has reached the same conclusion. Johnson v. United States, 26 App. D. C. 128.

In re MENZIN.

(District Court, S. D. New York. May 31, 1916.)

1. BANKRUPTCY ⟸405—DISCHARGE—RIGHTS OF CREDITORS.

While a creditor may prove his claim in bankruptcy and oppose discharge, he cannot, having proven his claim, refuse to liquidate it and proceed in the state courts on the theory that the debt is not provable and dischargeable, but in such case must abandon his opposition to the discharge or his action in the state courts.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 709–711; Dec. Dig. ⟸405.]

2. BANKRUPTCY ⟸413(8)—DISCHARGE—OPPOSITION—PRACTICE.

Where a creditor files specifications against a bankrupt's discharge, and also sues on his claim in the state court, the proper practice under District Court rule 15 is for the bankrupt to request the referee to certify the matter up to the District Court, and not to apply in the District Court for a stay in the first instance.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 717, 727; Dec. Dig. ⟸413(8).]

In Bankruptcy. In the matter of the bankruptcy of Abraham Menzin. Lewis Frank & Sons filed specifications to the bankrupt's application for discharge, and the bankrupt moves to stay the creditor from proceeding with the specifications and to expunge all proceedings taken thereunder, as well as the claim. Motion denied without prejudice.

Isidor Sachs, of New York City, for the motion.

Harry L. Herzog, of New York City, opposed.

MAYER, District Judge. On November 10, 1914, Abraham Menzin was adjudicated a bankrupt. On February 4, 1915, at the first meeting of creditors, Lewis Frank & Sons filed a proof of debt for $545.75, the agreed price of merchandise obtained from them by the bankrupt upon a statement in writing as to his financial responsibility, alleged by Lewis Frank & Sons to be false. This claim was allowed by the referee. On February 4, 1915, one Bloch was elected trustee, and thereafter duly qualified and is still acting as trustee.

Thereafter the bankrupt applied for his discharge, and Lewis Frank & Sons filed specifications, which are still pending undetermined before the referee. During December, 1915, Lewis Frank & Sons commenced an action against the bankrupt in the Municipal Court to recover $499.92 damages, because of the fraud and deceit alleged to have been practiced in procuring the sale of the goods on credit. This action is still pending and proceeds upon the theory that the debt is not dischargeable.

[1] The bankrupt now moves to stay the creditor firm from proceeding with its specifications and to expunge all proceedings taken by it thereunder. He also moves to expunge the claim of Lewis Frank

& Sons upon the ground that it is unliquidated, not provable, and not dischargeable. It was admitted upon the argument by counsel for the objecting creditor: First. That the claim was an unliquidated claim. Second. That the claim was not dischargeable in bankruptcy.

It seems to me that the creditor cannot insist on remaining in the bankruptcy proceeding and at the same time pursue his remedy in the state court on the theory that his debt is not dischargeable. A creditor like this one can prove his claim in bankruptcy and oppose the discharge, as in Matter of Reed (D. C.) 26 Am. Bankr. Rep. 286, 191 Fed. 920; but, if he will not liquidate his claim, and persists in proceeding in another jurisdiction on the theory that the debt is not provable and not dischargeable, then by his own interpretation he is not a party in interest, entitled to oppose discharge. Standard Varnish Works v. Haydock, 16 Am. Bankr. Rep. 286, 143 Fed. 318, 74 C. C. A. 456; In re Heinsfurter (D. C.) 3 Am. Bankr. Rep. 113, 97 Fed. 198; In re Servis (D. C.) 140 Fed. 222; In re Hildebrant (D. C.) 120 Fed. 992; In re Main (D. C.) 30 Am. Bankr. Rep. 547, 205 Fed. 421; In re Chandler, 138 Fed. 637, 71 C. C. A. 87.

[2] The proper practice is to ask the referee to certify up and not to apply for a stay to this court in the first instance. See District Court rule 15. However, to save unnecessary procedure, the referee is instructed that if, within five days from the filing of the order on this decision, the action in the Municipal Court is not discontinued, then this creditor has no standing to oppose the discharge, and this without prejudice as to whether, for failure to liquidate the claim or other reasons, Lewis Frank & Sons have or have not now a provable claim. It may be that by its course this creditor has elected, and cannot now, in any event, by discontinuing the state court case, regain a standing in the bankruptcy proceeding. That question I do not pass on. It will arise only if the creditor concludes to abandon the prosecution of his action in the Municipal Court.

The motion to expunge the claim is denied without prejudice, on the authority of In re Lewensohn, 9 Am. Bankr. Rep. 368, 121 Fed. 538, 57 C. C. A. 600.

CRANE v. JOHNSON, Governer of California, et al.

McNAUGHTON v. SAME.

(District Court, S. D. California, S. D. April 8, 1916.)

Nos. C-18, C-19.

1. INJUNCTION ⇐85(2)—UNCONSTITUTIONAL STATUTE—ENFORCEMENT.
The federal District Court has jurisdiction of a suit by one affected against state officers to enjoin enforcement of an unconstitutional statute.
[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 156; Dec. Dig. ⇐85(2).]

2. INJUNCTION ⇐135—TEMPORARY INJUNCTION—ISSUANCE.
The granting of an interlocutory injunction is within the sound discretion of the trial court.
[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 304; Dec. Dig. ⇐135.]

3. INJUNCTION ⇐151—PROCEEDINGS—MERITS.

The federal District Court, composed, under statutory requirements, of the judge of the District Court, a judge of another district, and a Circuit Judge, is not, on application for an interlocutory injunction against enforcement of a state statute, called upon to decide the merits of the case.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 336; Dec. Dig. ⇐151.]

In Equity. Bills by P. L. Crane and by Kate P. McNaughton against Hiram W. Johnson, Governor of the State of California and others. On motion for temporary injunctions. Denied.

Tom L. Johnston, of Los Angeles, Cal., for complainants.

U. S. Webb, Atty. Gen., and Robert M. Clarke, Asst. Atty. Gen., of California, and Thomas Lee Woolwine, Dist. Atty., and George E. Cryer, Deputy Dist. Atty., both of Los Angeles, Cal., for defendants.

Before ROSS, Circuit Judge, and TRIPPET and CUSHMAN, District Judges.

ROSS, Circuit Judge. [1] Upon the authority of the cases of William Truax, Sr., and Others, v. Mike Raich, 239 U. S. 33, 36 Sup. Ct. 7, 60 L. Ed. 131, and Raich v. Truax (D. C.) 219 Fed. 273, 283, we think the jurisdiction of the District Court over the present suits is clear. We have, therefore, only to determine whether, upon the bill, the complainant is entitled to an interlocutory injunction.

[2, 3] The rule is well settled that the granting of such orders is within the sound discretion of the court, and in the exercise of such discretion, based upon the averments of the bills, we are of the opinion that the application should be denied. We do not understand that, upon such an application as the present, the court, composed, under statutory requirement, of the judge of the District Court, of another District Judge, and a Circuit Judge, is called upon, if, indeed, authorized, to decide the merits of the suits.

EQUITABLE TRUST CO. OF NEW YORK v. WESTERN PAC. RY. CO. et al.

(District Court, N. D. California, Second Division. May 27, 1916.)

No. 169.

RAILROADS ⇐192—FORECLOSURE OF MORTGAGES—SALE.

The upset price required to be bid for railroad property at a foreclosure sale may fairly be based on the present earning capacity of the road and the value of property not used in its operation.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 391, 634–642; Dec. Dig. ⇐192.]

In Equity. Suit by the Equitable Trust Company of New York against the Western Pacific Railway Company. Order filing upset price for sale of property.

See, also, 231 Fed. 478.

Jared How, of San Francisco, Cal., for plaintiff.
John S. Partridge, of San Francisco, Cal., for receivers.
Charles W. Slack, of San Francisco, Cal., for Denver & R. G. Ry.
Pillsbury, Madison & Sutro, of San Francisco, Cal., for intervener.
John F. Bowie, of San Francisco, Cal., for reorganization committee.

DOOLING, District Judge. This is a proceeding to foreclose the mortgage securing the first mortgage bonds on the Western Pacific Railway Company, to the amount of $50,000,000. The cause was transferred to this division for the purpose of having determined here two questions:

(1) Should a minimum price be fixed at which the mortgaged property may be sold under the decree of foreclosure to be entered?

(2) If so, what sum should be fixed as such minimum or upset price?

It has been conceded by all the parties hereto that such a price should be fixed, so that the only question left for present determination is the amount which the court should require as the least sum for which it will permit the mortgaged property to be sold.

Of the parties before the court one side contends for a price of $40,000,000, the other for a price not in excess of $15,000,000. Testimony was taken, and various estimates given as to the value of the property. Not having the time, because of the pressure of other matters, to discuss the matter in extenso at present, I can only state at this time my conclusion, which is that, according to the testimony presented, the minimum price for which the court should permit the property to be sold is $18,000,000. This price is based upon the only concrete facts as to present value which the court has before it; that is to say, the present earning capacity of the road, the value of the unproductive properties, and the bonding power of the properties after the proposed sale. The earning capacity of the road is now about $1,000,000 above taxes, maintenance, and operating expenses. The unproductive properties on hand are, roughly, of the value of $1,500,000, and a bond issue is already underwritten which will produce the sum fixed, $18,000,000. If this sum were to be loaned solely on the properties as they now exist, I should fix the selling price at considerably more. But this money, if furnished, is to go into the road, thus increasing the value of the securities, so that the new bondholders will have as security the present value of the road plus the value put into it by the use of the money borrowed. It is not pretended by the court that these figures are strictly accurate, but that they are the best figures that the court can find from the evidence before it.

The upset price will therefore be fixed at $18,000,000.

RAIL & RIVER COAL CO. et al. v. PAISLEY.

(Circuit Court of Appeals, Third Circuit. June 15, 1916.)

No. 2074.

EVIDENCE ⟸441(6)—DOCUMENTARY EVIDENCE—PAROL EVIDENCE TO VARY.

Plaintiff, a real estate broker, attempted to secure a purchaser for defendants' coal lands. By two letters of April 26th, the defendants placed a price on the lands and also offered to pay plaintiff a commission of 10 per cent. The letter placing a price on the land recited that it was subject to withdrawal in 10 days. Thereafter, by subsequent letter, defendants gave plaintiff an option on the lands and also by separate letter agreed to pay a stated commission. *Held*, that the two instruments must be taken together as constituting a single contract for payment of a commission on sale of the land at an agreed price, and so parol evidence is not admissible to show that there was an agreement to pay a commission in the event that the purchaser interested by plaintiff should acquire the land.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1766–1771, 2041; Dec. Dig. ⟸441(6).]

In Error to the District Court of the United States, for the Western District of Pennsylvania; W. H. Seward Thomson, Judge.

Action by J. A. Paisley against the Rail & River Coal Company and others. There was a judgment for plaintiff, and defendants bring error. Reversed and remanded.

Patterson, Crawford, Miller & Arensberg, of Pittsburgh, Pa. (Thomas Patterson, of Pittsburgh, Pa., John G. Johnson, of Philadelphia, Pa., and Joseph Stadtfeld, of Pittsburgh, Pa., of counsel), for plaintiffs in error.

John McCartney Kennedy, H. F. Stambaugh, and Watson & Freeman, all of Pittsburgh, Pa., for defendant in error.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

McPHERSON, Circuit Judge. This action between citizens of different states is brought to recover commissions on a sale of the capital stock, carrying with it the property, of the Rail & River Coal Company. The purchaser was the Grand Trunk Pacific Development Company, a Canadian corporation, and the facts leading up to the sale, and giving rise to the dispute, are in outline as follows:

In the spring of 1910, the plaintiff, J. A. Paisley, a dealer of some prominence in bituminous coal, residing in Cleveland, made an effort to bring about a sale of the coal company's property to the Grand Trunk Railway Interests. For several years he had had business relations with Chas. M. Hays, the president of the Railway, and was also acquainted with one or two of the stockholders in the Coal Company. These stockholders (all residents of Pittsburgh) were Isaac W. Frank, W. R. Woodford, W. L. Kann, and the estate of Jacob Kaufmann. They owned all the capital stock, and in order to protect and advance their common interests they had also formed a partnership or association known as the Rail & River Coal Company Syndicate. The com-

pany owned 300 acres of surface and 32,000 acres of coal in Belmont county, Ohio. Three mines had been opened, $250,000 of improvements had been put on the property, and a going business had been built up. As already stated, Paisley had done business with the Railway Company and was familiar with its fuel requirements. Knowing that Hays had been considering the advisability of acquiring a source of coal supply, and knowing also that the Coal Company was willing to sell, he brought the company's property to the attention of Hays on April 15, and three days later received a reply, in which Hays stated, that he should—

"be glad to look into the property you speak of, if you will give me, in confidence, the price at which it can be obtained, and also advise me whether an option could be had at the price quoted for say six months, in order to enable me to thoroughly investigate as (to) the property and its value. * * * I should not want the parties to know we were considering the matter, or that it had any interest to us, until we were protected by a firm option for a period of time as before stated, which would enable us to look into it."

On April 26 Paisley saw Frank in Pittsburgh and asked if the property was for sale, saying that he had a purchaser for it. Frank answered in the affirmative, and quoted a price of $100 per acre for the coal and $250,000 for the surface and the improvements. As a result of the conference Frank handed the following letters to Paisley on the same day:

"Rail & River Coal Company,
"W. R. Woodford, President.

"Pittsburgh, Pa., April 26, 1910.

"Mr. J. A. Paisley, Cleveland, Ohio—Dear sir: Confirming verbal statement to you, with reference to the Rail & River Coal Company property in [Belmont] county, Ohio, beg to say that we own about 32,000 acres unmined coal, about 300 acres surface land in connection therewith, and also improvements valued at $250,000. We will sell this property at $100 per acre of coal, including the surface land, and $250,000 for the improvements.

"The property now carries $2,050,000 in bonds, five per cent., having twenty-seven years to run. I am warranted in saying that this bond issue could be carried as part payment for the property.

"The railroads skirting this property are the B. & O. road on the east, the Penna. Company on the south, and the Bellaire, Zanesville & Cincinnati running through the center of the property, with the Wabash System about two and one-half miles distant. No. 1 and No. 2 mines are open on the Penna. R. R. and the river, with thirteen feet slack water, and the third mine, No. 6, is on the B. & O. R. R.

"The present conservative output of these three mines is three thousand tons per day.

"The above price is subject to recall within ten days.

"Very truly, Rail & River Coal Company,
"Isaac W. Frank, Treasurer."

"Rail & River Coal Company,
"W. R. Woodford, President.

"Pittsburgh, Pa., April 26, 1910.

"Mr. J. A. Paisley, Cleveland, Ohio—Dear sir: Referring to price given you to-day on the Rail & River Coal Company property, if sold at said price I will personally arrange that you will receive a commission of ten per cent. (10%) of the same.

"Very truly, Isaac W. Frank."

One of these letters is evidently an official act on behalf of the Coal Company, while the other is an individual promise by Frank himself. Paisley understood this to be what it plainly is, a "ten-day option," and immediately went to Montreal and conferred with Hays about it, but of course nothing final could be done in so short a time. Accordingly Hays instructed Paisley to obtain an option for six months or a year, if possible, so as to allow time for a thorough examination. Upon Paisley's return to Cleveland, he received the following letter from the Coal Company under date of May 2:

"Referring to the option given you April 26th, expiring 10 days thereafter, beg to say that said option is hereby recalled, to take effect ten days after April 26th, which will be May 6th.

"Our company is entirely willing to sell our property at the price named to you in said option, but are not willing to give an option at this time, not knowing who your principals are in the matter. If you can work this sale up to a point where you feel justified in disclosing to us who your principals are in this matter, and we are satisfied that they are responsible, we would consider giving an option for thirty days in which to close the sale.

"Rail & River Coal Company,
"Isaac Frank, Treasurer."

On May 4 Paisley went to Pittsburgh and had an interview with Frank and Woodford. What took place is in some dispute, but there is no controversy about the fact that the interview resulted in the subsequent preparation of two papers, each bearing the date of May 5. One was in substance as follows:

It is a formal instrument called "Articles of Agreement" between the Coal Company, the Syndicate, and J. A. Paisley, and declares in detail that the Coal Company and the Syndicate give to Paisley—

"* * * the exclusive right or option to purchase at any time within 60 days from the date hereof, all the coal and surface lands and mining improvements, or the capital stock, of the Rail & River Coal Company * * * for the consideration or sum of one hundred dollars per acre of unmined coal, and $250,000 for the mining improvements and surface land, payable with $2,050,000 in first mortgage bonds now on the property, and the balance in money, one-fourth on acceptance of this option, and one-fourth every four months thereafter, with six per cent. interest on the deferred payments."

If the stock should be taken, instead of the lands and improvements, it is to be "free from all debts excepting $2,050,000 bonds outstanding," and the price of the stock is to be—

"* * * for an equity over and above the $2,050,000 bonds figured as for the sale of the property as above, and all the accounts and bills receivable: Provided, the said party of the second part [Paisley], his heirs and assigns, shall within 60 days from the date hereof, notify the parties of the first part, their heirs or assigns, that he will take, accept, and purchase said coal lands and improvements, or stock, at the price and terms aforesaid."

Then follow a declaration that "time is the essence of this option," and a provision that, if Paisley does not notify the other parties of his election—

"to take, accept, and purchase said coal lands and improvements at the price and terms aforesaid at or before the expiration of 60 days from the date hereof, then this agreement shall forthwith become null and void and of no effect."

This agreement is formally signed by the Coal Company, the Syndicate, and Paisley.

Under the same date the Syndicate wrote Paisley a letter, saying:

"Referring to the option given you this day on the property of the Rail & River Coal Company, beg to say that if you sell this property at the price and on the terms named, we will give you 10 per cent. as a commission on the sale in kind—that is, 10 per cent. of the bonds received, and 10 per cent. of the cash received in the transaction, as and when said cash is delivered to us, we putting the bonds in trustee's hands for you, to be delivered when all the payments are made in cash.

"The Rail & River Coal Company Syndicate,
"Isaac W. Frank, Trustee."

At this point the dispute between the parties emerges. The defendants contend that the contract between the parties is to be found in the writings, and cannot be modified by parol, while Paisley's position is this:

When he came to Pittsburgh on April 26 (to quote from his statement of claim)—

"* * * it was then and there agreed between the said plaintiff and the said Isaac W. Frank, representing himself and also the other defendants, that in case the plaintiff secured a customer who was willing to purchase said coal properties, which could be conveyed either direct or by a transfer of the capital stock of the said Rail & River Coal Company, at a rate based upon the price of $100 per acre for the coal lands, with the surface lands thrown in, and $250,000 for the improvements, that the said Rail & River Coal Company and the said Rail & River Coal Company Syndicate, either or both, would pay to the plaintiff, as compensation for his services in connection with securing said customer and making said sale, the sum of ten per centum (10%) on the total purchase price received by defendants, or either of them for said properties.

"That in confirmation of this agreement the plaintiff received from the Rail & River Coal Company its letters of April 26, 1910, a true copy of which is hereto attached and marked Exhibit B, and also letter of April 26, 1910, a true copy of which is hereto attached and marked Exhibit C."

After receiving the letter of May 2 (again quoting from the statement of claim)—

"* * * the plaintiff had an interview with the defendants Woodford and Frank, representing all of the defendants, at which time, at defendants' special request, the plaintiff informed them that his customer for said coal property was Charles M. Hays, Esq., representing the Grand Trunk interests, and it was then and there expressly agreed that defendants would do everything in their power to aid in making a sale of the said coal property, and that if any sale of said coal property, either by deed, conveyance, or by transfer of the capital stock of said Coal Company, was made by the said defendants to the said Charles M. Hays, or the Grand Trunk interests represented by him, at the price or substantially the price in said letter, Exhibit B, or upon terms acceptable to the said defendants, that the said defendants would pay to the plaintiff the commission of ten per centum (10%) as before agreed upon."

He testified that on May 4 he saw Frank and Woodford (and perhaps Kann also) and insisted that, if he should disclose the name of his customer, the agreement must be that his commission should be paid if the customer took the property at the price named by the Coal Company or at any other price that might be accepted by the company as satisfactory. Frank and Woodford agreed to this, and he then showed them the letter from Hays of April 18, and told them that a year

or more might be necessary before the sale could be brought about. He was told to take all the time he wanted, but that the company would not tie up the property to one customer. He testified, further, that the written agreement of May 5 was not intended to be a complete agreement, but was only prepared to be shown to Hays; and that the agreement to pay the 10 per cent. was made at the first interview in April, was wholly in parol, and was not limited in time, the writing of May 5 on this subject being only intended to make clear that the Coal Company might be at liberty to pay a part of his commission in kind—that is, in bonds or other securities—and might not be liable to pay the whole amount in cash. The District Court submitted these questions to the jury, who found in favor of Paisley, and the rulings and the charge on this matter constitute the principal errors assigned. Before considering them, however, let us follow the transaction to the end.

Paisley's account of what took place was in some respects directly denied by the other parties, but of course, if his testimony as to the parol contract was admissible at all, and if the course of the trial was free from error, the verdict is beyond our power. After the papers were signed, Hays sent an engineer to examine the property. His report was ready about the time the option expired, but, in order to obtain a little longer grace, Paisley on July 2 asked for a ten days' extension, and this was granted by the Coal Company and the Syndicate in the following letter:

"Replying to your personal request, we reluctantly extend the option given you on the 5th day of May, 1910, expiring the 5th day of July, 1910, for the purchase of the property of the Rail & River Coal Company. It is hereby extended until and including July 16, 1910."

The engineer recommended that additional land should be acquired, that three new mines should be opened, and that 20 miles of railroad should be built; these improvements (estimated at $1,300,000) to be made by the Coal Company or the Syndicate. When the defendants learned of these recommendations, they rejected them at once and this was the end of that particular negotiation. Paisley continued to hope, however, that the subject might be taken up again, and that he might receive a new option; occasionally, perhaps once a month, he referred to the "deal" in subsequent business conversations with Hays, and he spoke of it also in two or three letters about other matters, but he was never authorized to make, and (so far as appears) he never did make, a third offer.

In the following November, the defendants themselves made an effort to sell to Hays, and gave an option to a Mr. Ramsey, agreeing to pay him 10 per cent. if he should succeed. We do not know the other terms of this option, but in any event it expired in December, and a second option, which was given to Ramsey in February, 1911, expired at the end of that month. During the pendency of the second option, Frank asked Ramsey to agree that Paisley should receive one-tenth of his own commission, saying that Paisley had "brought this matter to our attention first and gave us the name of his principal, which is also your principal." He added:

"We feel that Mr. Paisley should have some recognition for his services, and rely upon you, if necessary, to satisfy a reasonable demand by Mr. Paisley. Our idea is now that not over one-tenth of your commission would be necessary to entirely satisfy him. We trust you will see this is but fair, and wish you success in closing this matter."

And (as we understand) Ramsey assented. Nothing came of Ramsey's efforts. In February the railway board in London declined to agree to the purchase, and Hays so notified Ramsey on February 25. In March, 1911, after this second option had expired, Paisley learned of Ramsey's employment and protested to Frank that this had been a violation of his own rights, and had been intended to prevent him from earning a commission. Frank explained what had been done, and the evidence is conflicting whether Paisley was satisfied with the explanation. Late in April—Hays being about to visit London to confer with his masters, the Grand Trunk Railway directors in that city, on various subjects, including the purchase of a coal field (which he continued to favor)—Paisley wrote to Frank and Woodford, asking that his interest be protected, and saying that this was the agreement when he disclosed his principal. Frank replied on May 1, stating that he would carry out the understanding between Paisley, Woodford, and himself to the effect that, if the sale was made to the Grand Trunk Railway, he and Woodford would take care of Paisley's interests, and calling Paisley's attention to the fact that, when he had visited them in March, he had been advised of the arrangement that he should receive one-tenth of Ramsey's commission, and had agreed to this as entirely satisfactory, promising to "do what you [he] could to further the sale." Woodford confirmed Frank's letter a few days later, and Paisley replied to them both on May 12. In this reply he said he was "a little sore from the way this has been handled by yourself, Mr. Frank, and Mr. Ramsey, Jr., as the matter has considerable bearing with my Canadian friends and the Inland Navigation Company." He said further that he "had the deal going as fast as it could go," complained again about Ramsey's interference, and asserted that he himself was "absolutely the fellow that put the deal through, providing it goes." On June 12 Frank wrote to Paisley on behalf of the Syndicate, referring to Paisley's letter of May 12, and saying inter alia:

"I beg to call your attention to the fact that your option expired by limitation July 16, 1910. Any work or effort that you have made since that time has been entirely voluntary on your part, and unsolicited by us. We appreciate the interest you have taken in this matter, but it must be clearly understood that, should we consummate a sale to the Grand Trunk R. R., any compensation we should see fit to make to you will be entirely voluntary on our part."

To understand fully the situation at this time, it is desirable to go back a few months. Late in February, 1911, W. L. Kann, one of the defendants, had a talk with Hays and was assured that (owing to the attitude of the London board) no arrangement could be made under the terms of Ramsey's option. Thereupon, after referring to the previous negotiations by Paisley and by Ramsey, Kann brought forward a new aspect of the situation, and offered to take up the matter

afresh on a "tonnage basis." His fundamental thought, never before proposed and apparently original with him, was that the Grand Trunk Railway should agree to buy the coal for its system from the Coal Company, and that a mutually advantageous scheme should be built up on this foundation. Hays was willing to discuss the proposal further, and negotiations between Kann and Hays were begun and thereafter were actively carried on. When Hays went to London in May to consult his board on several matters, Kann went abroad also on this and other business, and had some conference there with Hays, although without favorable result. In spite of Hays' wishes, the Railway Board (the final authority on the subject) declined to sanction Kann's scheme, and in effect Hays had given it up before he came back to Canada. This was late in May or early in June, and, when Kann made another effort to go on with the negotiations here, Hays replied to him on June 21:

"I discussed the matter of the coal property further with Chairman Smithers after our last interview in London, but did not receive sufficient encouragement to make me feel like pressing the matter, and I therefore think it only fair to you to say that, so far as we are concerned, the negotiations may be considered as concluded. I thank you very much for your personal time and attention you have given the matter, and desire to say that my own views as to the desirability of obtaining a coal property of this character are unchanged; but, as I explained to you personally, I have too many other matters of greater importance to carry with our board to warrant me in prejudicing them by pressing my views on this particular subject."

Kann persisted, however, in pressing his "tonnage" project, and gradually advanced it to the point of acceptance after correspondence and interviews and a second examination of the property by another engineer sent by Hays. The plan was finally agreed upon early in December, although the details were not elaborated or the papers executed until April, 1912. In outline the proposal was this:

The Grand Trunk Railway was to agree to buy from the Coal Company at least 400,000 tons of coal each year for 10 years from April 1, 1912, which the Coal Company was to sell for 30 cents a ton more than the cost of production. This assured the Coal Company a large annual profit, and, as this could be used to pay interest on bonds, and take care of other corporate obligations, it was, of course, a material addition to the value of the capital stock. The stock was to be sold to the Grand Trunk Pacific Development Company, a subsidiary of the Grand Trunk Railway, for $350,000, payable in notes of the Development Company that would fall due at intervals during a period of nine or 10 years. The Coal Company was also to issue $1,500,000 of second mortgage bonds (whose interest was provided for by the profit to be derived from the railway's contract), and the bonds were to be taken by the Development Company at 70, the price ($1,050,000) to be included in the notes of the Development Company just referred to. The Coal Company was to dispose of the notes, and to use the proceeds, inter alia, to pay certain of the company's debts. To give the notes value, they were to be secured by a collateral trust, pledging the Coal Company's stock and the second mortgage bonds. This ingenious plan was carried out, the contract to buy the coal was authorized and made, the second mortgage bonds were issued, the bonds

and the Coal Company's stock were transferred to the Development Company and were duly pledged, and the notes were issued and immediately sold at 97. This closed the transaction; the Development Company becoming the owner of the Coal Company's stock, and the property being still incumbered by the first mortgage. The proceeds from the notes paid off certain debts of the Coal Company and a net balance of $836,048.42 went to the Syndicate.

[1] We have omitted many details, but the foregoing statement outlines the transaction sufficiently to make it evident that the decision of the dispute turns on the extent to which the parol evidence rule should be applied. If the papers are to measure Paisley's rights, it is clear that much of the evidence was inadmissible; but, if his rights depend upon a parol contract, much of the evidence was no doubt properly received, in order to prove the existence and the terms of such a contract. The vital question, therefore, is whether the writings permit him to assert that the agreement to pay a commission was in parol, separate from the writings, and inconsistent with their terms. He asserts that such an agreement was made on April 26. This is the distinct language of his pleading, and he repeated the assertion on the stand. If this be true, we think he encounters a serious difficulty at the beginning. On that day he saw no one except Frank, the written contract concerning commissions was made with Frank, and this contract expressly binds Frank as an individual. In our opinion the two letters of that date are plainly parts of one instrument, and are to be read together, although for obvious reasons they were physically separate. Paisley's commission was a private affair and did not concern the purchaser, but we think there is no fair room for doubt that the two writings were parts of a single whole. The present suit, however, is a joint action against the Coal Company and against three of the individuals composing the Syndicate, and in strictness cannot succeed unless by the aid of proof that all the defendants were bound by the contract sued upon. In face of a writing that binds Frank alone, we have some trouble in understanding on what ground the plaintiff should be allowed to set up a parol agreement on the same subject binding Frank jointly with several other defendants. Nevertheless the jury were instructed that, if they found as a fact that—

"* * * the agreements were separate and distinct, and were intended so to be by the parties, that the contract of employment was a verbal one, and that the written memorandum as to the commissions was, and was intended to be, only a part of the general contract of employment, and that there was no time limit thereon, then the contract would be binding upon the parties, if the plaintiff performed his part of the agreement as to the sale, unless the agreement was afterwards annulled by the parties or another agreement substituted therefor."

In this submission we think there was error.

This was the vital question raised by the plaintiff's statement of claim, but the case seems to have been tried on the merits in a liberal way, and in this respect we follow the parties and the District Court. The transaction of May 4–5 came next to be considered, and here we think a similar error was committed. In our opinion the two writ-

ings of May 5 are even more plainly to be taken and read together as parts of one agreement, and we therefore hold that the court should not have instructed the jury that:

"Here again you must determine under the evidence what the contract was between the parties on May 5, 1910."

And in the same connection it was erroneous to instruct the jury as follows:

"On the other hand, the plaintiff contends that the two agreements are distinct and independent of each other; that the option can in no sense be construed as his contract of employment; that, as heretofore stated, that contract was a verbal one, a part only of which, that relating to commissions, was put in writing; and that this contract of employment was without limitation as to time. This I submit to you as a question of fact. And if you find, from all the evidence, that the said agreements of May 5th were intended by the parties to cover the entire contract between them in relation to this property, and that the two papers were intended to constitute but a single agreement, then at the expiration of the option as extended the right of the plaintiff under the contract so existing would cease and determine. But if you should find as a fact that the agreements are distinct and independent of each other, and were so intended by the parties, that the contract of employment was a verbal one, and that the written memorandum of May 5th was a part only of the general contract of employment, upon which there was no time limit, then the contract with reference to the commissions would be binding upon the defendants, if the plaintiff performed his part of the agreement in the sale of the property."

The writings of April 26 and of May 5 spoke for themselves, and the trial judge should have construed them himself.

We need not discuss the parol evidence rule, and shall content ourselves with quoting several authoritative statements concerning its scope. In De Witt v. Berry, 134 U. S. 306, 10 Sup. Ct. 536, 33 L. Ed. 896, the Supreme Court said:

"The principle is that, while parol evidence is sometimes admissible to explain such terms in the contract as are doubtful, it is not admissible to contradict what is plain, or to add new terms."

In Seitz v. Brewers' Co., 141 U. S. 510, 12 Sup. Ct. 46, 35 L. Ed. 837, the same court referred to certain limitations of the rule:

"Undoubtedly the existence of a separate oral agreement as to any matter on which a written contract is silent, and which is not inconsistent with its terms, may be proven by parol, if under the circumstances of the particular case it may properly be inferred that the parties did not intend the written paper to be a complete and final statement of the whole of the transaction between them. But such an agreement must not only be collateral, but must relate to a subject distinct from that to which the written contract applies; that is, it must not be so closely connected with the principal transaction as to form part and parcel of it. And when the writing itself upon its face is couched in such terms as import a complete legal obligation, without any uncertainty as to the object or extent of the engagement, it is conclusively presumed that the whole engagement of the parties, and the extent and manner of their undertaking, were reduced to writing."

In Rucker v. Bolles (C. C. A. 8) 133 Fed. 858, 67 C. C. A. 30, Judge Van Devanter said:

"Where a written contract, entered into without fraud, accident, or mistake, purports upon its face to be a complete memorial of the whole agreement, the conclusive presumption is that the parties have written into the

contract every material item and term of their engagement, and it is not permissible to contradict, vary, or add to its terms by parol evidence."

In Godkin v. Monahan (C. C. A. 7) 83 Fed. 116, 27 C. C. A. 410, it is held that:

"* * * 'Whenever the contract purports on its face to be a memorial of the transaction, it supersedes all prior negotiations and agreements, and * * * oral testimony will not be admitted of prior or contemporaneous promises on a subject so clearly connected with the principal transaction with respect to which the parties are contending as to be part and parcel of the transaction itself, without the adjustment of which the parties cannot be considered as having finished their negotiations and finally concluded a contract.' We recognized the rule that parol evidence may be received of the existence of an independent oral agreement not inconsistent with the stipulations of the written contract in respect to which the writing does not speak, but not to vary, qualify, or contradict, add to, or subtract from, the absolute terms of the written contract."

If other authorities on the subject are desired, numerous citations will be found in 17 Cyc. 567 et seq., and in 10 Ruling Case Law, 1016 et seq.

In conclusion we may perhaps be permitted to add that an attentive study of this voluminous record has convinced us that a mind without bias can hardly be in serious doubt about the general course of events. Paisley conceived the idea of selling this property to the Grand Trunk interests, and of course expected to receive a satisfactory commission. The Coal Company was glad to have him try, and gave him two opportunities, limiting him as to time and other particulars. He failed, but did not abandon hope, and kept up his efforts, believing (not without reason) that he would receive another option whenever he could sufficiently persuade the railway. The parties owning the Coal Company were at least willing that he should continue his efforts, and may have encouraged him; but they made their own attempts to bring the sale about, and finally succeeded. Now, how far the Coal Company might have been liable to Paisley on a quantum meruit if the suit had claimed a reasonable compensation for such services as the company may have accepted and profited by, we do not undertake to say. But evidently this is a wholly different matter from the suit that was actually brought, which could not succeed without setting aside formal writings, and thus violating a well-tried rule that was never more valuable than it is to-day.

The judgment is reversed, and a new trial is awarded.

CUYAHOGA CONTRACTING CO. v. CITY OF PORT HURON.

(Circuit Court of Appeals, Sixth Circuit. May 9, 1916.)

No. 2709.

MUNICIPAL CORPORATIONS ⊂=354—CONTRACTS—RIGHT OF CONTRACTOR TO RESCIND.

A contractor with a city for the construction of a canal, which obtained an extension of nine months in the time for completing the same, and

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

after the expiration of six months abandoned the work, admitting its inability to complete it within the extended time, *held* not entitled to a rescission of the contract on the ground that it was induced by misrepresentations of the city engineer, in his profile map, as to the character of the material to be excavated, nor because of changes in the route, increasing the cost, which were made by the city many months before and were not objected to at the time.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 886, 887; Dec. Dig. ⊂⇒354.]

Appeal from the District Court of the United States for the Eastern District of Michigan; Arthur J. Tuttle, Judge.

Suit in equity by the Cuyahoga Contracting Company against the City of Port Huron. Decree for defendant, and complainant appeals. Affirmed.

H. E. Spalding, of Detroit, Mich., for appellant.

Joseph Walsh and Lincoln Avery, both of Port Huron, Mich., for appellee.

Before WARRINGTON and KNAPPEN, Circuit Judges, and KILLITS, District Judge.

KILLITS, District Judge. The appellant, Cuyahoga Contracting Company, an Ohio corporation, on February 10, 1902, entered into a contract with the city of Port Huron, Mich., for the construction of a canal in the rear of the city of Port Huron extending from Lake Huron to Black river. It is unnecessary to set out the contract in full. Those provisions necessary to be understood for the purpose of this decision may be summarized as follows:

Appellant, known in the contract as the party of the second part, agreed to start the actual work of constructing a canal within 30 days of the time of executing the contract, to make fair monthly progress in carrying on the undertaking, and to fully complete and finish the canal, bridges and other work embodied in the terms of the contract within one year from the date thereof.

For failure, neglect or refusal to go on with the work or to carry out the reasonable instructions of the city engineer, it was provided that the city might serve written notice upon the party of the second part "to carry out such instructions and if within ten (10) days thereafter, said party of the second part shall fail to satisfy" the city "of its ability and intention to carry out such instructions and to complete the work within the time agreed upon, then in that case the party of the first part shall have the right to declare this contract forfeited," the money due or becoming due to the party of the second part on the contract to be thereby forfeited to the city as liquidated damages, with the privilege to the city to let the work to other parties without incurring any liability. This feature of the contract provided also that any expense above the unpaid balance of the contract price, incurred by the city under these circumstances in completing the work, should constitute a breach of the bond of the second party and that the second party and its sureties should become liable therefor.

Damages in the sum of not more than $15 per day were stipulated for each and every month that the work was delayed after the expiration

of the time of performance provided by the contract. The canal was to be completed according to plan A on file in the city engineer's office and the appellant, the second party, was to excavate and remove the material, of "whatever name or nature (except solid rock), required for the construction of such canal" included within the dimensions set forth in the plan.

If solid rock were found (and solid rock was defined to be "rock in its original formation and not broken rock or boulders, detached from such formation") the second party was to be compensated therefor at the rate of $1.15 per cubic yard as an extra; but this provision was coupled with the condition:

"That said second party is to excavate and remove the material, of whatever nature or name, for the construction of the said canal without additional compensation, except such solid rock as may be found in layers, if any there be."

An additional provision was to the effect:

"That all excavation will be classed as earth excavation except solid rock, should there be any, and nothing will be allowed for cave-ins, landslides or upheavals beyond the line of excavation occurring before the completion and acceptance of the canal."

It was provided that on or before the 10th day of the month 90 per cent. of the estimate of the previous month's work should be paid by the city to the party of the second part, the remaining 10 per cent. to be withheld until after the completion of the work.

The specifications were made part of the contract and appear in the record. No part of their terms is material for this decision, save that the city reserved therein the right to make alterations in the plans and details of the work when to do so seemed advantageous, and it was—

"to be distinctly understood that any increase or reduction of quantities, resulting from such alterations, is not to be assumed as a basis of a claim against the city for damages for loss of prospective profits."

The work progressed very slowly, and at the expiration of the limit for completion set by the contract, namely, February 10, 1903, about 22 per cent. only of the total amount of work to be done had been accomplished. At the company's request, at that time, for a year's extension of time, the city granted less than 10 months, or until December 1, 1903. By the first of August of the second year about 12 per cent. additional of the total amount of work had been done, wherefore, at that time, about a third only of the entire contract had been completed. The August estimate was not promptly made. There is some dispute in the record whether one was made at all, but no payment was ever made for work done in July, 1903, which was approximately of the value of $4,000 at the contract rate. On the 18th of August, following an investigation of the work in behalf of the city, the canal commission passed a resolution reciting that the Cuyahoga Contracting Company had failed and neglected to progress with the work as provided in its contract and expressing the opinion of the commission that the contractor had not the ability or intention to complete the work within the time agreed upon as extended. The commission therefore

recommended to the city that notice as provided in the contract be given to the company and that the latter satisfy the city "of its ability and intention to carry on said work and complete the same within the time agreed upon." A notice authorized by the council of the city and pursuant to this resolution was served upon the president of the Cuyahoga Contracting Company August 19, 1903, whereupon the company, August 21, 1903, served notice upon the city of its intention to abandon the contract. No effort was made by the company to meet the city's request for information as to the company's intentions or as to the prospect, in its opinion, that it would be able to finish the work by December 1, 1903. The notice of abandonment by the company was the only reply to the city's notice of August 19.

In the work preliminary to the advertising for bids for this improvement the city engineer had made a profile of the proposed excavation, the data for which, as to character of soil and material to be encountered in the excavation, having been obtained by borings. The contract did not make this profile part of its terms nor were either the profile or its representations embodied in the specifications. It appears, however, that one Rosenstock, the representative of the Cuyahoga Contracting Company, upon whose reports to his employer the contract was entered into by the latter, had himself, prior to the letting of the contract, seen the profile and had examined the borings. He also had familiarized himself with the surface indications and topographical peculiarities along the proposed route. In the actual work of excavation, so far as done, it was early discovered by the company that the profile indications were misleading to the point that materials difficult to be excavated existed in substantially greater amounts than appeared upon the profile. After the contract had been signed and the lines staked out, the city, near the northeast end of the excavation, made a change in the route which placed the contractor to some substantial inconvenience in excavating, through its inability to deposit excavated material on one side of the line because of the proximity of a cemetery. These untoward conditions were known to the company long prior to the time when it applied for an extension of time to complete the contract and were not complained of, at least not to the extent of making them grounds supporting the demand for any relief, until after the city notified the company as above stated. It also appeared that other difficulties, the encountering of which perhaps was not fully considered by the company in signing the contract, such as swampy places and overflowed lands and difficult water courses, were either well known to Rosenstock before the contract was signed, or the peculiar hardships they entailed were manifested shortly after the beginning of the work.

The notice served on the city by the company, referred to above, and which was intended to be preliminary to an action to rescind the contract, recited the discovery that the profile was incorrect and that the character of the soil was different from that represented in it to a very material and damaging extent, and that the route had been changed, shifting the line, causing peculiar difficulties. It concluded with these paragraphs:

"For these and other reasons we desire to notify you that it is not our intention to proceed further with the canal. We were induced to enter into the contract by representations as to conditions which we find do not exist, and hereby give notice to you of our intention to take proceedings for a rescission of the contract and for a recovery from the city of the damages arising from such representations.

"In addition the city has at various times violated the provisions of the contract relative to payments to be made to the company. The contract contained an express provision for the making of estimates by the city engineer at stated periods, upon which we were entitled to receive 90 per cent., but this clause has been repeatedly violated by the city, and the last estimate made by the city engineer entirely ignored and no provision whatever made for payment as required by the contract."

Upon the receipt of this notice, the city made other arrangements for the completion of this improvement, the company not offering anything further.

The case is before this court on appeal from the decree of the District Court for the Eastern District of Michigan, dismissing the complaint of the Cuyahoga Contracting Company, complainant, against the city. The issues before the District Court, which tried the case on its merits, were attempted to be made by the appellant in an amended bill of complaint filed March 25, 1908, reciting, among other things, the facts as above set forth and demanding that the city be restrained from attempting to recover from the plaintiff and its sureties the excess expense incurred by the city in completing the job, that the contract between it and the city be declared null and void and that its bond be canceled with release of its sureties, and that an accounting be had between the city and the complainant for the damages and expenditures incurred by the complainant in its attempt to perform the contract.

Consideration of the record of this cause had by this court, and of the arguments of counsel thereon, leads to a conclusion that we should affirm the decree dismissing the bill.

It is insisted that the notice given by the city August 19, 1903, was not authorized by the terms of the contract. Whether it was within the letter of the contract or not, it was certainly within its spirit. Complainant, in its notice August 21, of abandonment, predicates no ground of rescission upon the fact that the city served the notice of two days before. It was not a final and peremptory notice to abandon the work. It rather invited the company to meet the city and disclose what reliable assurances the company could offer that it could comply with the terms of the contract, even within the extension of time granted by the city. There is nothing in this record which, in our judgment, serves to excuse the company from accepting the invitation of the city to counsel together upon the situation. The city had the right to insist that much better progress be made than was then in prospect. It was anxious to have the work completed, and there is nothing to indicate that its attitude was unreasonable.

Doubtless the city clearly saw what was the fact, as admitted by the officers of the company, including the president, who was its executive officer, that the job could not be completed by the company within the extended time. Mr. Pelton, president of the company, himself testified that even with the new equipment which the company contemplated putting on, it would take "six months hard summer working" to com-

plete the job *after* the extended time had expired. Men on the ground occupying superior positions in the company's work gave similar testimony. In other words, in the middle of August, 1903, having been on the job then eighteen months and more than six months beyond the time it was originally contracted should see full completion, the Cuyahoga Contracting Company realized that it could not hope to finish its job without the favor of another extension of time covering practically another working year, or most of the season of 1904. Mr. Pelton, the president, testified that he had obtained the first extension from the city with difficulty, not getting the full time he desired and it is reasonable to assume that when, August 21, 1903, he issued for his company the notice to the city of abandonment, he felt that further like favors from the city were impossible to be secured. That the company was not in position to demand another extension is clear. In March, 1903, after the expiration of the original time for completion, and before an extension was granted, the city had mulcted the company in the sum of $200 on the per diem penalty for nonfulfillment, deducting that sum from the payment for March work. That a failure to complete the work by December 1, 1903, would be followed by the city's insistence on this penalty clause there was little reason to doubt.

All this suggests that the situation must have appeared hopeless to the company after the city's very natural dissatisfaction was manifested by the action of the canal commission and the council. The imposition of penalties for delays inevitable after December 1st meant wiping out more than any possible profits from the completion of the work. We cannot but feel that the company's embarrassment, because of its slow progress, and because of the attitude which the city was assuming, was the motive impelling the notice, which gave as reasons for abandonment facts which had been more available to support such a notice months before than in August. The record shows undoubtedly that prior to the making of the contract the company had full warning of all the probable difficulties in the work actually encountered for which its own default was not responsible, whether in fact Mr. Rosenstock actually apprised his superior of the situation or not. Mr. Pelton, who signed the contract for the company, testified that he relied entirely for all his knowledge of the situation influencing his making the contract upon Mr. Rosenstock, who, it was equally evident from the record, was on the ground in such relationship to the company at Cleveland as to bind it by the knowledge which he acquired. The change in route near the cemetery was under a right specially reserved to the city by a clause in the specifications made part of the contract, and, for all the record informs us otherwise, the company accepted the inconveniences and burdens of the change and worked at the excavation on the new line months before August without in any way then offering the objection that it was being unduly burdened by the change. The inference from the evidence is that the delays to the company incident to the change of route, and to other disagreements of detail or unexpected obstacles or extra work together did not work an extension of time greater than that actually granted by the city, and consequently, if justifiable grounds of complaint, they did not give the company a right to demand a further extension. There was nothing in the law

of Michigan, as it existed when the contract was let, which made the city responsible for the representations of the profile, nor did the contract place that burden upon the city.

The considerations of the foregoing paragraph dispose of the first ground of rescission quoted above. Indeed, all of the causes of dissatisfaction alleged then were old long before August 21, 1903. There remains the charge that the city violated the contract relating to payments. There is no evidence to support this ground as to any payments due prior to August, 1903. In fact the evidence shows that, without exception, the city made payments on the days when the estimates were made, and that, in most cases, the estimates were made within the contract periods. If any dissatisfaction existed on this ground it was not made to appear in evidence. Nor does it appear that the delay of the August estimate for July work to August 19 was deliberate on the part of the city, or that failure to make and pay it contributed to make it impossible for the company to complete the work within the extended time. Assuming that an estimate was made, as the appellant contends, we think that the circumstances justified the city in withholding its payment until the company should make it reasonably plain that it would make such progress thereafter as to give the city reasonable hope that its canal would be completed by December 1, 1903. If the fact was that the company was without ability to perform its contract (and the city's fears of that condition were certainly warranted) the city, because it could justly refuse another extension, was within its rights in refusing to pay any more money. Suppose, for instance, the company, instead of giving its notice of August 21, had first met the city in response to the latter's invitation of August 19, and had there confessed to the city, what Mr. Pelton and others admitted on the stand, that, under the most favorable circumstances the company would need most of the year succeeding December, 1903, to complete the job, how could it be said that the city was under obligation to acquiesce, and to signify its acceptance of the inevitable, for which only the company was responsible, by making payment of the August estimate? Under these circumstances common prudence would suggest withholding the payment and this would have been justified under the contract, as there would have been then a situation entirely within the contract, one when, to quote from that instrument, the company failed to satisfy the city "of its ability to complete the work within the time agreed upon." Such a situation gave the city the right to declare the contract forfeited, and to hold deferred payments as liquidated damages.

This case, in all particulars important for our conclusions, is quite similar to that of Sanitary District v. Ricker et al., 91 Fed. 833, 34 C. C. A. 91, decided by the Circuit Court of Appeals of the Seventh Circuit. We are satisfied that the case before us should be determined as that case was decided. The decree below therefore should be affirmed, but without prejudice to the right of both parties to try out in action at law any or all questions of pecuniary accounting growing out of their contractual relationship, including the claimed liability of the city for extra work, so far as the questions concerned in such accounting are not inconsistent with the conclusions stated in this opinion.

BROWN et al. v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. May 12, 1916.)

No. 2860.

COURTS ⊂=349—PROCEDURE—WITNESSES—COMPETENCY—COMITY.

As the federal courts are courts of an entirely different sovereignty and are wholly independent of the states, a conviction of an infamous crime in the state court rendering a person incompetent to testify in the state court does not render him incompetent to testify in the federal courts any more than it would in the courts of a foreign jurisdiction, for the federal courts, while following the state laws, do not give effect to a conviction by a state court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 925; Dec. Dig. ⊂=349.]

In Error to the District Court of the United States for the Middle District of Tennessee; John E. McCall, Judge.

E. P. Brown and another were convicted of crime, and they bring error. Affirmed.

Lewis Tillman, of Nashville, Tenn., for plaintiffs in error.

Lee Douglas, U. S. Atty., of Nashville, Tenn.

Before WARRINGTON and KNAPPEN, Circuit Judges, and KILLITS, District Judge.

KILLITS, District Judge. Plaintiffs in error, E. P. Brown and J. R. Harrell, were convicted after trial upon an indictment in four counts, three of which charged assault and battery in various forms of allegation upon one Clifford Johnson committed on the grounds pertaining to the post office building at Nashville, Tenn., and over which the United States had exclusive jurisdiction. The fourth count charged that defendant "unlawfully did knowingly and willfully obstruct and retard one Clifford Johnson, * * * a regularly employed driver of a regular mail wagon, * * * while the said Clifford Johnson was then and there engaged in transferring and delivering the United States mail from a mail wagon to the post office of the United States at Nashville aforesaid." The only alleged error presented for the consideration of this court is that predicated upon the admission of the testimony of Johnson himself. It is conceded that Johnson's evidence is indispensable to conviction, and that, if he were not a competent witness, the case must fail.

It appears from the record that in 1905 Johnson was convicted in a state court at Nashville upon an indictment reading as follows:

"The grand jurors for the state of Tennessee duly elected, impaneled, sworn and charged to inquire for the body of the county of Davidson, and state aforesaid, upon their oath aforesaid, present: That Clifford Johnson, of said county heretofore, to wit, on the ——— day of June, 1905, with force of arms, in the county aforesaid, unlawfully, feloniously and violently, did break and enter in the day time the dwelling house of W. M. Frank with the unlawful and felonious intent then and there and therein to commit a felony, to wit, larceny, and did then and there and therein steal, take, carry away one ring of the value of six dollars, the property of W. M. Frank, of said county,

then and there being found, contrary to the form of the statute in such cases made and provided and against the peace and dignity of the state."

Upon his conviction the following judgment was imposed:

"It is therefore considered by the court that defendant for his said offense shall be confined in the state penitentiary for a period of five (5) years, commencing on the day of his delivery to the keeper thereof, subject to the rules and regulations of said institution, that he be rendered infamous, incompetent as a witness in any court of justice in the state, incapable of exercising the election franchise, or of holding any office of honor, profit, or trust in the state."

[1, 2] It is urged in behalf of plaintiffs in error that this record rendered Johnson wholly incompetent as a witness for the government, because of the rule that the competency of witnesses in criminal cases is to be determined by the law of the state in which the federal court is sitting as the state law was when the Judiciary Act of 1789 was passed (Act Sept. 24, 1789, c. 20, 1 Stat. 73). United States v. Hall (D. C.) 53 Fed. 352; United States v. Reid, 12 How. 361, 13 L. Ed. 1023; Logan v. United States, 144 U. S. 263–302, 12 Sup. Ct. 617, 36 L. Ed. 429.

It is conceded in this case that the common law is the rule of decision. North Carolina had adopted the common law prior to the Revolution, and, when the Judiciary Act was passed, the country now comprising the state of Tennessee was a part of North Carolina. By common law petit larceny was a felony, but house-breaking in the daytime was not even a crime. Judgment upon conviction of a felony made the convict infamous, with the result that he was incompetent as a witness until he was relieved from the burden of infamy in some approved way.

A question was raised whether the indictment charged a crime conviction of which rendered the convict infamous at common law, but the government insists upon Johnson's competency upon a broader ground than that of a technical insufficiency of pleading. This is that the testimonial disqualification is operative only within the jurisdiction of the sovereign whose court pronounced the judgment culminating in the conviction of an infamous crime; in other words, that only a judgment upon conviction in a federal court of a crime infamous at common law works incompetency in the federal courts.

Greenleaf (Evidence, § 375) thus speaks of the rule settled in his day, and yet unweakened by criticism:

"We have already remarked, that no person is deemed infamous in law, until he has been legally found guilty of an infamous crime. But the mere verdict of the jury is not sufficient for this purpose; for it may be set aside, or the judgment may be arrested, on motion for that purpose. It is *the judgment*, and that only, which is received as the legal and conclusive evidence of the party's guilt, for the purpose of rendering him incompetent to testify. And it must appear that the judgment was rendered by a court of competent jurisdiction."

This results from the distinction between disqualification arising from deficiencies of mind or maturity or voluntarily assumed, as in coverture or because of views on religious questions, and that imposed by positive law, the latter not being regarded established until a solemn judicial determination is had. Chamberlayne, Modern Law of Evi-

dence, § 3664, and cases cited. Greenleaf further says (Evidence, § 376):

"Whether judgment of an infamous crime, passed by a foreign tribunal, ought to be allowed to affect the competency of the party as a witness in the courts of this country, is a question upon which jurists are not entirely agreed. But the weight of modern opinion seems to be that personal disqualifications not arising from the law of nature but from the positive law of the country, and especially such as are of a penal nature, are strictly territorial, and can not be enforced in any country other than that in which they originate."

This doctrine is supported by reasoning so cogent and conclusive, offered by the Supreme Judicial Court of Massachusetts through Chief Justice Parker (Commonwealth v. Green, 17 Mass. 515, 539–548) that any other seems of little weight. At any rate, it is but the application of the principle, universally adhered to, that the penalties adjudged by one jurisdiction will not be enforced by another. This, as elsewhere, was early the rule in Tennessee (Dickson v. Dickson, 1 Yerg. 110, 24 Am. Dec. 444), and, as a general proposition, is, of course, the rule in federal courts.

The principle that, until federal legislation is had to modify the practice, "the rules of evidence in criminal cases" in the federal courts "are the rules which were in force in the respective states when the Judiciary Act of 1789 was passed," is reasoned out by Chief Justice Taney (12 How. 364, 365, 13 L. Ed. 1023) in this language:

"But neither of these acts make any express provision concerning the mode of conducting the trial after the jury are sworn. They do not prescribe any rule by which it is to be conducted, nor the testimony by which the guilt or innocence of the party is to be determined. Yet, as the courts of the United States were then organized, and clothed with jurisdiction in criminal cases, it is obvious that some certain and established rule upon this subject was necessary to enable the courts to administer the criminal jurisprudence of the United States. And it is equally obvious that it must have been the intention of Congress to refer them to some known and established rule, which was supposed to be so familiar and well understood in the trial by jury that legislation upon the subject would be deemed superfluous. This is necessarily to be implied from what these acts of Congress omit, as well as from what they contain. * * * And the only known rule upon the subject which can be supposed to have been in the minds of the men who framed these acts of Congress, was that which was then in force in the respective states, and which they were accustomed to see in daily and familiar practice in the state courts."

As to states whose territories were not within the boundaries of the Union as they were in 1789, the rule is that the law of the state when it was admitted governs. Logan v. United States, 144 U. S. 263–303, 12 Sup. Ct. 617, 36 L. Ed. 429.

The language above quoted from the decision in Reid's Case carries no stronger suggestion than that a rule of decision, simply, is established; it is not potent to impose upon trial courts an obligation to adopt the results reached by state courts in any specific instance, through the application of the local rule of practice which the local federal court should, in instances before it, make its own. The effect of the doctrine, summarized by Prof. Greenleaf, that it is nothing less than the judgment of conviction making infamy, which is effective to disqualify, part of the penalty, is such that, if we hold that

a court of another sovereignty than that of the tribunal rendering the judgment, must also, ipso facto, regard the convict as disqualified, we are not simply applying a rule of decision but are enforcing a penal judgment.

Federal practice enforces the principle that a judgment of infamy has, at the best, no extraterritorial applicability. In Logan v. United States, supra, it was held that one convicted of perjury in North Carolina, and thereby incompetent as a witness in that state, was not incompetent in the federal court of another state, although therein the common-law rule of incompetency because of conviction for an infamous crime also prevailed when the latter state was admitted to the Union.

In this Logan Case, tried in the Northern district of Texas, two convicts of the crime of perjury were held competent as witnesses notwithstanding the common law in force when Texas was admitted—one, Martin, because to exclude him would be to give extraterritorial effect to a penalty adjudged by the courts of North Carolina; the other, Spear, because (144 U. S. 303, 12 Sup. Ct. 617, 36 L. Ed. 429) his disability had been removed by the pardon of the Governor of Texas, in a court of which state he was convicted. Nothing in this decision militates against the contention of the government in the instant case that the rule of exclusion applies in federal courts to federal convicts only. The point was not before the court. For Spear's competency the court manifestly did not look beyond the fact of his pardon, which, the court had already held (Boyd v. United States, 142 U. S. 450, 12 Sup. Ct. 292, 35 L. Ed. 1077), was sufficient to remove the disability.

As it appears from the above quotation the principle of United States v. Reid was not announced by Chief Justice Taney in language which affects the government's contention, and the question is therefore without adjudication so far as the federal courts are concerned, and turns wholly upon the consideration whether state and federal courts, sitting in the same state, and having the same territorial jurisdiction, are foreign to each other in the sense that the courts of two states are foreign.

The essential distinction between the government of the United States and that of any state, as two independent political identities, has been frequently pointed out in the decisions of the Supreme Court. Fox v. Ohio, 5 How. 432, 12 L. Ed. 213; Moore v. People, 14 How. 17, 14 L. Ed. 306; Slaughter-House Cases, 16 Wall. 36, 21 L. Ed. 394; United States v. Cruikshank, 92 U. S. 542, 23 L. Ed. 588; Ex parte Siebold, 100 U. S. 371, 25 L. Ed. 717. The last exposition of the subject is found in Twining v. New Jersey, 211 U. S. 78, 29 Sup. Ct. 14, 53 L. Ed. 97. The rule arises most frequently, as in cases just cited, where there is an apparent conflict of law between a state and the federal government touching crimes. The absolute separation of the two sovereignties, with independent jurisdictions unburdened with responsibilities one to the other, save as occasionally the paramount authority of the federal power is called into operation, is certainly emphasized by the fact that, upon the same state of facts, a wrongdoer may be called upon to answer to both governments. A

similar line of cases exists asserting the independence of the federal judiciary in its jurisdiction of civil causes of action. We need not cite other than Supreme Court cases, Stanton v. Embry, 93 U. S. 548, 23 L. Ed. 983, Gordon v. Gilfoil, 99 U. S. 168, 25 L. Ed. 383, and Hunt v. New York Cotton Exchange, 205 U. S. 322, 27 Sup. Ct. 529, 51 L. Ed. 821, all to the point that the pendency of a prior suit in a state court is not the ground of abatement of an action on the same state of facts between the same parties in the federal court, or vice versa, the decisions turning on the principle that the two courts are foreign as the creatures of different governments. The language of these decisions leaves no room for the feeling that any interdependence exists between a state and the federal government which affects the identification of either as a sovereignty entirely apart from the other. Whenever a decision seems to bridge this distinction it will be found that its aim and effect is either to adopt a rule of decision, or, without affecting the principle of distinct and independent sovereignties, to harmonize matters of practice with the practice of local state courts as far as possible *under federal legislation.*

The state courts have already begun to assert their independence of federal courts within their own territorial jurisdictions on precisely the point now under consideration by us; that is, it has already been decided that, although the state withholds testimonial capacity from one convicted of an infamous crime in its own court, it will not to that end give effect to a judgment of a local federal court. This was the decision of the Supreme Court of Appeals of Virginia in Samuels v. Commonwealth, 110 Va. 901, 66 S. E. 222, 19 Ann. Cas. 380. In this case, the court held that one offered as a witness who had been adjudged guilty of perjury by a federal court sitting in Virginia was not disqualified thereby as a witness in the state court, although by statute, as well as by common law within Virginia, one convicted of perjury was incompetent to testify, the court holding that very clearly neither the state statute nor the federal statute contemplates imposing or could impose the punishment prescribed by the other and that the courts of neither can take cognizance or punish violations of the statutes of the other, citing In re Loney, 134 U. S. 372, 10 Sup. Ct. 384, 33 L. Ed. 949.

It doubtless has never been thought that a court of one sovereignty within the state might entertain jurisdiction to try an offense against the other sovereignty, but in In re Loney, supra, the distinction was carried further, for there it was held that the courts of a state have no jurisdiction of a complaint for perjury in a contested election case involving a seat in the Congress of the United States, although the false swearing was before a notary public of the state, the court holding that the "power of punishing a witness for testifying falsely in a judicial proceeding belongs peculiarly to the government in whose tribunals that proceeding is had."

The foregoing and other decisions illustrate how consistently federal courts are applying, in various states of fact, the rule of the Supreme Court announced by Justice Johnson in Houston v. Moore, 5 Wheat. 1–69, 5 L. Ed. 19, that:

"In a government formed like ours, where there is a division of sovereignty, and of course, where there is a danger of collision from the near approach of powers to a conflict with each other, it would seem a peculiarly safe and salutary rule, that each government should be left to enforce its own penal laws, in its own tribunals."

In Ex parte Wilson, 114 U. S. 417, 5 Sup. Ct. 935, 29 L. Ed. 89, where the question was whether one imprisoned after conviction upon information was suffering the penalty of an infamous crime and, consequently, under the Fifth Amendment could not have been held to answer without presentment or indictment by a grand jury, the court, discussing the incidents of a conviction for an infamous crime, said (114 U. S. page 423, 5 Sup. Ct. page 938, 29 L. Ed. 89):

"Whether a convict shall be permitted to testify is not governed by a regard to his rights or to his protection, but by the consideration whether the law deems his testimony worthy of credit upon the trial of the rights of others."

The consideration, therefore, whether a federal court should permit any witness to testify is to be referred only to principles interesting that court in its effort to administer justice. It would seem that its freedom in this respect should not be controlled by the judgment of any court other than one within the federal jurisdiction as to any question not governed by established principles or legislative enactment.

Obviously the courts of one state in the Union are regarded as "foreign" to the courts of another, not because of geographical separation, but because they are instrumentalities of independent sovereignties. A District Court of the United States sitting in one state cannot be said to be geographically "foreign" to the state courts of another state for the reason that the sovereignty of which it is a part has geographical extension over the territory of the other state. It is limited, to be sure, to a territorial jurisdiction which may not include the situs of a state court, but it is nevertheless an integral part of a judicial system which extends over the situs of every state court. It is therefore "foreign" to the court of a state beyond its territorial limitations only because its jurisdiction depends upon the question of sovereignty, and it obtains its authority from a sovereign distinct from and independent of that creating the state court. For that reason, for instance in the cases cited above, a federal and a state court of the same state are free, each independent of the other, to punish as an offense against their respective sovereignties, the same act which serves as the predicate of a crime within the definition of the laws of the two sovereignties, respectively, wherefore, technically, at least, the actor may be liable to double punishment.

Therefore, recurring to the case of Logan v. United States, supra, we see no reason whatever to doubt, had the question been raised before it, that the Supreme Court would have ruled that, although Logan was being tried in a Texas federal court, Spear, as a convict of an infamous crime by the judgment of a local state court, was as competent to testify as was Martin, a convict of an infamous crime by the consideration of a court in another state. For the federal court of Texas to have enforced the penalty of Spear's conviction by the state

court of Texas, had the pardon not intervened, in our judgment, would not have been the application of any different principle than would have been employed had it refused Martin's testimony because of his conviction in another state. That the Texas federal court had the same geographical or territorial jurisdiction enjoyed by the state court of Texas brought the former into no closer association with the latter, so far as the question now before this court is concerned, than the federal court of Texas enjoyed with the state court of North Carolina.

It seems to us that, to the doctrine that a judgment of conviction, not mere proof of guilt, is indispensable to disqualification, there is the necessary corollary that the application of the disqualification is left only to the tribunals of the jurisdiction which created it.

The question made by the government in this case is, as we have suggested, one not concluded by specific adjudication; an answer to it favorable to the government's contention comports with the dignity and independence of the federal courts, and is in line with the general principle that courts of one jurisdiction will not enforce the penalties of those of another. The tendency of the courts, wherever possible, is "to enlarge the domain of competency and to submit to the jury for their consideration as to the credibility of the witness those matters which heretofore were ruled sufficient to justify his exclusion." Benson v. United States, 146 U. S. 325, 336–337, 13 Sup. Ct. 60, 64, 36 L. Ed. 991. "This change," says the Supreme Court in this case, "has been wrought partially by legislation and partially by judicial construction. * * * The spirit of this legislation has controlled the decisions of the courts, and steadily, one by one, the merely technical barriers which excluded witnesses from the stand have been removed."

Not simply to follow this tendency, but because the considerations above referred to seem compelling, we conclude that the rule of the Reid Case, announced by Chief Justice Taney, applies only to an instance where the witness tendered is under the conviction of a crime against the United States of that character, which at common law, as established in 1789, rendered infamous one adjudged guilty, and that the rule does not disqualify a witness who is under but the judgment of a state court.

For this reason, without passing on other questions raised, the judgment of the District Court is affirmed, and the petition in error dismissed.

GATES v. COLUMBIA-KNICKERBOCKER TRUST CO. ★

(Circuit Court of Appeals, Ninth Circuit. May 29, 1916.)

No. 2690.

1. STATUTES ⊂=226—CONSTRUCTION—INTERPRETATION.

In construing a statute adopted from another state, the decisions of that state may be considered.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 307; Dec. Dig. ⊂=226.]

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

★Rehearing denied October 9, 1916.

2. ATTORNEY AND CLIENT ⊜175—RIGHTS OF ATTORNEY—"ACTION."

Rev. Laws Nev. § 5376, gives an attorney a lien upon his client's cause of action, or counterclaim, attaching to a decision, or judgment in his client's favor, and the proceeds thereof. In proceedings before the General Land Office in the Department of the Interior, an attorney represented a corporation, which resulted in its obtaining title to 480 acres of land. *Held* that, as the statute refers only to an "action," which is a legal prosecution by a party complainant against a party defendant to obtain the judgment of the court in relation to some rights claimed to be secured or some remedy claimed to be given by law to the party complaining, plaintiff has no lien on such land, particularly as there was not even a formal contest in the Department of the Interior; such proceeding not being an action.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 394–398; Dec. Dig. ⊜175.

For other definitions, see Words and Phrases, First and Second Series, Action.]

Appeal from the District Court of the United States for the District of Nevada; E. S. Farrington, Judge.

Bill in equity by Joseph Gutman and others against the Pacific Reclamation Company, in which R. Woodland Gates filed a bill of intervention, and the Columbia-Knickerbocker Trust Company also intervened and prayed dismissal of bill by Gates. From an order dismissing the bill of intervener Gates, he appeals. Affirmed.

Sweeney & Morehouse and William W. Griffin, all of Carson City, Nev., and Theodore A. Bell, of San Francisco, Cal., for appellant.

Gifford, Hobbs & Beard, of New York City, and Dey, Hoppaugh & Fabian, of Salt Lake City, Utah (A. L. Hoppaugh and Charles C. Dey, both of Salt Lake City, Utah, of counsel), for appellee.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge. In March, 1913, Joseph Gutman and others, creditors, filed a suit against the Pacific Reclamation Company, a Nevada corporation, asking that a receiver be appointed, the property sold, and the proceeds distributed among those entitled thereto. The Pacific Reclamation Company admitted the facts set forth in the bill of complaint and joined in the request for the appointment of a receiver. George M. Bacon was appointed receiver, and duly qualified as such.

In his amended bill of intervention, Gates, the appellant here, alleged, in substance, that between August 18, 1911, and March 1, 1913, he performed services as attorney and counselor at law for the Pacific Reclamation Company at its request in prosecuting certain suits in the General Land Office and the Department of the Interior, in counseling and advising the Reclamation Company, and in attending in and about its business in respect to relinquishments of certain lands, location of lands, and land matters involving hearings before, and conferences with, the Department of the Interior and certain officials; that in some of the land matters adverse decisions had been rendered by the Commissioner of the General Land Office, and appeals were taken to the Secretary of the Interior; and that valuable lands were saved through appellant's efforts. He estimated his services as reasonably worth

$25,000, and alleged that, under and pursuant to paragraph 5376 of the Revised Laws of Nevada (1912), he had a lien in that sum upon and against the 480 acres of certain land owned by the Pacific Reclamation Company, and which became part of its assets by the efforts of appellant; his services having been rendered upon an agreement with the Pacific Reclamation Company to pay a reasonable sum for his services rendered in the Interior Department. His prayer is for a judgment for that amount against the Reclamation Company, and that he be decreed to have a lien on the 480 acres of land.

Intervener alleged that the Pacific Reclamation Company, in December, 1909, by deed of trust, mortgaged all its property in Elko county, Nev., to the Columbia Trust Company, but that when such deed of trust was made the Pacific Reclamation Company did not own certain lands (480 acres) which it later obtained through the efforts of this appellant, and that the claims of the Columbia Trust Company are subsequent to the lien of this appellant in the 480 acres of land just referred to.

The Columbia-Knickerbocker Trust Company, also an intervener below, appellee here, moved to dismiss the bill for lack of equity, and to strike out those special portions wherein a lien was claimed. The court dismissed the bill, and appeal was taken.

[1, 2] Appellant contends that the statute of Nevada (section 5376, Revised Laws of Nevada) gives him a lien. We quote the section:

"The compensation of an attorney and counselor for his services is governed by agreement, express or implied, which is not restrained by law. From the commencement of an action, or the service of an answer containing a counterclaim, the attorney who appears for a party has a lien upon his client's cause of action or counterclaim which attaches to a verdict, report, decision, or judgment in his client's favor and the proceeds thereof in whosever hands they may come, and cannot be affected by any settlement between the parties before or after judgment. There shall be allowed to the prevailing party in any action, or special proceeding in the nature of an action, in the Supreme Court and district courts, his costs and necessary disbursements in the action or special proceeding."

The premise that appellant performed valuable services for the appellee in matters before the General Land Office in the Department of the Interior, which resulted in obtaining title to 480 acres for the corporation, is to be accepted; and, in a general sense, it is correct to say that in the disposition of public lands the Interior Department is a quasi judicial tribunal, and that land officials in their decisions act in a quasi judicial capacity. And we will take it that, through appellant's efforts in the Interior Department, the property of the Reclamation Company was enriched by the addition of the 480 acres specially adverted to by appellant. But, notwithstanding these assumptions, we can find no ground for sustaining appellant's claim of lien. The statute of Nevada, supra, giving to the attorney who appears "a lien upon his client's cause of action or counterclaim which attaches to a verdict, report, decision or judgment in his client's favor, and the proceeds thereof, in whosever hands they may come," etc., presupposes that "an action" has been commenced and that the attorney claiming the lien has appeared. "From the commencement of an action" the attorney who appears has "a lien upon his client's cause of action or

counterclaim." This may be called the conferring language of the statute. If the lien is found to exist, it attaches to "a verdict, report, decision or judgment" in the client's favor, and the proceeds thereof, in whosever hands they may come, and cannot be affected "by any settlement between the parties before or after judgment." This may be described as the reach of the lien. The statute applies in protection of attorneys who appear for parties in actions commenced in the jurisdiction of Nevada. An action means the ordinary legal and formal demand of one's rights from another person, made and insisted on in a court of justice. Black in his Law Dictionary cites the definition of an action given in the Supreme Court of Nevada in Haley v. Eureka County Bank et al., 21 Nev. 127, 26 Pac. 64, 12 L. R. A. 815, where it was said:

"An action is a legal prosecution by a party complainant, against a party defendant, to obtain the judgment of the court in relation to some rights claimed to be secured, or some remedy claimed to be given, by law to the party complaining."

By no fair construction can a proceeding affecting public lands in the Interior Department of the United States, not even a formal contest in that Department, be regarded as an action commenced within the meaning of the Nevada statute. We agree with Judge Farrington, who said:

"The reference is to civil actions only. The statute quoted is a part of the Civil Practice Act, which elsewhere (Rev. Laws, §§ 4943, 4944) states there shall be in this state (Nevada) but one form of civil action for the enforcement or protection of private rights, and the redress or prevention of private wrongs. In such action the party complaining shall be known as the plaintiff, and the adverse party as the defendant."

The statute of Nevada, already quoted, was evidently taken from New York, where prior to 1899 there was the same provision respecting liens of attorneys. Hence we may turn to the decisions in that state to aid in interpretation. In Schreyer v. Deering, 30 App. Div. 602, 52 N. Y. Supp. 203, an attorney claimed a lien on a judgment in condemnation proceedings had before commissioners, but the court held that the lien applied only to causes of action to enforce which an action had been commenced, or to recover which an answer containing a counterclaim had been served. In the recent case of Morey et al. v. Schuster et al., 159 App. Div. 602, 145 N. Y. Supp. 258, it was held that attorneys employed to procure legislation authorizing the commissioners of the land office to convey land to the holder of a certificate of sale without further payment therefor, and to secure the issuance of a patent by the land office, had no lien on the land for their services under chapter 30, section 475, of the Consolidated Laws of 1909, which provides that from the commencement of an action or special proceeding, or the service of an answer containing a counterclaim, an attorney has a lien upon his client's cause of action, claim, or counterclaim, which attaches to a verdict, report, decision, judgment, or final order in his client's favor, and the proceeds thereof. And with respect to the possible claim of a lien for services independently of any statutory provision, the court said:

"It is doubtless true that, independently of any statutory provision, plaintiffs would be entitled to an attorney's retaining lien for the value of such services, provided there was anything belonging to the defendants, which had come to plaintiffs' possession or control in their professional capacity. Matter of Knapp, 85 N. Y. 284; Ward v. Craig, 87 N. Y. 550. But here there is nothing. Neither is their any 'verdict, report, decision, judgment,' or 'final order in the client's favor' or 'proceeds thereof' bringing the claim within the equitable control of the court under the statute. It is only, as the statute provides, 'from the commencement of an action or special proceeding, or the service of an answer containing a counterclaim,' that the statutory lien of an attorney attaches. These services did not, and in the nature of things could not, involve the expressed prerequisite to such a lien of either the commencement of an action or special proceeding or the service of an answer containing a counterclaim. It is true that these services in completing and perfecting defendants' title to the premises were performed while the ejectment action was still in its final issue undetermined. But these services were to an end distinct and separate from the conduct of the ejectment action, the result of which was in no way dependent upon their success or failure."

In Goodrich v. McDonald et al., 112 N. Y. 162, 19 N. E. 651, decided by the Court of Appeals of New York in 1889, when the statute of New York was like the statute of Nevada, the court held that attorneys had two kinds of liens peculiar to them in their relations with their clients:

"One is a lien which an attorney has upon all the papers of his client in his possession, by virtue of which he may retain all such papers until his claim for services has been discharged. That in the books is called a 'retaining lien.' An attorney also has a lien upon the fund, or judgment which he has recovered, for his compensation as attorney in recovering the fund or judgment, and that is denominated a 'charging lien.'"

Judge Earl, for the court, reviews the English and earlier American decisions, and writes of the peculiarity of an attorney's lien, saying, however, that after a careful search they could not find that an attorney could enforce his lien upon a judgment for his services by an equitable action, or where he has been permitted to follow the proceeds of a judgment after payment of them to his client.

"His lien," said the court, "is upon the judgment, and the courts will enforce that through the control it has of the judgment and its own records, and by means of its own process, which may be employed to enforce the judgment. But after the money recovered has been paid to his client he has no lien upon that, and much less a lien upon property purchased with that money, and transferred to another. After such payment, unless he has protected his lien by notice to the judgment debtor, his lien is forever gone, and he must look to his client alone for his compensation."

Under the rule of the New York cases, when by acquiescence of the attorney the money recovered has been paid to the client, or the client has received property in satisfaction of the judgment, the attorney cannot enforce his lien against such money or property, but must look to the client alone for his compensation. We conclude that there is no statutory lien; nor does appellant make a showing from which it is to be inferred that it was the purpose of the parties interested to create a lien of any kind upon the 480 acres involved in the proceedings before the Interior Department.

Central Railroad, etc., Co. v. Pettus, 113 U. S. 116, 5 Sup. Ct. 387, 28 L. Ed. 915, cited by the appellant, does not conflict with the doc-

trine of the New York decisions, for the Supreme Court says that the attorney's lien there prayed for was given by the law of Alabama, by which the question was determined. We have examined the other cases cited by the appellant and find nothing to justify a departure from the rule laid down by the District Court.

The order appealed from is affirmed.

AMERICAN BONDING CO. OF BALTIMORE et al. v. UNITED STATES, to Use of FRANCINI et al.

(Circuit Court of Appeals, Third Circuit. June 16, 1916.)

No. 2077.

1. UNITED STATES ⟸67(3)—BONDS OF CONTRACTORS—ACTIONS—"FINAL SETTLEMENT."

Under Act Aug. 13, 1894, c. 280, 28 Stat. 278, as amended by Act Feb. 24, 1905, c. 778, 33 Stat. 811 (Comp. St. 1913, § 6923), requiring government contractors to give bonds to pay all persons supplying labor or material, and allowing the government alone to sue during the first six months after final settlement, and authorizing suits thereafter in the name of the government for the use of materialmen and laborers, the final settlement may be accepted as the date on which the Supervising Architect of the Treasury recommended settlement which was made, and not as the date of payment or the actual date that the settlement recommended was approved by the Secretary of the Treasury, this being particularly so where contractors and others were informed that the date on which the recommendation was made was the date of settlement.

[Ed. Note.—For other cases, see United States, Cent. Dig. § 50; Dec. Dig. ⟸67(3).

For other definitions, see Words and Phrases, First and Second Series, Final Settlement.]

2. PRINCIPAL AND SURETY ⟸143—ACTIONS—DEFENSES AVAILABLE.

A surety may usually set up any defense of which his principal could take advantage.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. § 392; Dec. Dig. ⟸143.]

3. PRINCIPAL AND SURETY ⟸99—RIGHTS OF SURETY—COMMERCIAL SURETY.

Where the measure of a surety's liability is fixed, any change will, as to an individual surety, relieve from liability; but the rule is otherwise as to a commercial surety, who must show injury by the change to be relieved.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 158–161; Dec. Dig. ⟸99.]

4. PRINCIPAL AND SURETY ⟸97—DEFENSES—CHANGE OF LIABILITY.

Defendant became surety on the bond of a federal contractor, which was conditioned that the contractor should pay claims of laborers and materialmen. The contract with the subcontractor for marble work thereafter entered into provided that the subcontractor should receive partial payments according to the marble furnished, as the principal contractor received partial payments from the government. Instead the principal contractor gave notes to the subcontractor, which inclosed and discounted them and also made cash payments nearly equaling the amounts due under the contract. *Held* that, though the principal contractor refused to carry out his contract, such mode of payment injured the surety, because

casting a greater burden on the surety, by creating a contingent liability on the notes, and depriving it of the benefit of partial payments.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 146–168; Dec. Dig. ⊂⊃97.]

In Error to the District Court of the United States for the Middle District of Pennsylvania; Chas. B. Witmer, District Judge.

Action by the United States, for the use of Cæsar Francini, the Pennsylvania Marble & Granite Company, and others, against the American Bonding Company of Baltimore and others. There was a judgment for use plaintiffs, and defendants bring error. Judgment for all plaintiffs affirmed, save as to the Pennsylvania Marble & Granite Company, and reversed and remanded as to it.

F. B. Bracken, of Philadelphia, Pa. (Welles & Torrey, of Scranton, Pa., of counsel), for plaintiffs in error.

R. Stuart Smith, of Philadelphia, Pa. (O'Brien & Kelly, of Scranton, Pa., and Morgan, Lewis & Bockius, of Philadelphia, Pa., of counsel), for defendants in error.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

McPHERSON, Circuit Judge. [1] In October, 1910, Mark P. Wells contracted with the United States to build a post office at York, Pa., and gave the bond required by the act of 1905, conditioned, inter alia, to pay all persons supplying labor or material. The building was finished and accepted, a settlement was made with Wells, and the balance due him was paid over. But, as several subcontractors were still unpaid, one of them brought the present suit against Wells and his surety on February 4, 1914, and others intervened soon afterward. This writ is taken by the surety only.

The first question to be decided is whether the suit was premature; i. e., whether it was brought before the six months had expired within the United States alone has the right to sue. U. S. v. McCord, 233 U. S. 157, 34 Sup. Ct. 550, 58 L. Ed. 893; Stitzer v. U. S. (C. C. A. 3d) 182 Fed. 513, 105 C. C. A. 51. On this point, the facts are as follows:

On August 2, 1913, the Supervising Architect of the Treasury addressed a letter to the Secretary recommending a settlement with Wells upon certain terms, and this settlement, slightly changed, was approved by the Assistant Secretary, who appended the following memorandum without date:

"Approved and damages charged in part as recommended.
"By direction of the Secretary:
"Sherman Allen, Assistant Secretary."

The undisputed evidence shows that this memorandum was not signed before August 9, and that the balance thus found due was not paid before August 16. Now, if this were all, it might be argued with some force that August 9 was the earliest date assignable for the "settlement," and therefore that the action was brought several days too

soon. But other evidence leads to the opposite conclusion. On the whole case it appears that (since September 12, 1912, at least) the Treasury "treats as the date of final settlement mentioned in said acts" (of 1894 and 1905) "the date on which the Department approves the basis of settlement under such contract recommended by the Supervising Architect, and orders payment accordingly." This language is contained in Department Circular No. 45, bearing the date just mentioned, and this circular was sent to some, perhaps to all, of the subcontractors. Moreover, it was proved that, when several of these contractors asked the Department when settlement had been made with Wells, the Treasury replied, in December, 1913, or January, 1914, that "final settlement under the contract referred to above was authorized August 2, 1913." It was also shown that the following official indorsements appeared upon the contract: "Final payment authorized Aug. 2/13," and "Guarantee expires 8/2/15." The latter indorsement refers to a clause in the specifications guaranteeing certain work for a period of two years. No suit has been brought by the government. Clearly, therefore, the Department adopted August 2, 1913, as the date of final settlement, and so informed the subcontractors—among them, the firm by whom the suit was begun on February 4.

At the time of the trial the courts were not in agreement in their answers to the question, What constitutes a "settlement" between a contractor and the government? But since then the question has been answered definitely in Illinois Surety Company v. United States, for use of Peeler (decided Feb. 21, 1916) 240 U. S. 214, 36 Sup. Ct. 321, 60 L. Ed. 609. As that case has not yet been regularly reported, we quote from it freely. There the suit was brought on March 4, 1913. At the trial it appeared that on August 21, 1912, the Treasury Department had stated and determined what balance was due the contractor, although the money had not been paid until September 11. The surety contended that the suit was premature, because six months had not elapsed since the date of payment. But the Supreme Court held that August 21 was to be taken as the date of final settlement, and in the course of the discussion used the following language:

"It was evidently the purpose of the act of 1905 to remedy the defect in the act of 1894 by assuring to the United States adequate opportunity to enforce its demand against the contractor's surety, and priority with respect to such demand. * * * With this object in view—to protect the priority of the United States, and at the same time to give a remedy to materialmen and laborers on the contractor's bond and a reasonable time to prosecute it (A. Bryant Co. v. N. Y. Steamfitting Co., 235 U. S. 327, 337 [35 Sup. Ct. 108, 59 L. Ed. 253])—it was natural that the time allowed exclusively for action by the government should begin to run when the contract had been completed, and the government, in its final adjustment and settlement according to established administrative methods, had determined what amount, if any, was due. Then the government would have ascertained the amount of its claim, if it had one, and could bring suit, if it desired. As such determinations are regularly made in the course of administration, nothing would seem to be gained by postponing the date, from which to reckon the six months, to the time of payment. Indeed, if an amount were found to be due from the contractor, and he was insolvent, there might be no payment; and, if payment were essential, there would be no date from which the time for the bringing of the creditors' action could be computed.

"The pivotal words are not 'final payment,' but 'final settlement,' and, in view of the significance of the latter term in administrative practice, it is hardly likely that it would have been used had it been intended to denote payment [citing cases]. The word 'settlement,' in connection with public transactions and accounts, has been used from the beginning to describe administrative determination of the amount due [referring to numerous statutes upon this subject]. * * *

"We should not say, of course, that instances may not be found in which the word 'settlement' has been used in acts of Congress in other senses, or in the sense of 'payment.' But it is apparent that the word 'settlement,' in connection with public contracts and accounts, which are the subject of prescribed scrutiny for the purpose of ascertaining the rights and obligations of the United States, has a well-defined meaning as denoting the appropriate administrative determination with respect to the amount due. We think that the words 'final settlement' in the act of 1905 had reference to the time of this determination, when, so far as the government was concerned, the amount which it was finally bound to pay or entitled to receive was fixed administratively by the proper authority. It is manifestly of the utmost importance that there should be no uncertainty in the time from which the six months period runs. The time of the final administrative determination of the amount due is a definite time, fixed by public record and readily ascertained. As an administrative matter, it does not depend upon the consent or agreement of the other party to the contract or account. The authority to make it may not be suspended, or held in abeyance, by refusal to agree. Whether the amount so fixed is due, in law and fact, undoubtedly remains a question to be adjudicated, if properly raised in judicial proceedings, but this does not affect the running of the time for bringing action under the statutory provision.

"In the present case, the construction of the building was in charge of the Secretary of the Treasury and under the general supervision of the Supervising Architect. The Secretary of the Treasury was authorized to remit the whole or any part of the stipulated liquidated damages as in his discretion might be just and equitable. 32 Stat. 326 [Comp. St. 1913, § 6922]. On August 21, 1912, the Supervising Architect, having received the certificate of the chief of the technical division of the office that all work embraced in the contract had been satisfactorily completed, made his statement of the amount finally due, recommending that only the actual damage (as stated) be charged against the contractor, and that the proper voucher should be issued in favor of the contractor for the balance, to wit, $3,999.01. And on the same date this recommendation was approved and actual damages charged accordingly by direction of the Secretary of the Treasury. This, in our judgment, was the 'final settlement' of the contract within the meaning of the act. We understand that the administrative construction of the act has been to the same effect. The regulation of the Treasury Department, as it appears from its circular issued for the information of persons interested in claims for material and labor supplied in the prosecution of work on buildings under the control of that Department (Dept. Circ. No. 45, Sept. 12, 1912), is as follows: 'The Department treats as the date of final settlement mentioned in said acts' (referring to the acts of 1894 and 1905, supra) 'the date on which the Department approves the basis of settlement under such contract recommended by the Supervising Architect, and orders payment accordingly.'"

The precise question now before us is whether the Department should be held to the date on which it actually stated the terms of "settlement," or whether it might adopt the earlier date on which the settlement was recommended by the proper official. We see no sufficient ground for confining the government to the later day. If, for reasons of convenience or for any other administrative reason, the Department sees proper to adopt the date of recommendation—and especially if it furnish that date to others, who act upon the information as true—we perceive no principle that calls upon the court to set the Department's action aside. On the contrary, we see no objection

to allowing the government a discretion in this matter. The essential thing is that some date shall be fixed, so as to do away with the need of further inquiry, and to make it easy to ascertain merely from the Department's record just when the six months period will expire. Unless adverse rights should require the date of actual signing to be ascertained, we think the Department's own choice may safely be accepted as a final decision of the question. It is not irrelevant to observe that, unless adverse rights be involved, the formal date of a deed or a mortgage is continually accepted as the time when the instrument takes effect, in spite of the fact that a later date is in truth the time when the instrument was actually executed.

The District Court was right in holding that the suit had not been brought too soon.

[2-4] 2. The only other subject that needs consideration is the claim of the Pennsylvania Marble & Granite Company for a balance of $31,200.60, on which a verdict and judgment of $26.200 have been rendered. The company agreed to deliver the marble at York for $75,000, to be paid as follows:

"When payments are received by the said M. P. Wells, proportional amount of same to be paid to said Pennsylvania Marble & Granite Company in proportion to the amount of their work done, reserving therefrom 20 per cent. until the final payment shall be made to said M. P. Wells by said United States of America. Said final payment, with any addition thereto or abatement therefrom in manner herein provided, will be paid to the said Pennsylvania Marble & Granite Company, their executors, administrators, or assigns, upon a full compliance with this contract," etc.

These terms were not observed, but instead thereof the Marble Company from an early date in the transaction agreed to another method, accepted numerous notes from Wells for such amounts as were agreed upon from time to time—these amounts differing from the sums that would have been due under the paragraph just quoted—and discounted the notes at several banks. These notes were often renewed, the extensions sometimes being as much as a year, and one of them at least continuing after Wells had finished his contract and had made final settlement thereunder. Money also—nearly $44,000—was paid by Wells at irregular intervals, and these payments (except $4,000, and certain money paid by him for freight) were applied upon the notes in bank. At the time of trial, the banks (who were innocent holders) still held unpaid notes to a larger amount than the balance claimed by the Marble Company. There had been a good deal of delay in finishing the marble work, and the Bonding Company, claiming that the delay was chargeable to the Marble Company, set off the damages thus suffered by Wells against the balance sued for. The Bonding Company also defended on the ground that the notes given by Wells were accepted as payments by the Marble Company, and asserted still further that these note transactions (whether they were payments or not) so changed the agreement between Wells and the Marble Company as to relieve the Bonding Company from liability.

The verdict has decided that the notes were not given and accepted as payment; and has also decided that the Marble Company was liable to some extent for the delay—an allowance of $5,000 being

made on this account. Concerning these two matters, no dispute now exists. The questions still open are: (a) Whether the note transactions altered the agreement between Wells and the Marble Company to the Bonding Company's prejudice; and (b) to what extent, if at all, the fact that notes are outstanding in the hands of innocent holders should have prevented the Marble Company's recovery. The first of these questions is raised by the Bonding Company in its own right; and the second is raised by the company in the right of Wells, on the ground that a surety may usually set up any defense of which his principal may take advantage.

(a) Was the contract materially changed without the Bonding Company's consent, and was the company prejudiced thereby? The situation of a surety under the act of 1905 has been discussed in Guaranty Co. v. Brick Co., 191 U. S. 416, 24 Sup. Ct. 142, 48 L. Ed. 242. It usually happens—as it happened in the case before us—that the bond is given before the principal contractor agrees with his subcontractors, and therefore before the surety can know the terms of the subcontracts; but, since the surety "deliberately contracts for an uncertain liability, he ought not to complain when that uncertainty becomes certain," and he is in no position to object that these terms are of one kind rather than another, at least if they be usual and not unreasonable. Assuming their reasonableness, however, it is certainly true that, after the terms have been agreed upon, the measure of the surety's liability is thereby fixed, and, in the case of an individual surety, a material change without his consent will relieve him from liability. This rule is familiar, but of recent years the courts have qualified its application to companies that make a business of guaranty insurance. We need not stop to state the reasons for this qualification; we take note of the fact that such companies are not relieved by such a change in the contract as would relieve an individual surety, unless the change has done them harm. Atlantic Trust & Deposit Co. v. Laurinburg (C. C. A. 4th) 163 Fed. 691, 90 C. C. A. 274; Fidelity Co. v. United States (C. C. A. 3d) 178 Fed. 692, 102 C. C. A. 192; Pittsburgh-Buffalo Co. v. American Co. (C. C. A. 3d) 219 Fed. 826, 135 C. C. A. 488; U. S. v. Lynch (D. C.) 192 Fed. 364. That the terms of payment here were materially changed is beyond dispute. Indeed, it appeared without contradiction that they were not observed at all. The paragraph quoted from the subcontract contemplates that, when Wells should receive payments from the United States (these were regularly made and were based upon monthly estimates by the engineer in charge of the work), he should pay the Marble Company a proportional amount of the money so received, reserving 20 per cent. until the government should make final payment. The stone began to arrive in March or April, 1911, and early in June the Marble Company would have been entitled to receive about $2,400 in cash. Instead, it took and discounted a note of $9,050. By the middle of September the company had received (and discounted) notes for nearly $25,000 and $3,000 in cash, and had credited Wells with about $1,250 additional for freight paid by him. At this time, however, he had received from the United States more than $20,000 on account of the

marble work, and if the terms of the subcontract had been carried out he ought to have paid to the Marble Company $16,000 of that sum, instead of the $4,250 that had actually been paid. And this is merely an illustration of the way in which the transaction was carried on. Other illustrations are these: In the middle of January, 1912, the company had furnished about $38,000 worth of marble, but at that time Wells had given notes for about $28,500, had paid $17,700 in cash, and had paid about $2,250 for freight. In the middle of May the marble had run up to about $49,000, but in notes, cash, and advances for freights the company had received more than $65,600. And in August, 1912 (a year before final payment), when the marble amounted to $55,400, the notes, $37,500, the cash, about $34,000, and the advances for freight, about $3,200, aggregated nearly $75,000, almost the full amount that Wells had agreed to pay.

We need scarcely discuss the proposition that such a course of dealing materially changed the terms of payment originally agreed upon and guaranteed. These terms were not observed at all, and it is not sufficient to reply that Wells was hampered by insufficient capital, and by the fact that he was carrying on other contracts at the same time and was compelled to use the money for other purposes. Neither is the reply sufficient that the Marble Company could not induce Wells to pay in accordance with the subcontract, and was therefore obliged to accept the notes and such money as it could get, because this was the best way out of the difficulty. The company certainly owed some duty to the surety. It was not obliged to go on with a contract that Wells from the first was refusing to carry out, and if it chose to do so, and to take its chance of getting out whole, it must stand by the risk it deliberately undertook. We do not know whether the Bonding Company knew the terms of the agreement between Wells and the Marble Company; but in any event it does not appear to have had knowledge of what the parties to the agreement were actually doing, and it had a clear right to rest on the assumption that (whatever the terms of payment might be under the subcontract) they would be lived up to without material change, and without injury to itself. In brief, a corporate surety under the act of 1905 is much like the signer of a blank check. Undoubtedly such a man takes a risk; if a larger sum should be inserted than he intended, he must usually accept the situation; but, after the blank has been filled, his liability is fixed, and is not subject to injurious change thereafter.

Was the Bonding Company injured by the complete disregard of the contract terms? This, also, is beyond dispute. One of a subcontractor's safeguards is that he shall receive his due proportion of the contract price while the work is going on, and while payments are being made to the principal contractor; and therefore such proportional payments safeguard the surety also—a protection that is removed, or is at least endangered, if these payments be omitted or be unreasonably deferred. If the terms of this subcontract had been observed, the Marble Company would have been paid 80 per cent in cash as the work went on, and, even if the retained 20 per cent. had not been paid at the end, the loss of the Surety Company would have been no larger

than this percentage. In fact, however, it is confronted now with a judgment for $26,000, and with a contingent liability, which may or may not become an actual liability, of more than $30,000 in addition. For, of course, since the Marble Company has indorsed the notes still outstanding, it may be obliged to take them up; if it is so obliged, and if it does not or cannot recover from Wells (who, as we understand, is insolvent), its claim against the Bonding Company will by so much be increased. In a word, the situation is this: Both elements are present that are necessary to relieve a corporate surety, namely, a material change of its contract without consent and a resulting injury therefrom. As there was no dispute upon either of these subjects, the trial judge should have directed a verdict in favor of the Bonding Company.

If this conclusion be correct, we need not consider question (b) stated above.

As far as this writ of error affects the claims of Cæsar Francini, Pisani Bros., Voska, Foelsch & Sidlo, Incorporated, and the Atchison Revolving Door Company, the judgments in their favor are affirmed; but the judgment in favor of the Pennsylvania Marble & Granite Company is reversed, and a new trial is awarded.

CHAUTAUQUA INSTITUTION v. ZIMMERMAN et al.

(Circuit Court of Appeals, Sixth Circuit. May 12, 1916.)

No. 2753.

1. APPEAL AND ERROR ⟸1010(1)—REVIEW—ACTION TRIED TO COURT.
Where an action at law is by stipulation tried to the court without a jury, under the provisions of Rev. St. §§ 649, 700 (Comp. St. 1913, §§ 1587, 1668), the findings of fact made by the court are not reviewable by an appellate court, if there is any competent evidence on which they could have been made.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979–3981; Dec. Dig. ⟸1010(1).]

2. APPEAL AND ERROR ⟸977(1)—REVIEW—RULING ON MOTION FOR NEW TRIAL.
In the federal courts, the ruling on a motion for new trial is not reviewable.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3860; Dec. Dig. ⟸977(1).]

3. EVIDENCE ⟸498½—OPINION EVIDENCE—GROUNDS FOR ADMISSION.
Admission of the opinion of a witness, who was in a position to form an intelligent estimate as to the proportion of the total number of subscriptions to a magazine in a given year which had been secured by plaintiff and defendant, respectively, *held* within the discretion of the court, where it was practically impossible to ascertain the precise number secured by each.
[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2290, 2291; Dec. Dig. ⟸498½.]

4. SET-OFF AND COUNTERCLAIM ⟸29(1)—BREACH OF CONTRACT—RIGHT TO RECOVER FOR PART PERFORMANCE.
By a contract denominated a lease, plaintiff turned over to defendants for a term of years the publication of a magazine. The contract pro-

vided that, in case the property should revert to plaintiff, it should pay to defendants a sum based on the number of subscriptions obtained by defendants during the preceding year. After a number of years defendants refused to further perform the contract, and the property and business were taken over by plaintiff. *Held*, in an action by plaintiff to recover for breach of the contract, in which it was awarded the damages claimed, that defendants were entitled to recover, by way of counterclaim, the sum stipulated in the contract for subscriptions.

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Cent. Dig. § 49; Dec. Dig. ⊂⊃29(1).]

In Error to the District Court of the United States for the Western Division of the Southern District of Ohio; John E. Sater, Judge.

Action at law by the Chautauqua Institution against John L. Zimmerman, John M. Good, and the Popular Education Publishing Company. From the judgment, plaintiff brings error. Affirmed.

M. L. Buchwalter, of Cincinnati, Ohio, for plaintiff in error.

J. W. Keifer and J. L. Zimmerman, both of Springfield, Ohio, for defendants in error.

Before KNAPPEN and DENISON, Circuit Judges, and EVANS, District Judge.

EVANS, District Judge. The plaintiff, on May 9, 1910, instituted this action in the Circuit Court of the United States for the Southern District of Ohio to recover $12,224.75 damages alleged to have been sustained by it from divers breaches by the defendants of the stipulations of a contract in writing entered into on April 24, 1902, between the plaintiff (called therein the first party) and the Floral Publishing Company (called the second party), and of other agreements which supplemented and enlarged it. So far as they are material to the question before us, the provisions of the first contract are as follows:

"First. That said first party does hereby lease to the second party the exclusive right to print and publish the official monthly magazine of said first party, now known as the Chautauquan Magazine, beginning with the October number, 1902. * * *

"Second. That the term of this lease shall be ten (10) years from the date on which full possession and enjoyment, by said second party, of said leased property shall begin. * * *

"Third. That the bona fide circulation of the magazine shall be the number of copies sold or subscribed for by responsible persons, and this circulation shall be taken and held to be, at all times during the life of this lease, as the unit of value in calculating and determining all rentals and reversionary interests hereunder. The basis of such unit of value shall be twenty-five thousand ($25,000) dollars for each ten thousand (10,000) such bona fide circulation, and pro rata for all circulation above or below said ten thousand. There shall be no rental whatever paid by said second party to said first party for the first five years of the original term hereof, except as transportation clause in article 10 may be considered as such. For the second five years of the original term hereof, said second party shall pay said first party in full of all rentals hereunder, in addition to the transportation referred to in article 10 hereof, such sum of money annually as shall equal four (4) per cent. of the value of the average monthly circulation for the twelve months immediately preceding the date of settlement hereinafter provided for, furnished by said first party, or said magazine, in such rental year, the said value being ascertained as above provided. And that, for each year of this lease beyond said original term of ten (10) years, said second party shall pay said first party, in full of all rentals for such renewal term of this lease in addi-

tion to the transportation aforesaid, such sum of money annually as shall equal six (6) per cent. of said value calculated and determined as aforesaid. That all subscriptions mailed to and received by the general offices of said first party shall be credited to it and all subscriptions mailed to and received by said second party shall be credited to said second party. Said second party shall enter all subscriptions, secured by said first party, on the printed mailing list of said magazine with some distinguishing mark attached and give said first party a reasonable time in which to compare the printed proof of such list (which shall be furnished to said first party by said second party) with the original orders of such subscriptions, to the end that said first party may learn that due credit has been given to it for such subscriptions.

* * * * * * * * * *

"Twelfth. That in case the rights and property leased hereunder should ever revert to said first party, said first party shall pay said second party the sum of twenty-five thousand ($25,000) dollars for each ten thousand (10,000) average monthly circulation secured by said second party for the preceding twelve months, and in the event the total number of such average circulation shall be greater or less than ten thousand (10,000), then said first party shall pay said second party such sum as shall bear the same proportion to said sum of twenty-five thousand ($25,000) dollars as the number of said subscriptions shall bear to ten thousand."

Under date of November 16, 1903, the parties to that contract entered into another agreement whereby John L. Zimmerman and John M. Good took the place of the Floral Publishing Company in the lease. After reciting that it was the desire of all the parties to make the substitution the Floral Publishing Company, with plaintiff's consent, assigned to Zimmerman and Good all its rights in the original contract, and Zimmerman and Good covenanted with plaintiff to keep and perform all the covenants, undertakings, and agreements of the Floral Publishing Company specified therein.

On January 20, 1904, the plaintiff and John L. Zimmerman and John M. Good made a further agreement, but no part of it appears to have any bearing upon the questions before us, except those which are precisely similar to those to be copied from the contract next to be mentioned.

On October 15, 1904, the plaintiff and the Popular Education Publishing Company, John M. Good, and John L. Zimmerman entered into the final agreement of the series, and the relevant parts of that agreement are those which follow, viz.:

"The parties of the second part further agree that they will continue to pay one-half of the salary ($1,000.00 per annum) to N. O. Wilhelm, or his successor, at Chautauqua, New York, as has heretofore been done by them, and that in return for the party of the first part paying the other one-half of the salary ($1,000.00 per annum) during the term of this instrument, said Wilhelm, or his successor, is to be allowed to conduct the extension department of said first party during that time.

* * * * * * * * * *

"It is mutually agreed by and between the parties hereto that the original lease of 1902, now operating between them, shall be in and continue in effect, except where it may be superseded for the time being by this instrument, and in such cases this instrument during this time is to be substituted for the original lease during its term."

It is alleged by the plaintiff that the regular subscribers to the Chautauquan Magazine in the latter part of 1905 and the beginning of the year 1906 were about 8,000, some of which were received under

and by the name of the Chautauquan Press, and in great part commenced with the issue of September, 1905, and continued for one year thereafter, and that some of these subscriptions were received by the plaintiff and turned over to the defendants and the others were received by the defendants. It is further alleged that on or about the 20th of December, 1905, the defendants notified the plaintiff that they would not longer furnish nor issue the Chautauquan Magazine under and pursuant to the terms and provisions of their several agreements, but would decline to carry out the said agreements except to the extent of winding up the business, and that defendants did not either by themselves or by any other means or person, or corporation, publish or continue to publish the Chautauquan Magazine after the issue in January, 1906, but refused and declined to do so.

It is unnecessary to state in more detail the allegations upon which the plaintiff in its petition based its right to recover, because the defendants admit practically all of those allegations and the court's judgment for the full amount claimed was not excepted to, nor is any complaint now made of it.

The defendants in their answer allege that by virtue of the provisions of the four contracts referred to they succeeded to all the rights of the Floral Publishing Company therein, and that immediately following the issue of the Chautauquan Magazine for January, 1906, the average monthly circulation of said magazine and its accompanying publications secured by the defendants or any of them or by plaintiff for the preceding year then next was 8,000.

They further claim that under the provisions of article 12 all of the leased property, including the magazine and other publications and said monthly circulation, reverted to the plaintiff as of January 1, 1906, that plaintiff took possession thereof, and that ever since that time, plaintiff has claimed and exercised and continues to claim and exercise full and exclusive ownership thereof, and is and has been ever since in full and complete enjoyment of same. Defendants also assert and claim that by reason of these facts and under the stipulations of article 12 referred to plaintiff became indebted to the defendants in the sum of $20,000 by reason of the reverter to it of the said property, and accordingly they plead this indebtedness as a counterclaim against plaintiff and demand judgment therefor.

Pursuant to sections 649 and 700 of the Revised Statutes the parties filed a stipulation in writing agreeing to submit the case to the judgment of the court without a jury—a jury being expressly waived. The District Court (which, by operation of law, had succeeded to the jurisdiction of the Circuit Court), by its judgment allowed the plaintiff's claim in full with interest up to the date of judgment, amounting to $17,668.82. It allowed the defendants upon their counterclaim the sum of $14,252 with interest to the date of the judgment, the amount being $21,073.95, with the result that it rendered judgment in favor of the defendants for the difference between the two amounts, namely, $3,405.13, with interest thereon from the date of the judgment and costs.

While, as we have seen, the defendants do not complain of the court's

judgment upon the plaintiff's cause of action, the plaintiff took exceptions to the allowance of defendants' counterclaim and tendered its bill of exceptions, in which was also embraced the evidence heard and various exceptions to the court's rulings thereon during the trial. This bill of exceptions was allowed by the court, and the plaintiff brought the case here by writ of error.

1. Before the hearing on the merits, the defendants moved the court to strike out the bill of exceptions, and moved also to strike out certain separate parts thereof. The latter motion, if sustained, would have emasculated the bill to an extent equivalent to striking out the entire bill. Both motions were argued and considered, and we have concluded that they should be overruled, though they have become so far immaterial as to require no particular statement of our reasons for overruling them, except that they are similar to those indicated in the opinions of this court in Camden Iron Works v. Sater, 223 Fed. 611, 139 C. C. A. 157, and Edwards v. La Dow, 230 Fed. 378, 144 C. C. A. 520, decided March 7, 1916.

[1] 2. The court below made very full findings of fact, and with great pains and elaboration stated in its opinion the grounds of its judgment thereon. In its assignment of errors the plaintiff specifies 26 rulings of the court which it claims were erroneous. We must first examine the assignments of error in the light of sections 649 and 700 of the Revised Statutes and a great number of cases which have construed them. The Supreme Court said in Dooley v. Pease, 180 U. S. 126, 131, 132, 21 Sup. Ct. 329, 331 (45 L. Ed. 457) that:

"Where a case is tried by the court, a jury having been waived, its findings upon questions of fact are conclusive in the courts of review, it matters not how convincing the argument that upon the evidence the findings should have been different. Stanley v. Supervisors, 121 U. S. 547 [7 Sup. Ct. 1234, 30 L. Ed. 1000].

"Errors alleged in the findings of the court are not subject to revision by the Circuit Court of Appeals, or by this court, if there was any evidence upon which such findings could be made. Hathaway v. National Bank, 134 U. S. 498 [10 Sup. Ct. 608, 33 L. Ed. 1004]; St. Louis v. Rutz, 138 U. S. 241 [11 Sup. Ct. 337, 34 L. Ed. 941]; Runkle v. Burnham, 153 U. S. 225 [14 Sup. Ct. 837, 38 L. Ed. 694]."

This language refers specifically to section 649, but many cases hold that under section 700 only questions of law decided by the court during the progress of the trial and duly excepted to, and the general question whether the facts found are sufficient to support the judgment, can be reviewed by an appellate court. United States v. U. S. Fidelity Co., 236 U. S. 527, 35 Sup. Ct. 298, 59 L. Ed. 696; Nashville Interurban Ry. v. Barnum, 212 Fed. 634, 129 C. C. A. 170.

The court under neither section will consider whether the testimony supports the finding of fact, for, said the Supreme Court in Lehnen v. Dickson, 148 U. S. 72,[1] "the verdict of a jury settles all questions of fact," and section 649 expressly provides that the findings of the court "shall have the same effect as the verdict of a jury."

We must apply these rules to the first 8 of plaintiff's assignments of errors, and as each of them only questions the accuracy of some finding of fact they need be given no further attention.

[1] 13 Sup. Ct. 482, 37 L. Ed. 373.

3. The ninth assignment is directed against the thirteenth of the court's findings, and claims that there was no testimony to support the finding. If we assume this to be true, the matter nevertheless has become immaterial for the reason that the judgment upon defendants' counterclaim was not to any extent founded upon the clause of the contract of October 15, 1904, respecting the "correspondence of records of the office as conducted by the defendants," but altogether upon the provisions of article 12 of the contract of April 24, 1902, presently to be examined.

4. Assignments of errors Nos. 14, 15, 16, and 21 all relate to the admission as testimony of certain statements made by John L. Zimmerman and John M. Good as witnesses for the defendants. These statements appear to have been mere explanations of the reasons actuating the defendants in abandoning the contract. While technically it possibly may have been erroneous to admit this testimony, no prejudice resulted to the plaintiff, because the matter became wholly immaterial when the court rendered judgment for plaintiff's entire claim for damages resulting from breaches of the contract, the reason for making which the witnesses undertook to explain. These assignments, therefore, have no force.

[2] 5. Assignments 24, 25, and 26 either fall under the objection that they question the accuracy of findings of fact or they are appropriate only to a motion for a new trial. The former phase has already been sufficiently treated, and a motion for a new trial being a matter of judicial discretion, the court's ruling thereon will not be reviewed. Big Brushy Coal & Coke Co. v. Williams, 176 Fed. 533, 99 C. C. A. 102.

[3] 6. While some of the other assignments of error are confused in statement and difficult to classify, they may all, we think, be broadly embraced in two general groups. And first those which question the admissibility of portions of the testimony of N. O. Wilhelm. This witness, under the contracts, was in the joint employment of the plaintiff and defendants in very responsible positions, and was well acquainted with the situation and condition of the business conducted.

As we have seen, the plaintiff, in its declaration, claimed damages for certain breaches of the contract between the parties. The court adjudged the plaintiff to be entitled to the full amount it had demanded. The defendants in their answer, made a counterclaim against the plaintiff for $20,000, under the provisions of article 12 of the original lease, and in substance alleged as the basis thereof that the leased property had, on January 1, 1906, reverted to the plaintiff, that the latter had taken possession of it and had ever afterwards used and possessed it, that at the time of the reverter the average circulation of the magazine for the 12 months preceding said date was not less than 8,000, and that under article 12 they were entitled to claim and did claim $2.50 upon each subscription. The plaintiff's reply made no issue upon defendant's allegations that plaintiff had in 1906 taken possession of the magazine and other leased property and resumed its use. On the contrary, it asserted that it had done so, and made issues only upon other questions, particularly as to the number of subscribers secured by defendants in 1905.

The testimony of Wilhelm was taken upon the issues made upon the counterclaim. Among other things he testified that he was connected with plaintiff from October 1, 1902, to October 1, 1906, as director of extension, and was also at the head of the subscription department of the Popular Education Publishing Company, that in a general way he saw and "kept tab" on the subscription lists of defendants in the midst of his other duties, but did not have actual charge of them; that the circulation of the magazine was around 8,000, more or less, each month; that he had seen the mailing lists for October, November, and December, 1905; that he had gone over them and counted a few of the columns, the average number of names in each being 45; that on the day he testified, and while he was testifying, he had made calculations which indicated the average circulation to be 8,000, more or less, but he did not make further actual count, nor claim mathematical accuracy for his figures. This estimate of 8,000 agreed with that stated alike by the plaintiff and defendants in their pleadings. However, at about this stage in the trial it was expressly agreed between counsel and entered upon the record that the average monthly circulation of the Chautauquan Magazine for the year 1905 was 7,126, which relieved that issue from further uncertainty.

The testimony had otherwise shown that during the preceding years the letters, papers, subscription lists and documents respecting circulation and pertaining to the business generally, and which were all then in plaintiff's hands, had accumulated to an extent which would make it practically impossible, within any reasonable time, to so separate them as to enable any one to tell precisely what proportion of the subscriptions to the magazine made in 1905 had been secured by the defendant and what proportion by the plaintiff. Under all the circumstances, and although plaintiff produced or offered to produce the entire mass of papers, the court permitted Wilhelm to make an estimate of the proportion which had been obtained in that year by defendants' organizers throughout the United States and what proportion by the plaintiff. He gave his best recollection of the facts and numbers and made an estimate, the precise accuracy of which he could not attest, but it was his best recollection that four-fifths of the subscriptions were obtained by the defendants and one-fifth by the plaintiff. Allowing the witness thus to testify involved a decision by the court that Wilhelm was competent and qualified to make an estimate which was intelligent and not mere guesswork. Under these circumstances we think the trial judge who heard all the other testimony and was in position to judge of the inherent probabilities of the situation might properly receive the estimate of Wilhelm and give to it in connection with the other testimony such weight as he thought proper.

There is some analogy between this situation and that upon which the Supreme Court, in Inland, etc., Co. v. Tolson, 139 U. S. 559, 11 Sup. Ct. 656, 35 L. Ed. 270, said:

"Whether a witness is shown to be qualified to testify to any matter of opinion is always a preliminary question for the judge presiding at the trial, and his decision thereon is conclusive unless clearly erroneous as matter of law."

7. The remaining assignments present in various forms two questions: First, whether there was any competent testimony to support the court's several findings of fact in respect to the counterclaim; and, second, whether those facts were sufficient to support the judgment rendered thereon for the defendants. It would be tedious and unnecessary to go into details, but we have no doubt, after careful examination of the record, that there was competent testimony heard in support of each of the court's findings, and this being so, we are not permitted to inquire whether the facts were correctly found. Dooley v. Pease, 180 U. S. 131, 132, 21 Sup. Ct. 329, 45 L. Ed. 457; Runkel v. Burnham, 153 U. S. 225, 14 Sup. Ct. 837, 38 L. Ed. 694; United States v. U. S. Fidelity Co., 236 U. S. 527, 35 Sup. Ct. 298, 59 L. Ed. 696.

[4] Thus we come to the final question whether the facts found were sufficient to support the court's judgment on the counterclaim. The plaintiff insists, inasmuch as the defendants in December, 1905, pursuant to notice given by them, definitely declined to further perform the contract sued on, that they cannot recover on their counterclaim. To support this contention, it relies upon the general principle announced in many decided cases that:

"Where there is an entire executory contract and the plaintiff has performed a part of it, and without legal excuse and against the consent of the defendant, refuses to perform the rest, he cannot recover anything for the part performed."

Among the cases cited in support of this general proposition are Niblett v. Herring, 49 N. C. 262, Brown v. Kimball, 12 Vt. 617, Malhon v. Birney, 11 Wis. 107, Scheible v. Kline, 89 Mich. 376, 50 N. W. 857, Hartman v. Meighan, 171 Pa. 46, 33 Atl. 123, and Van Clief v. Van Vechten, 130 N. Y. 571, 29 N. E. 1017.

We are not convinced, however, that these authorities or the general principle some of them maintain should be applied here. On the contrary, we adhere to the views expressed for this court by Judge (later Mr. Justice) Lurton, in Michigan Yacht & Power Co. v. Busch, 143 Fed. 929, 75 C. C. A. 109, where it was said that:

"It is now well established that a plaintiff may recover to the extent that he has benefited the defendant by part performance of a contract which the plaintiff himself has failed to carry out; his recovery being subject to recoupment by the damages sustained by the defendant."

While this case is so far unusual as to stand apart, the general principle last stated seems to have some application. Here, after the breach of the contract by defendants, the plaintiff took possession of all of the property including subscriptions, and thereafter did the work which the defendants had refused to do. This, of course, terminated the lease between the parties as of January 1, 1906. For the breaches of the contract involved in defendants' refusal further to carry into effect its terms the plaintiff sued, and has been adjudged the full amount of damages it had thereby sustained. The contract sued on is plainly and by its express terms a lease. This characterization of the agreement was carried through all of the contracts. One of the inherent terms of a contract of lease is that at its termination the prop-

erty leased returns or reverts to the lessee. No reason is suggested why this inevitable result should not follow the termination of this lease on January 1, 1906. It was always within the contemplation of the parties that there should be at some time a termination of the lease and a return of the property. Furthermore, it was intended, not only that the property on hand in 1902 should be returned, but also that certain property created during the last year of the lease in the way of subscriptions secured by defendants should be turned over to plaintiff and paid for by it, and the agreement contained stipulations providing for this. The damages resulting from the premature and wrongful termination of the lease have been assessed against the defendants, but this does not interfere with article 12 of the contract, which now becomes most important, for it explicitly provides that in case the rights and property leased hereunder shall revert to the owner, the latter shall pay the lessees $25,000 for each 10,000 average monthly subscriptions secured by the defendants for the preceding 12 months, and proportionately for a greater or a less number. This, of course, is $2.50 for each subscription.

If we assume that this proved to be an unwise and unfortunate stipulation, nevertheless it was, in the plainest terms, agreed to by parties competent to contract, and we perceive no reason to doubt its validity. The parties had a right to make the stipulation and each is bound by its terms. The subscriptions for the previous year were regarded as valuable and their value was agreed upon and fixed. Four-fifths of the 7,126 subscriptions were obtained in 1905 by the defendants. Construing the contract the court below allowed defendants $2.50 for each of four-fifths of the 7,126 subscriptions, and in this, we think, there was no error, inasmuch as the court only carried into effect the agreement of the parties after having imposed upon the lessees a judgment for the full amount of damages claimed by the plaintiff as the result of defendants' breaches of the contract, thereby making full reparation for that wrong.

Upon these grounds we are constrained to conclude that the judgment of the court below was correct, and it is accordingly affirmed.

STALLO v. WAGNER.

(Circuit Court of Appeals, Second Circuit. April 11, 1916.)

No. 195.

1. BANKS AND BANKING ⊂⊃287(4)—CLAIMS—LIABILITY—FRAUD.

A depositor in a national bank received statements, accompanied by receipts, reciting that, unless notified to the contrary within 10 days, the balance as shown would be considered correct and the vouchers genuine. In some cases the depositor signed the receipts himself, and in others they were signed by his authorized agent. Several years thereafter, the bank meantime having been closed and a receiver appointed, the depositor attacked the statements and balances as shown, claiming that large sums

⊂⊃For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

had been diverted from his account. *Held*, that there could be no recovery, unless fraud was established.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 1097–1104, 1126, 1127; Dec. Dig. ⊂⊃287(4).]

2. FRAUD ⊂⊃50, 58(1)—PRESUMPTIONS—FRAUD.
Fraud is never presumed, and must be proven by a clear preponderance of the testimony.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 46, 47, 55; Dec. Dig. ⊂⊃50, 58(1).]

3. BANKS AND BANKING ⊂⊃287(4)—DEPOSITS—EVIDENCE—SUFFICIENCY.
Where a depositor in a national bank, several years after receiving his statements, alleged that large sums had been diverted from his account, evidence *held* insufficient to establish any fraud on the part of the bank, warranting recovery against a receiver of the bank.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 1097–1104, 1126, 1127; Dec. Dig. ⊂⊃287(4).]

4. BANKS AND BANKING ⊂⊃287(4)—PRESIDENT—AGENCY—BURDEN OF PROOF.
Where a depositor and the president of a national bank were closely allied in business transactions, and the president made deposits and in many respects controlled the depositor's account, the depositor, in an action against the receiver of the bank, has the burden of proving that the president was the agent of the bank, and not his agent, in misapplying funds.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 1097–1104, 1126, 1127; Dec. Dig. ⊂⊃287(4).]

5. BANKS AND BANKING ⊂⊃262—PRESIDENT—AUTHORITY.
Where a depositor authorized the president of a national bank to act for him in making payments on notes, the fact that the depositor was only an accommodation maker of the note is immaterial, on the question of the president's agency.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 1001–1006; Dec. Dig. ⊂⊃262.]

6. BANKS AND BANKING ⊂⊃262—PRESIDENT—AGENCY OF.
Where national bank depositor gave the president of the bank bonds to be sold and the proceeds to be deposited, and also checks for the amount to be realized from the sale, which were to be applied by the president to certain payments, the president was the agent of the depositor, and not of the bank, in making the application of the proceeds, and the bank is not liable for misapplication therefor, for such notice to the president was not notice to the bank.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 1001–1006; Dec. Dig. ⊂⊃262.]

Cross-Appeals from the District Court of the United States for the Southern District of New York.

Bill in equity by Edmund K. Stallo against Petro E. Wagner, as receiver of the Mt. Vernon National Bank. From the decree, complainant appeals, and defendant files cross-appeal. Reversed and remanded, with directions to modify decree by dismissing bill.

Stallo was a depositor in the Mt. Vernon (Westchester County, N. Y.) National Bank from October 2, 1909, until it was closed by the Comptroller of the Currency on or about March 24, 1911. His account was last balanced on January 18, 1911, and showed a credit of $36.69. Wagner is the receiver of the bank. From a time prior to the opening of Stallo's account, and until failure, one Jennings was the bank's president. Stallo never had any personal dealings with this banking institution, and never saw it during business hours. Both he and Jennings had offices in New York City, and were jointly interest-

ed in several somewhat hazardous enterprises, none of which had any connection with the bank. Stallo's deposit account was the result of his connection with Jennings, and his relation of depositor, plus Jennings' position as president, rendered it possible to discount or otherwise negotiate Stallo's paper, for use in the ventures in which Jennings and Stallo were jointly concerned. Stallo's passbook was eight times balanced during the period of deposits, and after four of these balances the book was returned to him with vouchers, and a receipt which he was asked to sign and return. The receipt contained these words: "Unless notified to the contrary within ten days, balance as shown will be considered correct and the vouchers genuine." In every instance the receipt was signed and returned, three times by Stallo's secretary, who had authority so to do, and once by the plaintiff himself. Subsequent to the failure Jennings and the cashier of the bank (both of whom have been witnesses herein) were convicted under the National Bank Act (Act June 3, 1864, c. 106, 13 Stat. 99) of misapplication of funds, and are now undergoing imprisonment therefor.

This bill is brought to set aside the account stated (if it be one) produced by acquiescence in the balances rendered from time to time by the bank, and to restate or ascertain the true condition of Stallo's account, alleged to be some $70,000 greater than the sum stated on final balance in the passbook. It is alleged that said apparent balance was produced "through fictitious entries on the part of" the bank and "in fraud of the rights of the plaintiff in the premises." The court below permitted plaintiff, not only to introduce evidence tending to show the fraud complained of, but the origin and amount of the money items thought by Stallo's accountant (he himself had no knowledge of the books or papers summarized or otherwise used in evidence) to be wrongfully inserted in or omitted from the passbook account. By this method of trial the questions presented both here and below are whether Stallo, either as a depositor or otherwise, is or ever was a creditor for, or was wrongfully charged with, all or any of ten certain sums of money. The trial judge held as to nine of the claims presented that Stallo had no just complaint. For the tenth he was given a decree as a general creditor. From this both parties appealed.

For opinion below, see 220 Fed. 360.

Rockwood & Haldane, of New York City (Charles A. Winter and Nash Rockwood, both of New York City, of counsel), for plaintiff.

Barber, Watson & Gibboney, of New York City (Stuart G. Gibboney and George M. Burditt, both of New York City, of counsel), for defendant.

Before WARD and ROGERS, Circuit Judges, and HOUGH, District Judge.

HOUGH, District Judge (after stating the facts as above) The bill is so drawn as to render it difficult to ascertain the branch of equitable jurisdiction upon which plaintiff relies. The sufficiency of the pleading has not been challenged at trial or on argument, and we have stated and taken the allegations most favorably to the pleader. As so construed the case falls within Dunbar v. Miller, 1 Brock. 85, Fed. Cas. 4,130, and Brydie v. Miller, 1 Brock. 147, Fed. Cas. No. 2,071, and, as to some of the claims advanced, Union Stockyards Bank v. Gillespie, 137 U. S. 411, 11 Sup. Ct. 118, 34 L. Ed. 724, and perhaps Manhattan Bank v. Walker, 130 U. S. 267, 9 Sup. Ct. 519, 32 L. Ed. 959. This is mentioned in order that the form of pleading may not seem to meet with approval. If objected to, the bill would certainly have been ordered redrawn, that the issues might be more clearly presented.

Plaintiff brought no suit, and presented no claim against the bank

or its receiver, until more than a year and a half after failure, and the present action was not begun until three years after the bank was closed.

[1-3] The gist of this suit is fraud, which is never presumed, and must be proven by a fair preponderance of credible testimony, for the purpose of oversetting the effect of Stallo's long acquiescence in the accounts submitted by the bank. Leather Mfrs.' National Bank v. Morgan, 117 U. S. 96, 6 Sup. Ct. 657, 29 L. Ed. 811; Morgan v. United States Mortgage, etc., Co., 208 N. Y. 218, 101 N. E. 871, L. R. A. 1915D, 741, Ann. Cas. 1914D, 462. Accordingly the pleading and plaintiff's direct evidence contain abundant statements to the effect that he always objected to the accounts rendered, demanded and was promised explanations of the matters objected to, and was lulled into inaction by promises of Jennings and Raymond (the cashier) to render "a full accounting" wherein "everything would be explained." When these allegations are tested by the cross-examination and documentary evidence, they fail completely. What Stallo did seek for was, not an explanation of his bank account, but of his financial relations with Jennings, arising from matters in which the bank was not interested, but for which it was made a convenience, both by Stallo and Jennings. In one instance, after pleading an objection to an item charged against him, plaintiff was confronted with his own written approval of the same. He asserted positively that in his relations with Jennings he did not loan the latter money, yet later claimed that Jennings owed him upwards of $50,000; and he denied when on the witness stand that he was ever jointly interested with Jennings in the purchase of the share control of a bank in Oneonta, N. Y., yet admitted that on the trial of Jennings for misapplication of bank funds he had testified, not only that he was so interested, but that Jennings "was authorized to use money of mine" therein. If Jennings and Raymond are believed, every item complained of was proper, but the lower court was naturally loath to place confidence in their testimony. We find it unnecessary to do more than point out that the documentary evidence is throughout consistent with the version of affairs given by Jennings, and we hold that Stallo is to say the least a most unpersuasive witness, whose statements so lack corroboration that we are clear that no fraud on the part of the bank has been shown.

[4] Plaintiff's position seems to be that because Jennings, as its president, defrauded the bank, therefore, whenever he gave the bank any orders in respect of Stallo's affairs, he was defrauding Stallo on behalf of the bank. No such conclusion is permissible. The proven relations between Stallo and Jennings were such that when, so long after accounts rendered, Jennings' acts are complained of, the burden of proof is strongly on plaintiff to show, not only that such act was wrong per se, but that it was committed by Jennings in his capacity of bank president, instead of as Stallo's agent.

The ten items of contention may be divided into classes for purposes of discussion. The first class is of charges made against Stallo's account and duly reported to him, by charge or debit slips showing

on their face that such debits had been entered by or for Jennings (claims 2, 3, 4, and 6). There being no fraud shown, plaintiff cannot at this late date complain of the charges, under the cases above cited.

The second class is of instances in which plaintiff's account was charged with the amount of unpaid commercial paper, for which he had not received original credit. Stallo alleges that he was entitled to such credit. In each case he acquiesced in the charge for years, and in each case he has failed to affirmatively prove that he ever was entitled to the credit claimed (claims 8 and 10).

[5, 6] The third class is of matters having no legal connection with Stallo's deposit account, and wherein the bank is sought to be treated as Stallo's agent. The questions are whether Jennings in negotiating (claim 7) certain bonds of plaintiff's, and a note (claim 5) made by plaintiff, was acting for the bank or for Stallo. We have no doubt that in both instances he was acting for and with Stallo, and as the latter's agent. Hilliard v. Lyons, 180 Fed. 685, 103 C. C. A. 651. That plaintiff was perhaps an accommodation maker of the note is of no importance. Israel v. Gale, 77 Fed. 532, 23 C. C. A. 274; Id., 174 U. S. 391, 19 Sup. Ct. 768, 43 L. Ed. 1019.

The fourth class is of one claim only (No. 1), which as pleaded rests on an alleged wrongful failure to credit Stallo's account with three checks, aggregating $12,500, sent by him to the bank in December, 1909. It is enough to say of this demand that we believe it proven that said checks were lawfully used, to Stallo's knowledge and with his consent, to take up a draft equaling the aggregate of the checks, on which plaintiff had become liable to the bank.

The fifth class also contains but one claim (No. 9) based upon the admitted fact that on January 6, 1911, plaintiff drew four checks on and in favor of the bank, covering an exact amount which Jennings had on the previous day deposited to plaintiff's credit. Stallo gave the checks to Jennings, with (as he says) specific directions as to the application of their proceeds. He did not own the money which Jennings had deposited; it was the property of a corporation in which both Jennings and Stallo were concerned. The latter now alleges that Jennings used two of the checks for purposes other than agreed upon; hence this demand. The difference between this and the claims of the third class is that the checks were drawn to the bank's order.

But Jennings was the only channel of communication between Stallo and the bank, and any notice or instruction that Stallo could have given to any bank official was part of a private business arrangement between himself and Jennings. Notice is not given a corporation by communicating the same to one's partner, who is also a corporate officer, when the subject of notice is a partnership affair. Hilliard v. Lyons, supra, applies, on plaintiff's own statement, which we have used for argument only.

The bill has no merit, and the cause is remanded, with directions to modify the decree below by dismissing said bill, with costs in both courts.

CHICAGO GREAT WESTERN R. CO. v. LE VALLEY.

(Circuit Court of Appeals, Eighth Circuit. April 18, 1916.)

No. 4459.

1. COURTS ⟸356—FEDERAL COURTS—REVIEW—MATTERS REVIEWABLE.
What is necessary to be done in a federal District Court to render rulings reviewable is determined by federal statutes, and, where they are silent, by the common-law practice prevailing in the federal courts.
[Ed. Note.—For other cases, see Courts, Cent. Dig. § 937; Dec. Dig. ⟸356.]

2. APPEAL AND ERROR ⟸544(1)—BILL OF EXCEPTIONS—NECESSITY.
In the federal courts in actions at law a bill of exceptions, stating the ruling and the exception, settled and signed by the trial judge, is indispensable to the review of rulings on motions, oral or written, to strike out pleadings, as well as rulings on motions based on the evidence, or requests for instructions.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2412; Dec. Dig. ⟸544(1).]

3. EXCEPTIONS, BILL OF ⟸56(1)—SUFFICIENCY—CERTIFICATE.
The clerk of the court cannot make exceptions a part of the record, and reviewable, by writing them into the journal of the proceedings of the trial court, without the approving certificate or signature of the trial judge.
[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. § 94; Dec. Dig. ⟸56(1).]

4. APPEAL AND ERROR ⟸544(1)—RECORD—REVIEW.
A written motion for a directed verdict on four specified grounds was filed at the close of the evidence, and a copy of it appeared in the printed transcript. There also appeared in the transcript a copy of the clerk's journal of the proceedings at the trial, which contained a recital that the written motion was made "upon the grounds stated in said motion," that it was denied, and that an exception was taken; but the bill of exceptions which recited the evidence at the trial contained no reference to the motion, the ruling thereon, or the exception. *Held* that, as the grounds of the written motion, the written motion itself, the ruling thereon, and the exception thereto were not preserved by the bill of exceptions, they were not a part of the record, and the ruling was not reviewable.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2412–2415, 2418–2420, 2422–2426; Dec. Dig. ⟸544(1).]

In Error to the District Court of the United States for the Northern District of Iowa; Henry T. Reed, Judge.

On motion for rehearing. Motion denied, and former decision upheld.

For former opinion, see 227 Fed. 1016, 141 C. C. A. 664.

Donald Evans, George H. Carr, and Fred P. Carr, all of Des Moines, Iowa, for plaintiff in error.

E. P. Andrews and B. H. Mallory, both of Hampton, Iowa, for defendant in error.

Before SANBORN and CARLAND, Circuit Judges, and TRIEBER, District Judge.

SANBORN, Circuit Judge. The motion for rehearing in this case presents but a single question, and that is whether or not the motion for a directed verdict, the denial thereof, and the exception to that ruling were so presented to this court in the transcript that under the rules and practice of the federal courts this court could lawfully take cognizance of the ruling and exception, and, if the former was erroneous, correct it. The action was for damages for the death of an employé of the railroad company. It was tried by a jury, and a judgment against the company resulted. The transcript contained a copy of a bill of exceptions, which recited the evidence at the trial, but contained no reference to or recital of the motion for a directed verdict, the ruling thereon, or the exception thereto; but in a copy of the journal of the proceedings of the court during the trial, set forth in the transcript, there appeared a recital that in the course of the trial, upon the consideration of defendant's filed motion at the conclusion of its evidence to direct the jury to return a verdict for it, the motion was denied, and the defendant excepted, and a copy of the filed motion to direct a verdict for the defendant appears in the transcript. When the case came on for argument, this court was of the opinion that it was essential to its cognizance of the motion, ruling, and exception that they should have been embodied in a bill of exceptions certified by the trial judge over his signature, and for that reason the court disregarded this ruling and exception and affirmed the judgment below. Counsel for the railroad company contend that herein was error, and that the motion, ruling, and exception were sufficiently presented to this court by the copy of the record of the proceedings of the day in the journal of the proceedings.

[1-4] They concede that an exception to the ruling of the court was indispensable to its review, and the question is whether or not a recital of this ruling and of the exception in the journal of the proceedings, without the embodiment of them and the written motion in a bill of exceptions, is sufficient to invoke the jurisdiction of the appellate court to review the ruling. In support of an affirmative answer to this question counsel cite St. Joseph Stockyards Company v. United States, 187 Fed. 104, 105, 110 C. C. A. 432, 433; but the question here at issue was not presented or decided in that case, for the issue there was whether or not a special finding of the court sustained the judgment rendered thereon, and that issue arises upon the special finding without objection or exception thereto. Worthington v. McGough, 192 Fed. 512, 513, 112 C. C. A. 662, 663. In that case at the close of the trial, on the motion of the plaintiff, a juror was withdrawn and the case was dismissed without prejudice to another action, and no exception was taken or bill of exceptions made, and the appellate court reviewed the action of the trial court. But in that case the entire action of the court was recited upon the face of the judgment entry, and the court held that the action of the court thereby fully appeared as a part of the record, and that no exception was required to enable the court to review it, citing Chicago, Rock Island & Pacific Ry. Co. v. Barrett, 190 Fed. 118, 123, 111 C. C. A. 158, 163. When, however, the latter case is examined, it will be found that it does not sustain that conclusion, nor an affirmative answer to

the question here at issue. The court merely held in that case that a special finding of facts by the trial court in a case in which a jury had been waived is a part of the record itself, and that without objection, exception, or bill of exceptions the finding presents for review under section 700 of the Revised Statutes (Comp. St. 1913, § 1668) the question whether or not it supports the judgment rendered upon it. Denver v. Home Savings Bank, 236 U. S. 101, 103, 104, 35 Sup. Ct. 265, 59 L. Ed. 485. But that case arose upon a demurrer to a defense in an answer. It fails to rule the issue in hand, because it rests on the established and familiar rule that no exception or bill of exceptions is required to present to an appellate court for review a ruling upon a demurrer to a pleading. Nalle v. Oyster, 230 U. S. 165, 167, 33 Sup. Ct. 1043, 57 L. Ed. 1439. In Nalle v. Oyster, the Supreme Court said:

"The practice of bills of exception is statutory. By the ancient common law a writ of error lay only for an error in law apparent upon the judgment roll —what is now called the 'strict record'—or for an error in fact, such as the death of a party before judgment. See Green v. Watkins, 6 Wheat. 260, 262 [5 L. Ed. 256]. For an erroneous decision that did not appear upon the record there was no redress by writ of error."

What is necessary to be done in a District Court of the United States to render rulings reviewable is determined exclusively by the statutes of the United States, and, if they be silent, by the common law and the practice prevailing in the courts of the United States. Chateaugay Iron Co., Petitioner, 128 U. S. 544, 553, 555, 9 Sup. Ct. 150, 32 L. Ed. 508; St. Clair v. United States, 154 U. S. 134, 153, 14 Sup. Ct. 1002, 38 L. Ed. 936; Ghost v. United States, 168 Fed. 841, 843, 94 C. C. A. 253, 255. A federal appellate court considers only such matters as appear in the record. "From time immemorial," says the Supreme Court, "that has been held to include the pleadings, the process, the verdict, and the judgment, and such other matters as by some statutory or recognized method have been made a part of it." Metropolitan Railroad Co. v. District of Columbia, 195 U. S. 322, 332, 25 Sup. Ct. 28, 32 (49 L. Ed. 219). Exceptions to the rulings of the court in the course of the trial of a case, exceptions to the rulings of the court upon motions conditioned upon the evidence, may be made a part of the record by a bill of exceptions certified and signed by the judge, but the clerk of the court may not make them part of the record by writing them into his minutes or journal of the proceedings. In Young v. Martin, 75 U. S. (8 Wall.) 354, 357 (19 L. Ed. 418), the Supreme Court said:

"It is no part of the duty of the clerk to note in his entries the exceptions taken, or to note any other proceedings of counsel, except as they are preliminary to, or the basis of, the orders or judgment of the court. To be of any avail, exceptions must not only be drawn up so as to present distinctly the ruling of the court upon the points raised, but they must be signed and sealed by the presiding judge. Unless so signed and sealed, they do not constitute any part of the record which can be considered by an appellate court."

The sealing of such bills of exception is no longer necessary, but the authentication of them by the signature of the judge is still required.

It is a familiar and an established rule of practice of the federal courts that in actions at law a bill of exceptions, stating the ruling and the exception, settled and signed by the trial judge, is indispensable to the review of rulings upon motions, oral or written, to strike out parts of pleadings, rulings upon motions based on affidavits or evidence and rulings on written or oral requests for instructions to the jury founded upon evidence. Dietz v. Lymer, 61 Fed. 792, 794, 10 C. C. A. 71, 73; Hildreth v. Grandin, 97 Fed. 870, 872, 38 C. C. A. 516, 518; Ghost v. United States, 168 Fed. 841, 842, 94 C. C. A. 253, 254; England v. Gebhardt, 112 U. S. 502, 504, 505, 5 Sup. Ct. 287, 28 L. Ed. 811; Evans v. Stettnisch, 149 U. S. 605, 13 Sup. Ct. 931, 37 L. Ed. 866; Metropolitan R. R. Co. v. District of Columbia, 195 U. S. 322, 324, 330, 25 Sup. Ct. 28, 49 L. Ed. 219. And neither the filing of a written motion founded on evidence, nor the recital by the clerk in his record of the proceedings of the trial of a case of such a motion, or of an exception to a ruling upon it, makes them a part of the record in the case, so that an appellate court may review the ruling. Thus in Dietz v. Lymer, 61 Fed. 794, 10 C. C. A. 71, and Ghost v. United States, 168 Fed. 841, 842, 94 C. C. A. 253, 254, this court held that a bill of exceptions was indispensable to make motions to strike out parts of pleadings parts of the records. In Hildreth v. Grandin, 97 Fed. 870, 872, 38 C. C. A. 516, 518, where an attempt was made to review an order on a motion founded on an affidavit and a judgment, this court declared that:

"When a motion is presented to a trial court which presents issues of fact for determination by that court on evidence adduced by the respective parties, the action of the trial court cannot be reviewed on a writ of error, unless a proper bill of exceptions, embodying the motion and the proofs, is duly settled, signed, and filed, so as to show to this court, in an authentic form, on what state of facts the action of the trial court was predicated."

In England v. Gebhardt, 112 U. S. 502, 503, 505, 5 Sup. Ct. 287, 288 (28 L. Ed. 811), the Supreme Court refused to review an order based on affidavits and the opinion of the court, all of which were filed in the court below and set forth in the transcript, and held that a bill of exceptions was essential to bring each of them into the record, although by one of the rules of that court a copy of the opinion filed was required to be and was annexed to and transmitted with the record. The court declared that the attachment and transmission of the opinion did not of itself make it a part of the record below and that "the mere fact that a paper is found among the files in a cause does not of itself make it a part of the record. If not a part of the pleadings or process in a cause, it must be put into the record by some action of the court." To the same effect is Evans v. Stettnisch, 149 U. S. 605, 607, 13 Sup. Ct. 931, 37 L. Ed. 866. And in Metropolitan R. R. Co. v. District of Columbia, 195 U. S. 322, 324, 330, 25 Sup. Ct. 28, 49 L. Ed. 219, the Supreme Court held that written requests for instructions to the jury, on file in the court below and marked "Rejected, with permission to present later," a petition regarding evidence and a recital that the court granted the prayer of the petition, copies of all of which appeared in the transcript, formed no part of the record which could be considered by the appellate court, in the

absence of a bill of exceptions containing them, allowed and authorized by the judge.

In the case in hand the recital of the motion for a directed verdict in the record of the proceedings at the trial in the journal merely states that the motion was made "upon the grounds stated in said motion." The copy of the written motion, which appears to have been filed in the District Court and which has not been made a part of the record, contains four specific grounds. This court cannot consider the grounds of the motion which are not a part of the record, and hence cannot consider the question which the motion presented. The clerk is without power to make an exception a part of the record without the certificate of the judges, as we have seen.

In view of the state of the record before this court, and of the rules of practice and the decisions of the federal courts to which reference has been made, the court is still of the opinion that in the absence of a bill of exceptions embodying the motion for a directed verdict and the grounds stated therein, together with the exception to the ruling thereon, these form no part of the record which this court is authorized to review, and the motion for a rehearing is denied.

HAMILTON IRON & STEEL CO. v. GROVELAND MINING CO. et al.

(Circuit Court of Appeals, Sixth Circuit. June 16, 1916.)

No. 2733.

1. EVIDENCE ⊜416—PAROL EVIDENCE—CONTRACTS.

In an action on notes for price of iron ore, where defendant claimed that sale was made in July, while plaintiff asserted that sale was consummated in October, and the contract entered into in October, a contract then executed and preliminary letters leading up to its execution were admissible on this issue.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1903–1905; Dec. Dig. ⊜416.]

2. SALES ⊜52(5)—ACTIONS—EVIDENCE.

In an action on notes given for the purchase price of iron ore, evidence *held* to show that the contract was not consummated until October following delivery, when the terms were fixed.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 136, 137, 139; Dec. Dig. ⊜52(5).]

3. EVIDENCE ⊜441(9)—PAROL EVIDENCE—CONTRACTS.

Though a statement by the seller of iron ore as to the percentage of manganese constituted an express warranty under the Uniform Sales Act of Ohio (Gen. Code, § 8392), the subsequent execution of a written contract, omitting any such statement, merged in it all prior representations, so that, as it omitted the warranty, the buyer could not rely thereon.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1732, 1787, 1790, 2035; Dec. Dig. ⊜441(9); Sales, Cent. Dig. § 721.]

4. EVIDENCE ⊜441(9)—PAROL EVIDENCE—CONTRACTS.

A seller's warranty as to the percentage of manganese contained in iron ore is a warranty relating directly to the sale, and is not a collateral

undertaking, and therefore such warranty is merged in a written contract subsequently executed.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1732, 1787, 1790, 2035; Dec. Dig. ⊂⊃441(9); Sales, Cent. Dig. § 721.]

5. APPEAL AND ERROR ⊂⊃1068(3)—REVIEW—HARMLESS ERROR.

Where plaintiff was entitled to judgment and verdict in its favor under the undisputed evidence, errors in instructions are not prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4227; Dec. Dig. ⊂⊃1068(3); Trial, Cent. Dig. §§ 475, 480, 525, 526.]

In Error to the District Court of the United States for the Western Division of the Southern District of Ohio; John E. Sater, Judge.

Action by the Groveland Mining Company, a corporation, against the Hamilton Iron & Steel Company, in which J. B. Courtney, trustee in bankruptcy, was substituted as plaintiff. There was a judgment for plaintiff, and defendant brings error. Affirmed.

W. M. Shohl, of Cincinnati, Ohio, for plaintiff in error.

C. B. Matthews, of Cincinnati, Ohio, for defendant in error.

Before WARRINGTON and DENISON, Circuit Judges, and SANFORD, District Judge.

SANFORD, District Judge. This is an action at law brought by The Groveland Mining Company, a Michigan corporation, against The Hamilton Iron & Steel Company, an Ohio corporation, on three promissory notes, executed and delivered in payment for iron ore sold by the Groveland Company to the Hamilton Company. The Hamilton Company in its answer and cross petition admitted the execution and delivery of the notes, and plead by way of counterclaim, damages accruing to it in excess of the amount of the notes by reason of an alleged breach of warranty in reference to the percentage of manganese in a portion of the ore. J. B. Courtney, trustee in bankruptcy of the Groveland Company, was subsequently substituted for it as plaintiff in the suit. There was a verdict and judgment in favor of the plaintiff for the full amount of the notes sued on; and the defendant has brought this writ of error for review.

The entire controversy relates to the alleged warranty as to the manganese.

The defendants' answer and cross petition alleged, in substance, that on July 20, 1910, the plaintiff represented and warranted to the defendant that the iron ore in question did not contain more than .70 per cent. of manganese, and that, relying on such representation and warranty, it purchased the ore on July 22, 1910; that the ore in fact contained 1.34 per cent. of manganese; and that by reason of the excess of manganese and breach of warranty it had been damaged as claimed. The plaintiff's reply to the answer and cross petition denied generally all of these allegations.

The testimony introduced on the trial consisted mainly of documentary evidence, including a voluminous correspondence between the parties from January 11, 1910, to October 13, 1911, relating to the sale and purchase of the ore and their course of dealing and settlements

and adjustments in regard thereto. The evidence showed, however, without dispute, that the ore in fact contained more than .70 per cent. of manganese; and there was also evidence tending to show material damage resulting to the defendant in consequence. On the question of the warranty the main contention of the defendant was that, as shown by the correspondence, the plaintiff sold it the iron ore on or about July 22, 1910, on a written representation and warranty as to the percentage of manganese; while, on the other hand, the plaintiff contended that the correspondence showed that no contract of sale had been made in or about July and that the entire terms of the sale had been embraced in a written contract executed by the parties on October 10, 1910, containing no representation or warranty whatever as to the manganese. And, in the alternative, the defendant insisted that even if the October contract were the sole contract between the parties, that nevertheless the prior correspondence contained an affirmation of fact as to the percentage of the manganese, on which the defendant relied, and which hence constituted a warranty under the provision of the Ohio Uniform Sales Act embraced in section 8392 of the General Code.

The trial judge submitted to the jury the questions whether the contract between the parties was made in July or on October 10th, and whether there was a warranty of the manganese. The defendant has assigned various errors relating to the admission of evidence, the charge of the court and refusals to charge.

[1] 1. There was no error in admitting in evidence the contract of October 10, 1910, and the preliminary letters passing between the parties relating to its execution and transmission. This evidence was material on the question whether the parties had in fact completed the contract of sale on or about July 22d or whether the terms of the contract of sale were intended by them to be entirely embraced in the contract of October 10th; this being clearly a matter in issue under the plaintiff's denial that the ore had been bought on July 22d on a representation and warranty as to the manganese, as alleged in the defendant's answer and cross petition.

[2, 3] 2. The undisputed evidence shows the following material facts: The Groveland Company, which was engaged in mining iron ore in the Lake Superior region and is hereinafter designated the plaintiff, had sold the defendant, the Hamilton Company, which was engaged in the manufacture of iron, some of its ore in the season of 1909. In the spring of 1910 the plaintiff, through its agent, both by correspondence and conference, endeavored to sell the defendant a large quantity of ore for use during the current season, offering it first at the former price, namely, $3 a ton; although the general market price of Lake Superior ore for the 1910 season was 50 cents higher than the preceding year. The defendant expressed a desire to use the plaintiff's ore on account of its cheapness, but criticised it on the ground of its large percentage of manganese, constituting a detrimental element. The analysis of the ore submitted by the plaintiff from time to time in the course of the correspondence showed considerable fluctuation in the percentage of manganese, which apparently changed with the progress of its mine workings. On June 15, 1910,

the plaintiff wrote offering the defendant from ten to fifteen thousand tons at a price per unit of iron, approximating, as the evidence shows, $2.50 per ton (an admittedly cheap price); to which no reply was made. On July 15th the plaintiff sent the defendant an analysis of twenty-two cars of ore, showing low phosphorus and silica, and manganese running from .41 to .56 per cent., and stating that it stood in a fair position to give lower manganese than anticipated, and requesting an order for all the defendant could take under these conditions. On July 18th the defendant wrote that it would be glad to take 2,500 to 3,000 tons of ore of approximately this analysis. On July 20th the plaintiff wrote, enclosing its last analysis of the ore, showing manganese .70 per cent., and stating that it would immediately ship a cargo of about 3,000 tons for the defendant's account. On July 22d the defendant wrote that it would be pleased to receive the 3,000 tons and noted the analysis. This shipment was duly made, the cargo containing 3,128 tons; and on receipt by the defendant was found to contain manganese largely in excess of .70 per cent. In the ensuing correspondence between the parties mutual disappointment was expressed at this result, and the defendant wrote that it could not take any more of the ore until it could get a definite idea of what it was to receive. Subsequently, on August 9th the defendant requested an invoice for the shipment, stating that it understood it "was to be on the basis of $2.50, leaving any adjustment there may be on account of the quality, for a later period." The plaintiff sent the invoice as requested, stating that: "As to the adjustment, that matter can be taken up later." On September 27th the plaintiff requested the defendant to send it two $2,500 notes on account of the ore, and stated that it would "make up a contract covering the amount of the ore" delivered, and send it to the defendant for execution. The defendant executed and forwarded the two notes as requested. On October 7th the plaintiff mailed the defendant a triplicate contract for the ore which it had prepared and signed, stating in the letter of transmission that this was sent in accordance with the defendant's request. This contract was signed by the defendant on October 10th, and two of the triplicate copies returned to the plaintiff. This contract which, in its introductory clause recited that it was made April 30, 1910, was dated at the end October 10, 1910. It was a complete contract for the sale of the 3,128 tons of ore in question, with elaborate provisions as to delivery, payments and other matters. It contained no representation or warranty whatever as to the percentage of manganese or any reference whatever thereto. On the contrary it specifically provided that the price of the ore should be $2.50 per ton "named and accepted on the expectation that the ore will average .46 per cent. in metallic iron, natural state"; that this price should be subject to adjustment by increase or abatement in price at the rate of 5.43 cents per unit per ton for metallic iron; that in case of excess phosphorus above the agreed quantity settlement should be made according to the table of phosphorus values; and that the cargo should be analyzed by an independent chemist, mutually agreed upon, "and said analyses shall be final and the basis of settlement hereunder." Subsequently on December 9th the plaintiff transmitted to the defendant a statement of ac-

count showing the balance due on the ore under the contract of October 10th after crediting the defendant with the two $2,500 notes, and deducting $638.05 on account of the ascertained deficiency in the metallic iron (this adjustment leaving the net price of the ore at $2.30 a ton); and the balance thus shown to be due was subsequently paid in full by the defendant, in accordance with the provisions of the contract relating to deferred payments. The defendant also from time to time thereafter renewed the two $2,500 notes in question; the last renewals being two of the notes now in suit. On these facts and the other evidence in the case, the details of which need not here be set out, we are of opinion that it appears from the undisputed evidence, without material testimony or inference to the contrary, that the terms of sale were not finally agreed upon between the parties on July 22, 1910, or at any time prior to October 10th; that the contract executed October 10th, which purported on its face to be the entire contract between the parties in reference to the sale of this ore, is, and was intended to be, a final and complete statement of all the agreements of the parties in reference thereto; and, further, that it was not executed by the defendant in reliance upon any affirmation or representation in the prior correspondence as to the percentage of manganese in the ore, the defendant having full knowledge at the time it executed this contract of the exact percentage of manganese which the ore in fact contained. Furthermore, even if the statement in the plaintiff's letter of July 20th that the last analysis of the ore showed manganese .70 per cent., is to be construed as an affirmation of fact as to the percentage of manganese in the ore shipped, to which it did not on its face purport to relate, or is to be regarded as more than a mere indication of the probable percentage of manganese which might be expected, we are of opinion that such representation must be deemed to have been merged in the final contract. When a written contract is upon its face couched in such terms as import a complete legal obligation, without any uncertainty as to the object or extent of the engagement, it is conclusively presumed that the whole engagement of the parties, and the extent and manner of their undertaking, were reduced to writing in the contract. Seitz v. Refrigerating Co., 141 U. S. 510, 517, 12 Sup. Ct. 46, 35 L. Ed. 837; Huntington v. Toledo Railroad (6th Cir.) 175 Fed. 532, 537, 99 C. C. A. 154. And this rule as to the merger of prior representations in a subsequent complete contract is applicable, as we have heretofore held in Marmet Coal Co. v. People's Coal Co. (6th Cir.) 226 Fed. 646, 650, 141 C. C. A. 402, to any prior representation relied on as an affirmation of fact constituting an express warranty under the Ohio Uniform Sales Act; such prior representation not being available as a warranty under that act when merged in a subsequent written contract purporting to contain the entire agreement of the parties.

[4] It is not now necessary to determine to what extent, if any, a prior representation as to a collateral matter, relating to a subject distinct from that to which the written contract applies, might be relied on as an express warranty under the terms of this act, as a representation not merged in the written contract under the qualification of the general rule of merger stated in Seitz v. Refrigerating Co., supra, 141

U. S. at page 517, 12 Sup. Ct. 46, 35 L. Ed. 837. Such qualification has, in our opinion, no application to the instant case, since, if any prior representation were made as to the percentage of manganese, it is clear that it related directly, and not collaterally, to the subject to which the written contract applied; that it was "so closely connected with the principal transaction as to form part and parcel of it"; and that hence, under the very terms in which the qualification to the general rule is stated, it must now be conclusively presumed to have been merged in the written contract. This conclusion as to the scope and effect of the contract of October 10th is furthermore in harmony with the entire conduct and course of dealings between the parties, which shows conclusively, without any material inference to the contrary, that they both regarded this contract as completely embodying the terms of sale and the undertakings and agreements entered into by them in respect to the quality of the ore sold and intended it to be the full and complete contract with reference to this matter, under the terms of which settlements should be made.

It results that, as the contract of October 10th must be held to have embraced the entire agreement between the parties, and as it did not contain any affirmation, representation or warranty as to the percentage of the manganese, and was not entered into on the faith of any such representation, affirmation or warranty, the defendant, on the undisputed evidence, did not make out a case entitling it to a submission to the jury of its claim for damages under the alleged warranty upon which it relied; and that, on the contrary, the plaintiff was, on the undisputed evidence, clearly entitled to a verdict and judgment in its favor on the notes on which it sued.

[5] 3. And finding as we do that upon the undisputed evidence the plaintiff was entitled to a verdict and judgment in its favor upon the notes in suit, so that no prejudicial error resulted to the defendant from the course taken in the trial below and a new trial would be a merely futile proceeding, we conclude, without passing upon the several assignments of error relating to the charge of the court and its refusals to charge, that, in accordance with the rule stated in Pensacola State Bank v. Thornberry (6th Cir.) 226 Fed. 611, 617, 623, 141 C. C. A. 367, the judgment below should be affirmed, with costs.

LAM FUNG YEN v. FRICK, Immigration Inspector.

(Circuit Court of Appeals, Sixth Circuit. June 16, 1916.)

No. 2777.

1. ALIENS ⟸23(2)—CHINESE PERSONS—DEPORTATION—LABORERS.
Where a Chinese person, who lawfully entered the United States as the minor son of a merchant, thereafter became a laborer, such fact will not deprive him of his right to remain in the country.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 77; Dec. Dig. ⟸23(2).]

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

2. ALIENS ⟸32(8)—CHINESE PERSONS—DEPORTATION.
On application by a Chinese person for writ of habeas corpus against the immigration inspector, evidence *held* to warrant a finding by the inspector that such Chinese person was addicted to gambling when he left China, and that he entered the United States intending to make his living by gambling, and not by profitable industry.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 84; Dec. Dig. ⟸32(8).]

3. ALIENS ⟸32(12)—DEPORTATION—FINDINGS OF IMMIGRATION AUTHORITIES.
Where supported by competent evidence, a finding by the immigration authorities with regard to an alien is conclusive on the courts.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 95; Dec. Dig. ⟸32(12).]

4. ALIENS ⟸21—CHINESE PERSONS—IMMIGRATION ACT.
Th Immigration Act applies to aliens born in China, and the minor son of a Chinese merchant cannot lawfully enter the United States, if at that time he be a person likely to become a public charge.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 74; Dec. Dig. ⟸21.]

5. ALIENS ⟸49—IMMIGRATION ACT—CONSTRUCTION—"PERSONS LIKELY TO BECOME A PUBLIC CHARGE."
The Immigration Act, excluding persons "likely to become a public charge," is not limited to paupers or those liable to become such, but includes those who will not undertake honest pursuits, or who are likely to become periodically the inmates of prisons, and so includes one who intends to make his living by gambling, instead of honest labor.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 107; Dec. Dig. ⟸49.]

6. ALIENS ⟸49—DEPORTATION—PERSONS LIKELY TO BECOME A PUBLIC CHARGE.
That petitioner, when he entered, was the son of a Chinese merchant, and as such liable to be supported by his father during minority, does not except him from the Immigration Act, excluding persons likely to become a public charge, where it was clear that at the end of his minority he was likely to become such a charge.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 107; Dec. Dig. ⟸49.]

7. ALIENS ⟸49—DEPORTATION—RIGHT TO DEPORT.
Immigration Act Feb. 20, 1907, c. 1134, § 2, 34 Stat. 898 (Comp. St. 1913, § 4244), excludes persons likely to become a public charge; section 20 (Comp. St. 1913, § 4269) makes it the duty of the Secretary of Labor to cause to be deported at any time within three years after entry any alien who shall enter in violation of law, and as such become a public charge from causes existing prior to landing; while section 21 makes it the duty of the Secretary, when satisfied that an alien has been found in the United States in violation of law, to deport him. *Held*, that the act is not limited to persons who shall from existing causes become a public charge within three years after entry, but warrants the deportation of one who is likely thereafter to become a public charge.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 107; Dec. Dig. ⟸49.]

Appeal from the District Court of the United States for the Eastern District of Michigan; Arthur J. Tuttle, Judge.

Application by Lam Fung Yen for writ of habeas corpus against

G. Oliver Frick, United States Immigration Inspector in Charge. From an order dismissing the writ, applicant appeals. Affirmed.

F. H. Watson, of Detroit, Mich., for appellant.

J. E. Bland, Asst. U. S. Atty. of Detroit, Mich., for appellee.

Before KNAPPEN and DENISON, Circuit Judges, and EVANS, District Judge.

KNAPPEN, Circuit Judge. Appeal from an order discharging a writ of habeas corpus. Petitioner is an alien, born in China. In August, 1911, when nearly 19 years of age, he entered the United States as the minor son of a Chinese merchant domiciled in this country. He was arrested on warrant issued by the Secretary of Labor February 26, 1914 (within three years after entry), and after hearing before an immigration inspector was, by order of the Secretary of Labor, ordered returned to China, upon the grounds, first, that at the time of his entry into the United States he was a person likely to become a public charge within the meaning of sections 2, 20, and 21 of the Immigration Act of February 20, 1907, c. 1134, 34 Stat. 898, as amended by Act March 26, 1910, c. 128, 36 Stat. 263 (Comp. St. 1913, §§ 4244, 4269, 4270), and Act March 4, 1913, c. 141, § 3, 37 Stat. 737; and, second, that he was a laborer, and thus unlawfully within the United States under Chinese Exclusion Act April 27, 1904, c. 1630, 33 Stat. 394, 428, and so liable to be deported under section 21 of the Immigration Act.

[1] The second ground of deportation relied upon may be passed by in a few words: As the minor son of a Chinese merchant domiciled in this country petitioner was entitled to enter, unless excluded by the provisions of either the Chinese Exclusion Act or the Immigration Act. United States v. Mrs. Gue Lim, 176 U. S. 459, 20 Sup. Ct. 415, 44 L. Ed. 544; Lew Ling Chong v. United States (C. C. A. 6) 222 Fed. 195, 199, 137 C. C. A. 635. Petitioner was not a laborer when he entered the United States; if he is now liable to deportation as a laborer it is only because he has become such since his entry. Assuming that the small amount of work done by petitioner in a laundry has established his present status as a laborer (which is, to say the least, not very clear), we think the case falls within the decision of this court in Lew Ling Chong v. United States, supra, 222 Fed. at page 200, 137 C. C. A. 635, where it is held, in accordance with numerous authorities, that such labor, following a lawful entry in the capacity stated, did not destroy petitioner's right to remain.

[2, 3] The situation as affecting the charge that petitioner is a person liable to become a public charge is in narrow compass and the evidence undisputed. It appears by petitioner's testimony that during the 2½ years he had been in this country his profitable industry was practically negligible; that he first went to his father in Philadelphia, remaining there four or five weeks, then going to Chicago, largely with money provided by friends in his father's store, staying in the latter city more than a year, doing nothing; that he went to Detroit for a short time, and then returned to Chicago, where he remained until about a week before his arrest, when he went to Pontiac,

Mich., where also he was "doing nothing," except that when he was arrested he was helping "wrap up clothes in the laundry"; that he made his living by gambling, borrowing when out of money, and repaying when he had won. As he expressed it, "When I won, I paid back; but when I lost, I borrowed again." He says that he did not gamble in any one place; that "I gambled all over Chinatown." When arrested he had about $20, which he says was "money I had saved up from gambling in Chicago." He says "I never done any work," assigning as the reason that "no one wants to hire me to work," and that he had not learned for that reason. His father testified that when petitioner first came from China he gave him $35, that petitioner has never been to school in this country, that he refused to obey his father, and when scolded ran away. The father apparently feels little interest in petitioner. The latter testified that he sometimes gambled in China; that he "used to run a drug store, and it was burned, and I started to gamble a little"; that he did not make a living at it, for his father "sent money home to take care of the whole family."

We cannot say that the Secretary of Labor might not competently conclude from the evidence that petitioner was, when in China, addicted to gambling; that he came here without the intention of engaging in profitable industry, and intending to make his living, so far as necessary, by gambling. Taking into account the charge, the evidence, the findings, and the order of deportation, the Secretary of Labor may well have so concluded; and, as there was competent evidence supporting such conclusion, it is binding upon the courts. Lewis v. Frick, supra, 233 U. S. at page 300, 34 Sup. Ct. 488, 58 L. Ed. 967; Id., 195 Fed. 693, 696, 115 C. C. A. 493.

[4] The Immigration Act applies to aliens born in China, and notwithstanding petitioner's entry as the son of a Chinese merchant, if he was at the time a person likely to become a public charge he could not lawfully enter. Low Wah Suey v. Backus, 225 U. S. 460, 32 Sup. Ct. 734, 56 L. Ed. 1165; United States v. Wong You, 223 U. S. 67, 32 Sup. Ct. 195, 56 L. Ed. 354. And see Japanese Immigrant Case, 189 U. S. 86, 23 Sup. Ct. 611, 47 L. Ed. 721.

[5] The more important question is whether the fact that petitioner entered the United States as a gambler, and as one having no other permanent means of support, actual or contemplated, makes him a person "likely to become a public charge" within the meaning of the Immigration Act.

It seems clear that the term "persons likely to become a public charge" is not limited to paupers or those liable to become such; "paupers" are mentioned as in a separate class. In United States v. Williams (D. C.) 175 Fed. 274, 275, the term "persons likely to become a public charge" is construed as including, "not only those persons who through misfortune cannot be self-supporting, but also those who will not undertake honest pursuits, and who are likely to become periodically the inmates of prisons." We think this a reasonable construction. "A statute excluding paupers or persons likely to become a public charge is manifestly one of police and public security." The Japanese Immigrant Case, supra, 189 U. S. at page 97, 23 Sup. Ct. at page 613 (47 L. Ed. 721). Inmates of jails and prisons are for the

time being public charges, and we think it open to conclusion by reasonable minds that those who will not work for a living, but rely for that purpose upon gambling, are more likely than citizens following the ordinary pursuits of industry to become, at least intermittently, public charges. Such conclusion does not involve the proposition that gambling in any and every form is necessarily immoral; but public policy generally, as disclosed in statutes of varying nature, regards professional gambling at least as within the domain of police supervision and public security.

We see nothing in the suggestion that Chinese gamblers and high-binders have been held to be laborers within the Chinese Exclusion Act. See United States v. Ah Fawn (D. C.) 57 Fed. 591. The basis of that holding was that the term "laborers" was intended to exclude broadly all Chinese, except those who entered the United States "for purposes of teaching, studying, mercantile transactions, travel or curiosity."

[6] The fact that petitioner was a minor when he entered, and so liable to be supported by his father during the remaining period of minority, does not, in our opinion, take the case out of the statute; for such minority would continue but for a limited period.

We therefore conclude that it was open to the Secretary of Labor to find that petitioner was at the time of his entry into the United States a person "likely to become a public charge," excluded by section 2 of the Immigration Act, and that petitioner had thus entered the United States in violation of law, and that we are not at liberty to disturb this finding. Does the right to deport follow?

[7] Section 20 of the act makes it the duty of the Secretary of Labor to cause to be deported to the country whence he came, at any time within three years after the date of his entry, "any alien who shall enter the United States in violation of law." The language of section 20, however, is that "any alien who shall enter the United States in violation of law, and such as become public charges from causes existing prior to landing" shall be so deported; and petitioner contends that the right to deport those unlawfully entering because *likely to* become public charges is limited to those who *actually* become such within three years from the date of entry. If this is the correct construction of the act, petitioner is not subject to deportation, for he is not shown to have actually become such public charge.

There is force in the contention that the special designation of "such as become public charges from causes existing prior to landing" excludes from the general language "any alien who shall enter the United States in violation of law" those who did not actually become such public charges. But we think the section should not be so construed. Section 21 of the same act expressly makes it the duty of the Secretary of Labor, when satisfied that an alien "has been found in the United States in violation of" the act, to deport him, and this without any mention of his actually becoming a public charge.

The various amendments of the act have tended to enlarge rather than restrict the rights of exclusion and deportation; and, especially in view of the language of section 21, it is not lightly to be presumed that Congress intended to withdraw from the general right of de-

porting those not entitled to enter because likely to become public charges, all such as should not actually become such within three years. Congress may well have intended to include as separate classes, subject to deportation, those who *become* public charges within three years, from *causes existing* prior to landing, and those who, at the time of entry, were *likely to become* public charges; in other words, to have intended a distinction between a possibility (or even a liability), to become a public charge, and an *actually* existing *likelihood* of such result. As a matter of evidence, the former class might not unnaturally be held prima facie to include all who become public charges during that period without the intervention of a new or unexpected cause. It can scarcely be presumed that Congress intended deliberately to take away the right of deporting the undesirable class of citizens "likely to become a public charge," unless such likelihood ripened into fact within three years. An illustration of the liberality with which the provisions of the Immigration Act have been construed is found in Lewis v. Frick, supra.

It is worthy of note that in the Japanese Immigrant Case, supra, an order deporting an alien under section 11 of the Immigration Act of March 3, 1891 (26 Stat. 1084, c. 551) as a pauper and a "person likely to become a public charge" was sustained, although the point here considered does not seem to have been there raised. The language of section 11 of the act of 1891 is, however, substantially the same as the language we have quoted from section 20 of the existing act. The fact that in the case referred to the deported alien had entered clandestinely is not, in our opinion, enough to distinguish, for the deportation was based upon the fact that the alien entered "in violation of law," as is the case under the existing act; and an admission after actual inspection and inquiry is not an adjudication of immunity from deportation. Pearson v. Williams, 202 U. S. 281, 26 Sup. Ct. 608, 50 L. Ed. 1029.

In our opinion petitioner was within the deportation provisions of the Immigration Act, and the order of the District Court dismissing the writ of habeas corpus must be affirmed.

NAPIER v. WESTERHOFF et al.

(Circuit Court of Appeals, Second Circuit. May 9, 1916.)

No. 219.

CORPORATIONS ⇐190—ACTIONS BETWEEN MEMBERS—EVIDENCE—SUFFICIENCY.

Evidence in a suit where complainant asserted that, on incorporation of a business in which he was a partner, it was agreed that as between the parties the business should be conducted as a partnership, *held* insufficient to support that contention, or to bear out complainant's claims of misconduct and waste of assets by defendants.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 723–731; Dec. Dig. ⇐190.]

Appeal from the District Court of the United States for the Southern District of New York.

Bill by Thomas S. Napier against Peter D. Westerhoff and Henry Westerhoff, individually and as members of the firm of Westerhoff Bros. & Napier and as directors of the Westerhoff Bros. & Napier Company, and another. From a decree dismissing the bill, complainant appeals. Affirmed.

The final decree appealed from was entered June 20, 1912, dismissing the bill and supplemental bill.

Olney & Comstock, of New York City (J. N. Hayes, of New York City, of counsel), for appellant.

G. N. Hamlin and Charles E. Rushmore, both of New York City, for appellees.

Before COXE, Circuit Judge, and VEEDER and MAYER, District Judges.

MAYER, District Judge. This record of over 2,200 pages in a suit commenced in 1905, different phases of which have been passed on by Judges Ward, Holt, Hazel and Hough, demonstrates what was possible under the old method of trying equity causes. We venture to say that this case could have been tried, under the present rules, within a week, with greater satisfaction and much less expense to the litigants. The essential features of the controversy are covered in Judge Hough's opinion, but the length, and bitterness of the litigation require a brief expression of our views.

If we were to adopt the construction of the facts for which appellant contends, we should nevertheless affirm the decree on the law of the case; but a discussion of the questions of law argued by counsel becomes unnecessary because of our conclusions as to what the record demonstrates in respect of the facts.

The original bill, verified January 24, 1905, sets forth that Napier and Henry and Peter D. Westerhoff were partners from 1895; that about July 1, 1900, the Westerhoffs proposed that the existing firm should carry on its business as to the outside world as a corporation, but as to themselves, i. e., Napier and the Westerhoffs, as a partnership; that Napier, though reluctant to enter into such an arrangement, consented upon the express condition that he should share in the management of the corporation equally, should be and continue a director and officer thereof, should be sole selling agent of all the product of the corporation, and, if he desired to withdraw, that he should first offer his stock for sale to the Westerhoffs, and that they would buy the same and pay him the value of his interest as if he were a retiring partner, or sell him their interests on a like basis.

In pursuance of this understanding, as Napier alleges, a New Jersey corporation was organized early in August, 1900, with an authorized capital stock of $100,000, divided into $1,000 shares, of which 333 were allotted to Napier, 333 to Peter, and 334 to Henry Westerhoff. Thereafter, as the bill continues, the corporation adopted the contract made by Napier on his own behalf and that of the partnership with the commission house of Spielman & Co., on July 31, 1900. The bill then charges various acts by the Westerhoffs in violation sooner

or later of every detail of the agreement and understanding, all for the purpose of forcing Napier out of the corporation, depreciating the value of his stock, and destroying his exclusive selling agency. As a result, according to Napier, he was wrongfully deprived of being sole sales agent, driven out of the corporation, impoverished and ruined by the conduct of defendants Peter and Henry, who were now aided by Harris Westerhoff, a relative, who had been brought into the corporation. The relief asked is a decree adjudging the Westerhoffs to be Napier's copartners, and the stock of the corporation to be copartnership assets, and directing an accounting and the appointment of a receiver of the assets of the corporation.

A supplemental bill, verified March 15, 1906, alleges, in effect, a continuation of the acts complained of in the original bill, failure to pay dividends, and wasteful conduct of the business and funds for the benefit of the Westerhoffs. The facts developed in the record controvert in every detail the charges of wrongful conduct made against defendants.

After some unsuccessful experiences, Peter and Henry Westerhoff began the business of manufacturing silks in Paterson, N. J., in 1894, under the name of Westerhoff Bros. Their capital was about $3,200 and they started with 4 looms. In May, 1895, they had 35 looms and approximately in plant and stock $8,000 to $12,000. Napier was selling silks in a small way, and after some solicitation, a promise from Peter against the desire, at first, of Henry, an assertion by Napier that he could sell a lot of goods, and a statement that he would put $2,000 into the business, the Westerhoffs agreed to take him into partnership. The partnership agreement was made on May 1, 1895, and its main features were as follows (Henry being party of the first part, Peter the second, and Napier the third):

"Second. That the parties of the first part and second part shall allow one-third interest in the aforesaid firm of Westerhoff Bros. upon the payment of two thousand dollars ($2,000) * * * to said Thomas S. Napier, party of the third part, to be paid to the aforesaid firm to be used in the business.

"Third. The parties of the first and second part shall manage and devote their whole time to the business and shall receive as salary therefor eighteen dollars ($18) per week, or nine hundred and thirty-six dollars ($936) per year, and keep careful books and accounts for the inspection of all parties herein mentioned.

"Fourth. That the partnership shall expire on May 1, 1897. Any party or parties herein mentioned wishing to renew or withdraw from said firm at the expiration of said partnership shall give two months' written notice to the firm.

"Fifth. That no profits or money shall be drawn out of this business for the time of this partnership.

"Seventh. The party of the third part shall make payments for his interest in said firm as follows: First payment, May 1, 1895, $700.00; second, June 1, 1895, $200; third, July 1, 1895, $200.00; fourth, August 1, 1895, $200.00; fifth, September 1, 1895, $200.00; sixth, October 1, 1895, $200.00; seventh, November 1, 1895, $200.00; eighth, December 1, 1895, $100.00; total $2,000.00. When fully paid his interest shall be one-third interest partner in said firm."

It will be noted that the Westerhoffs are to "manage" the business and devote their whole time to it, and there is no suggestion that Napier was to be the sole and exclusive selling agent. As time went on the Westerhoffs were not pleased with Napier as a salesman, nor

with his way of doing business, and, finally, a crisis came in 1900, when the Westerhoffs learned that Napier, who was selling goods through the commission house of Wendt, Steinhauser & Co., had overdrawn his account with that house to the extent of over $5,000 and that the Wendt concern claimed that his interest in the firm was responsible for this sum and deducted it from the account current payable to the Westerhoff firm.

Thereupon Henry Westerhoff insisted, as he had the right to (the partnership being terminable on two months' notice), that the firm should be dissolved or a corporation formed. It was manifest that, if conduct of this kind were continued by Napier, the business would be seriously affected, and perhaps ultimately destroyed. Defendants testified that Napier yielded his unconditional assent to the incorporation, while Napier claims that it was granted only upon the conditions set forth in his bill.

On July 1, 1900, the books showed assets of $105,000. This rather remarkable growth was attained, not merely because of the ability of the Westerhoffs, but because they permitted the profits to accumulate and practiced a large measure of self-denial, allowing to themselves only $18 a week at first, and never more than about $1,200 to $1,300 per annum. Napier, however, was making in some years $15,000 as net earnings from the sale of the merchandise manufactured by the partnership.

The corporation was formed under the name of "Westerhoff Bros. & Napier Company"; the certificate of incorporation, dated July 31, 1900, having been filed August 2, 1900. The claim of Napier is that the terms which he asserts were imposed as a condition of the incorporation were the subject-matter of discussion with and consent by Peter Westerhoff. This testimony is not only contradicted by both of the Westerhoffs, but also by Reynolds and Campbell, disinterested witnesses, and by the probabilities of the case as shown by all the surrounding circumstances. Reynolds was the attorney who drew up the incorporation papers and Campbell was his associate. Napier signed the incorporation papers, all the formal routine was gone through with, and Napier heard the by-laws read section by section, but never said a word about the alleged partnership agreement.

Without further elaboration of detail, we are entirely satisfied that there never was any agreement in any of the respects claimed by Napier, and, in any event, that Napier has fallen far short of proving one. So, likewise, as to the alleged agreement that he should be exclusive selling agent, or the alleged scheme of defendants to deprive him of the right of being the exclusive selling agent. He had not been such prior to incorporation, and the incorporation was not undertaken for any unfair purpose, nor with any preconceived wrongful design, but solely to put the business in a safeguarded legal position, rendered necessary by Napier's actions and well justified by the industry and economy of the Westerhoffs. Napier's subsequent conduct made his continuance impossible, and invited the loss of confidence in him and the action of the majority stockholders in the fall of 1904, by which he was ousted as an officer, director, or selling agent.

Many of the charges as to waste and misconduct relate to alleged transactions after the original bill was filed. When examined, it will be found that these charges have no substance. In course of time the business and the books were put into an orderly businesslike condition, and during the lean days the Westerhoffs acted conservatively, as they had to, in respect of the declaration of dividends. Napier claims that he was deprived of dividends because the corporation paid the Westerhoffs increased salaries and paid the expenses incident to this litigation. Napier's share on this theory would have been about $1,000 per annum at most. The Westerhoffs' raise of salary was $1,050 per annum each—a well-deserved and modest increase. The corporation, whose very life was being attacked, had the right to expend reasonable law expenses for defense; but, nevertheless, the Westerhoffs have credited the amounts due them for their salary in discharge of these expenses.

After this suit was commenced, and Napier had been unsuccessful in other enterprises, he and his then partner made an assignment on August 12, 1908, to one Barnard and one Lotte, as trustees, of—

"all their assets, claims, demands, causes of action, policies of insurance, * * * real estate, * * * stock in any and all corporations, and any and all property of whatever nature and description and whatsoever situated, owned by the debtors individually or as members of any firm, * * * excepting, however, any and all household furniture and wearing apparel of the debtors, in trust nevertheless to convert such property into money."

Defendants contend that by virtue of this assignment the suit has abated, and so the District Court held. This is probably true, but we need not pass on this question, because on the facts we find no merit whatever in any of plaintiff's claims, and, on the contrary, we are of opinion that the actions of defendants were with full power and wholly justified, and that, if the business is now prosperous, it is such because of the hard work, intelligence, and self-denial of defendants, and not because of any wrong inflicted by them upon plaintiff.

We find it unnecessary to analyze at length the mass of testimony contained in this record, or to add anything further to the conclusions as to the facts outlined in the opinion of the District Judge.

The decree is affirmed, with costs.

MILLER et al. v. HAMILTON et al.

(Circuit Court of Appeals, Eighth Circuit. May 1, 1916.)

No. 4474.

1. MUNICIPAL CORPORATIONS ⇐950—BONDS FOR PUBLIC IMPROVEMENT—PLEDGE OF FUTURE ASSESSMENTS.

Under Kirby's Dig. Ark. § 5683, which provides that no single improvement shall be undertaken by a sewer district which alone will exceed in cost 20 per cent. of the value of real property in the district as shown by the last county assessment, and section 5720, which authorized the board of improvement of a district in order to hasten the work to borrow money and pledge all uncollected assessments for the repayment there-

⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

of, where a district has issued bonds for the construction of a sewer system which together with the interest paid and to accrue thereon and the expense of collecting future assessments exceeds 20 per cent. of the assessed value of the real property in the district, its officers have no power to divert any part of such assessments made for the improvement to the payment of claims other than the bonds.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 902-910; Dec. Dig. ⊂950.]

2. MUNICIPAL CORPORATIONS ⊂950—BONDS—"PLEDGE" OF ASSESSMENTS FOR PUBLIC IMPROVEMENT.

In a statute authorizing a municipal corporation to issue bonds for a public improvement and to pledge assessments to be made therefor for their payment, the word "pledge" is not used in a technical sense so as to create a lien which may be enforced in equity, but is nevertheless effective to prevent a diversion of the assessments when collected to any other purpose.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 902-910; Dec. Dig. ⊂950.

For other definitions, see Words and Phrases, First and Second Series, Pledge.]

In Error to the District Court of the United States for the Eastern District of Arkansas; Jacob Trieber, Judge.

Mandamus at law by J. F. Hamilton and others against Max D. Miller and others. Judgment for plaintiffs, and defendants bring error. Reversed.

S. H. Mann, of Forrest City, Ark., and H. F. Roleson, of Marianna, Ark., for plaintiffs in error.

Jacob Fink, John I. Moore, J. M. Vineyard, and W. R. Satterfield, all of Helena, Ark., for defendants in error.

Before SANBORN and CARLAND, Circuit Judges.

CARLAND, Circuit Judge. Defendants in error, hereafter called plaintiffs, brought this proceeding in mandamus against the plaintiffs in error, hereafter called the defendants, to compel the assessment and levy of certain taxes for the purpose of paying a judgment which the plaintiffs had obtained against the board of improvement of sewer district No. 1, in the city of Marianna, Ark. Judgment was rendered in favor of the plaintiffs, and defendants sued out a writ of error to review that judgment. The judgment was rendered on the pleadings, and we will endeavor to state the facts as they appear therefrom.

Plaintiffs on the 28th day of January, 1901, entered into a written contract with the defendants as the board of improvement of sewer district No. 1 of Marianna, Ark., wherein the plaintiffs contracted for the sum of $15,650 to do certain work and furnish all the materials, tools, and labor necessary to complete an unfinished and abandoned contract for the construction of a system of sewers in and for said sewer improvement district No. 1, according to certain plans and specifications. Plaintiffs fully complied with their part of the contract and completed the work according to the terms and requirements thereof, and demanded of the defendants the balance due therefor in the sum of $5,539.01, which demand was refused. Thereupon the

plaintiffs on the 28th day of September, 1912, brought their action against the board of improvement of sewer district No. 1, as aforesaid, in the United States District Court for the Eastern District of Arkansas, and such proceedings were had therein that on March 11, 1913, the plaintiffs recovered judgment against the board of improvement for $4,684.46, which, with costs and interest on January 27, 1915, amounted to $5,319.27. Demand for payment of said judgment has been made and payment refused. There are no funds in the hands of the treasurer of said sewer district No. 1 with which to pay said judgment or any part thereof. On the 1st day of July, 1906, the commissioners of said sewer district issued bonds in the sum of $23,400, for the sum of $1,000 each except No. 1, which was for the sum of $1,400 payable the 1st day of July, 1936, except the first seven bonds which were payable July 1, 1921, 1922, 1923, 1924, 1925, 1926, and 1927, and bearing interest at the rate of 6 per centum per annum, payable semiannually on the 1st day of January and July of each year. None of said bonds have been paid, and all are outstanding valid obligations of said sewer district, payable to bearer, and all held by various persons none of whom are parties to this action.

[1] The defendants have already expended the sum of $28,899.34 in the construction of sewers in said district, and have paid in interest on the bonds the sum of $12,698.75; the interest still to accrue on said bonds will amount to the sum of $29,557.50; the expense of collecting future assessments will amount to the sum of $2,169.72. The amount of the assessed valuation of the real estate in said sewer district No. 1 on January 3, 1906, at the time of the organization of said district according to the assessment as equalized for state and county purposes for the year 1905, is $337,550, 20 per cent. of which is $67,510. The funds arising from the proceeds of the bonds were used to satisfy contracts for the construction of the sewer improvement, executed prior to the contract with plaintiffs. The bonds issued by sewer improvement district No. 1 on their face and by their tenor pledged the uncollected assessments of the district for their payment. The alternative writ prayed that defendants who were named in the petition for the writ should be compelled to make a new assessment on lands within the sewer district for the purpose of paying the judgment. This relief was not granted by the trial court, presumably for the reason that the limit of expenditures authorized by law, to wit, 20 per cent. of the assessed value of the real estate within the district, had already been reached and no new assessment could be made. But the trial court did award a peremptory writ of mandamus compelling the board of commissioners of sewer district No. 1 to draw their warrant upon the treasurer of said district, payable to the order of plaintiffs or their attorneys of record in the sum of $4,684.46, with interest at 6 per cent. from March 11, 1913, and all costs expended in this action; and further commanded the treasurer to pay said warrant out of the first moneys coming into his hands as the treasurer of said district. It is objected that the judgment below was erroneous for the reason that it was not responsive to the petition. We pass this question, as we are satisfied from the facts stated that the court below erred in

issuing the peremptory writ of mandamus to the board of commissioners and the treasurer of the district. We have arrived at this conclusion on consideration of the laws of Arkansas which relate to the raising of money for the improvement of sewer districts.

Section 5683, Kirby's Digest of the Statutes of Arkansas, provides:

"No single improvement shall be undertaken which alone will exceed in cost twenty per centum of the value of the real property in such district as shown by the last county assessment."

Section 5720 of the same digest provides that the board of improvement in order to hasten the work may borrow money and pledge all uncollected assessments for the repayment thereof. The powers of the board of improvement are derived directly from the Legislature, and in exercising their powers the board acts as the agent of the property owners. Fitzgerald v. Walker, 55 Ark. 148, 17 S. W. 702. The Supreme Court of Arkansas has decided that no assessment could be made against the real property of any improvement district for any single improvement in excess of 20 per centum of the assessed value. Morrilton Waterworks Improvement District v. Earl, 71 Ark. 4, 69 S. W. 577, 71 S. W. 666; Lenon v. Brodie, 81 Ark. 219, 98 S. W. 979; Webster v. Ferguson, 95 Ark. 575, 130 S. W. 513.

It therefore appears that there are two facts established by the record which would prevent any relief in this action in favor of the plaintiffs. The first is that the expenditures already paid and incurred by sewer district No. 1 exceed 20 per centum of the assessed valuation of the real estate in the district. This is shown by the following statement:

Expenditures	$28,899.34	
Interest paid on bonds	12,698.75	
Interest to be paid on bonds	29,557.50	
Expense in collecting future assessments	2,169.72	
		$73,325.31
Assessed valuation $337,550, 20 per cent. of this amount would be		67,510.00
Excess		$ 5,815.31

The interest on the bonds is a part of the cost of the improvement. Fitzgerald v. Walker, supra; Bateman v. Board of Commissioners, 102 Ark. 306, 143 S. W. 1062. This state of the case would prevent any new assessment.

The plaintiffs, however, claim that they are entitled to have their judgment paid from uncollected assessments which they claim to be as follows:

Expenditures paid	$28,899.34
Interest paid	12,698.75
Total	$41,598.09
Twenty per cent. of amount of assessment	$67,510.00
Less	41,598.09
Uncollected assessments	$25,911.91

[2] This claim is based upon the contention that the attempt of the board of improvement to pledge the uncollected assessments for the payment of the principal and interest of the bonds was invalid for the reason that the uncollected assessments, being incapable of delivery, could not be pledged. The case of Street Grading District No. 60 v. Hagadorn, 186 Fed. 451, 108 C. C. A. 429, is cited for the purpose of showing that this court has decided that these uncollected assessments could not be pledged for the payment of bonds and interest in a case like the one at bar.

The case cited was brought in equity by Hagadorn, a holder of bonds similar to those issued by sewer district No. 1, for the purpose of having a receiver appointed to collect certain unpaid assessments and to enforce the pledge of the same for the payment of the bonds. It was objected that the complainants had an adequate remedy at law. The court sustained this objection and enforced the rule that the powers of a court of equity cannot be made use of to assess and levy taxes. For the purpose of maintaining the suit in equity, the complainant contended that the bondholders had a lien upon the uncollected assessments which a court of equity had jurisdiction to enforce. In reply to this contention, the court held that the language of the Legislature of Arkansas, in providing that the uncollected assessments might be pledged for the payment of the bonds, used the word "pledge" in a colloquial and not in a technical sense, and decided there was no lien; but the court did not intend to hold that the sewer improvement district could not pledge or hypothecate the uncollected assessments for the payment of the bonds and interest in face of the statute which expressly permitted it to do so, and in this case we have no doubt but that under the statute the board of improvement could pledge in the sense that word is used in the statute, and according to the record did pledge the uncollected assessments for the payment of the bonds and interest. This is frequently done where railroads mortgage their income for the payment of bonds. It has been held by this and other courts that taxes assessed for the purpose of paying bonds and interest cannot be diverted to any other purpose, but must be sacredly kept for the purpose for which they were assessed and levied. Brooke v. City of Philadelphia, 162 Pa. 123, 29 Atl. 387, 24 L. R. A. 781; Vickrey v. Sioux City (C. C.) 104 Fed. 164; Farson et al. v. Sioux City et al. (C. C.) 106 Fed. 278; Jewell v. City of Superior, 135 Fed. 19, 67 C. C. A. 623; Olmsted v. City of Superior et al. (C. C.) 155 Fed. 172. It is elementary in the law of mandamus that the writ carries no power; that is, a board or officer cannot be compelled to do by mandamus that which he could not do without it.

We therefore are of the opinion that the trial court erred in awarding a peremptory writ, and that the judgment below must be reversed, and the case remanded, with instructions to grant a new trial.

And it is so ordered.

VENNER v. PENNSYLVANIA STEEL CO. OF NEW JERSEY.

(Circuit Court of Appeals, Third Circuit. June 30, 1916.)

No. 2127.

1. INJUNCTION ⊜136(2)—PRELIMINARY INJUNCTION—RIGHT TO.

Where a preponderating majority of the shareholders of a corporation agreed to a sale of its property, and complainant acquired only a few shares after the stockholders had been notified that a meeting would be held to consider the question of sale of corporate property and dissolution of the corporation, a preliminary injunction on the ground that the sale would violate the federal Anti-trust Act (Act July 2, 1890, c. 647, 26 Stat. 209), as well as state statutes, and that payment would not be made as required by state law, is properly refused in the discretion of the trial court; the affidavits offered not clearly sustaining such contentions, and complainant being protected by an order that a sum of money should be deposited for his protection.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 306; Dec. Dig. ⊜136(2).]

2. APPEAL AND ERROR ⊜1033(8)—HARMLESS ERROR—PRELIMINARY INJUNCTION.

Where complainant did not establish his right to enjoin the sale of corporate property and dissolution, he cannot complain that the court ordered the depositing of a sum of money for his protection in lieu of a preliminary injunction against such proceedings.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4060; Dec. Dig. ⊜1033(8).]

Appeal from the District Court of the United States for the District of New Jersey; John Rellstab, Judge.

Bill in equity by Clarence H. Venner against the Pennsylvania Steel Company of New Jersey. From the decree denying preliminary injunction, complainant appeals. Affirmed.

Robert H. McCarter, of Newark, N. J., and E. N. Zoline, of New York City, for appellant.

John R. Hardin, of Newark, N. J., and A. H. Wintersteen, of Philadelphia, Pa., for appellee.

Before McPHERSON and WOOLLEY, Circuit Judges, and DAVIS, District Judge.

McPHERSON, Circuit Judge. The court below refused to grant a preliminary injunction restraining the Pennsylvania Steel Company of New Jersey from carrying out a contemplated agreement with another corporation, but required the Steel Company to pay into court $10,000 to secure the plaintiff (a holder of common stock) against possible loss. The plaintiff appeals, asserting the illegality of the proposed agreement, and attacking the decree generally as an abuse of discretion. Briefly, the facts that need now be stated are as follows:

As the result of previous negotiations carried on between the Bethlehem Steel Company, a Pennsylvania corporation, and the New Jersey company, a provisional agreement was reached on February 17 of this year—amended a month later in some details. The New Jersey company is a holding corporation, and owns all the stock of the Maryland

Steel Company, a Maryland corporation, and nearly all the stock of the Pennsylvania Steel Company of Pennsylvania, a corporation of that state, as well as the stocks of several other companies that need not now be specified. The manufacture of steel products is carried on by the Steel Company of Pennsylvania and by the Maryland company at their respective plants. A large amount of capital—about $51,000,000—is invested in these combined enterprises, but on this appeal we may avoid further detail concerning the business. It is enough to say that the plants and the other assets of the principal corporations are heavily incumbered, and that the holding company has paid no dividend on its common stock since 1901, and no dividend on its preferred stock since 1913. Probably owing to the recent demand for steel—in part an abnormal demand, growing out of the well-known conditions in Europe—the Bethlehem Company offered to buy (subject to existing incumbrances) the assets of the New Jersey company, except the shares of the Steel Company of Pennsylvania and of the Maryland company, and to buy also the plants and some other assets of the Steel Company of Pennsylvania and the plant of the Maryland company. The New Jersey company was then to dissolve. Considering the proposal a favorable opportunity to dispose of a business that had encountered many difficulties, the managers of the Pennsylvania and the Maryland companies agreed provisionally on the terms, but of course a binding contract so extensive in scope could not be made by a board of directors; it required the consent of the stockholders also, and the method by which the defendant's stockholders must consent, if at all, is laid down by the New Jersey Corporation Act of 1896. Accordingly the proposal of the Bethlehem Company was laid before the three corporations immediately concerned, and was favorably acted upon by the directors of each and by the stockholders of the New Jersey corporation. (We do not know what action, if any, has been taken by the stockholders of the Steel Company of Pennsylvania and of the Maryland company.) Of the New Jersey company's preferred stock, which amounts to $20,500,000, about 80 per cent. voted in favor of dissolution, only 451 shares opposing; and of the common stock, which amounts to $10,750,000, about 99 per cent. voted in favor of dissolution, only 24 shares opposing. These 24 shares were owned and voted by the plaintiff Venner, who bought them on April 14, 1916, 11 days after the stockholders had been notified that a meeting would be held on May 4 to consider the question of dissolution. It therefore appeared as the result of the regular statutory proceeding that both classes of the defendant's stock were overwhelmingly in favor of accepting the Bethlehem proposal. Among the dissentients were Joseph H. Brandt (the original plaintiff, who has now withdrawn), the owner of 139 shares of preferred stock, and the present plaintiff, who bought his few shares on April 14 and intervened a month later.

[1] In our view of the dispute, little need now be said. On such an appeal, taken at a preliminary stage of the proceeding, it is well settled that the chief concern of a reviewing court is to decide whether the trial judge exercised his discretion properly. And it is evident, also, that the present plaintiff, who is apparently not without experience

in litigation, cannot expect us to regard him as having undertaken a public duty. Undoubtedly he is entitled to his legal rights, and one of these is to raise the question now, whether the transaction he attacks is so plainly unlawful that a court should restrain it from the beginning. The principal ground upon which he asserts it to be illegal is that it violates the federal Anti-trust Act of 1890 and the Clayton Act of 1914 (Act Oct. 15, 1914, c. 323, 38 Stat. 730), and violates also the New Jersey statutes known colloquially as "the Seven Sisters." This position has received our careful attention, but we are decidedly of opinion that on the present record—which consists mainly of ex parte affidavits—the plaintiff's charges cannot be safely determined. A court should have facts before it, satisfactorily proved in accordance with the usual well-tested rules, before deciding questions of such gravity as were presented on the argument; and, of course, as the time for taking evidence has not yet arrived, these questions must for the present be left undetermined.

The plaintiff contends, further, that the Bethlehem Company's proposal is unlawful, because the whole purchase price of the property to be bought is payable in bonds, although the New Jersey act of 1896 requires part of the price to be paid in cash. The defendant denies that no cash is to be paid, pointing out that the Bethlehem Company agrees to pay off certain of the defendant's current obligations, and insisting that this is the plain equivalent of cash. Here, also, we ought to know the precise facts before deciding, and these can hardly be ascertained until the liquidating trustees of the defendant have finally agreed on all the details of the sale. No doubt the plan of purchase has in general been approved by the defendant's stockholders; but we see no reason why in some minor particulars the terms might not be varied by the liquidating trustees, if they should see proper to do so.

[2] The only other matter that may call for a moment's notice is the complaint that, instead of granting an injunction, the court ordered a deposit to protect the plaintiff from contingent loss. The objection can hardly be directed against the deposit as such, for, instead of attacking that feature of the order, the plaintiff should rather commend it. If the plaintiff's interest be merely pecuniary—and we so regard it for the present—and if he should turn out to be injured, the money is in court to pay him. His complaint against the deposit must therefore be only another form of objecting to the refusal to enjoin, and in that event nothing more need be said about it.

On the whole case, we think the decree appealed from was a proper exercise of discretion by the District Court, and accordingly we now affirm it.

In re LOUIS J. BERGDOLL MOTOR CO.

HARRIGAN v. BERGDOLL.

(Circuit Court of Appeals, Third Circuit. June 15, 1916.)

No. 2110.

1. BANKRUPTCY ⟸328—CLAIMS—ALLOWANCE.

Under Bankr. Act July 1, 1898, c. 541, § 57n, 30 Stat. 560 (Comp. St. 1913, § 9641), declaring that claims shall not be proved against a bankrupt estate more than one year after adjudication unless they are liquidated by litigation, and the final judgment is rendered within 30 days before or after the expiration of that time, then within 60 days after the rendition of such judgment, a creditor may, after a payment by the bankrupt had been adjudicated a preference, present his claim within 60 days though the judgment was rendered more than a year after adjudication.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 518; Dec. Dig. ⟸328.]

2. BANKRUPTCY ⟸311(1)—PREFERENCES—ALLOWANCE.

Under Bankr. Act, § 57, declaring that the claims of creditors who have received preferences shall not be allowed, unless such creditors shall surrender their preferences, a creditor who received a voidable preference may, after the preference is set aside, prove his claim, though he resisted suit to recover such preference, the original transaction being untainted by any fraud.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 497–499; Dec. Dig. ⟸311(1).]

Appeal from the District Court of the United States for the Eastern District of Pennsylvania; Oliver B. Dickinson, Judge.

In the matter of the bankruptcy of the Louis J. Bergdoll Motor Company. The claim of Erwin R. Bergdoll was allowed, and Frank A. Harrigan, trustee, appeals. Affirmed.

J. Frederick Jenkinson and Frank A. Harrigan, both of Philadelphia, Pa., for appellant.

Henry J. Scott and Nicholas H. Larzelere, both of Philadelphia, Pa., for appellee.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

McPHERSON, Circuit Judge. This is an appeal by the trustee from the allowance of a claim against the bankrupt estate of the Louis J. Bergdoll Motor Company. The facts that gave rise to the original controversy are fully stated by Judge Woolley in Bergdoll v. Harrigan (C. C. A. 3d) 217 Fed. 943, 133 C. C. A. 615, and need not be repeated. In order to explain the present dispute, it is enough to say briefly, that an involuntary petition was filed against the Motor Company on March 17, 1913, and that an order of adjudication was entered on April 11. In October the trustee was authorized to sue Erwin R. Bergdoll to recover a preference of more than $31,000, and accordingly he brought the suit soon afterward and recovered a verdict in the spring of 1914. We affirmed the judgment in 217 Fed. 943, 133 C. C. A. 615,

and the Supreme Court was of the same opinion. Bergdoll v. Harrigan, 238 U. S. 609, 35 Sup. Ct. 663, 59 L. Ed. 1487. The decision of the Supreme Court was announced on April 26, 1915, and thereupon Bergdoll paid the judgment. On June 7, 1915, he offered a proof of claim, embracing the same debt ($31,270) that had been preferentially paid. The referee rejected the claim, but the District Court (Dickinson, J.) reversed this order and held that the proof should have been allowed. 230 Fed. 248. The question now presented is whether for any reason the claim was barred.

[1, 2] The trustee does not assert that the mere lapse of time was sufficient. It is true that more than a year had passed since the adjudication (section 57, cl. "n"); but as the litigation about the preference was not ended until April 26, 1915, and as the proof was offered within 60 days from that date, he concedes that the offer was in time. The decisions on this subject are collected in 1 Rem. Bkcy. (2d Ed.) §§ 717, 727½; Collier, Bkcy. (10th Ed.) 746; Black, Bkcy. § 526. And see Page v. Rogers, 211 U. S. 581, 29 Sup. Ct. 162, 53 L. Ed. 332, where the Supreme Court allowed a creditor "to prove his claim and to receive a dividend on it upon an equality with other creditors," although more than five years had passed since the adjudication. The sole ground of the trustee's objection is that the preferential payment was a fraud in which Bergdoll himself took part, and that such conduct affords an equitable reason for denying him the right to prove. It is contended that Keppel v. Bank, 197 U. S. 356, 25 Sup. Ct. 443, 49 L. Ed. 790, inferentially supports this position, and one or two passages from the opinion are quoted to justify the argument. We do not so understand the reasoning of that case. The question submitted and answered in the affirmative was this:

"Can a creditor of a bankrupt who has received a merely voidable preference, and who has in good faith retained such preference until deprived thereof by the judgment of a court upon a suit of the trustee, thereafter prove the debt so voidably preferred?"

The ground of the decision is that, although the act declares in section 57 that "the claims of creditors who have received preferences shall not be allowed unless such creditors shall surrender their preferences," Congress intended that such claims should be allowed, whether the surrender be voluntary or involuntary. We are now asked to hold that, although this may be true when the creditor has been preferred in good faith, it is not true when the preference has been brought about by fraudulent conduct in which he himself has taken part. We suppose that, when this proposition speaks of "good faith," it means a preferential payment honestly believed by the parties to be permitted, and that, when it speaks of "fraudulent conduct," it means a knowing and deliberate violation of the act. For the purposes of this appeal we assume that the preference now in question was fraudulent; the referee and the District Court have united in so holding, and we accept their finding. But it should be observed that this finding refers to the preference only, and that the preference no longer exists. In the last analysis, we are asked to punish a creditor whose debt was lawfully contracted, for the reason that he was guilty of fraud after-

ward in trying to secure an advantage. The subject-matter of the claim is money advanced by Bergdoll in January and February, 1913, in a bona fide effort to assist a failing business, and the trustee does not attack the innocence of these advances. He would make no objection to the proof if Bergdoll had not attempted in March to secure full repayment by fraudulent conduct. But the fraud has been defeated, the money thus obtained has been recovered, and Bergdoll is now no better off than he was when he tried to take advantage of the other creditors. Is he to be punished still further by the practical forfeiture of his debt? As it seems to us, the sufficient answer is the language of Keppel v. Bank, 197 U. S. 362, 25 Sup. Ct. 445, 49 L. Ed. 790:

"This would disregard the elementary rule that a penalty is not to be readily implied, and on the contrary that a person or corporation is not to be subjected to a penalty unless the words of a statute plainly impose it."

As the Supreme Court has shown, the Bankruptcy Act of 1898 contains no language forfeiting the whole or any part of an otherwise valid claim on the ground that the creditor has afterward been guilty of fraud, and (this being so) the courts have no authority to enlarge the statute by adding such a provision.

But what we have said must not be understood to embrace a debt that in itself is founded on fraud. Obviously both a debt and a preference may arise out of the same fraudulent transaction, or the debt alone may be fraudulent irrespective of the preference. Such a situation would present no difficulty, for a fraudulent debt is almost a contradiction in terms; in the eye of the law, it is really no debt at all (at least, as against bona fide creditors), and is therefore incapable of proof.

The order of the District Court is affirmed.

FEILBACH CO. et al. v. RUSSELL.

(Circuit Court of Appeals, Sixth Circuit. June 16, 1916.)

No. 2795.

1. BANKRUPTCY ⟸303(3)—PREFERENCES—EVIDENCE—SUFFICIENCY.
In a suit to set aside a chattel mortgage as a preference, evidence held to warrant a finding that the creditor took the mortgage knowing that it would effect a preference.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 462; Dec. Dig. ⟸303(3).]

2. BANKRUPTCY ⟸186(1)—PREFERENCES—VACATION.
An assignee of a chattel mortgage, which constituted a preference against other creditors of the mortgagor, who became a bankrupt, is liable for the value of the mortgaged property, possession of which he obtained by foreclosure

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 285, 319; Dec. Dig. ⟸186(1).]

3. APPEAL AND ERROR ⊂⊃719(1)—ASSIGNMENT OF ERRORS IN COURT BELOW—NECESSITY.

An objection not raised by appropriate assignment of error cannot be considered on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2968, 2972, 2980, 2981, 3490; Dec. Dig. ⊂⊃719(1).]

4. BANKRUPTCY ⊂⊃395(1)—EXEMPTIONS—CLAIM OF—RIGHT TO ASSERT.

Where a merchant gave a chattel mortgage on his stock of goods, he can assert exemptions thereon, but one who purchased on foreclosure of the mortgage, which was preference, cannot set up such exemptions to diminish recovery by the merchant's trustee in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 658; Dec. Dig. ⊂⊃395(1).]

Appeal from the District Court of the United States for the Eastern District of Michigan; Arthur J. Tuttle, Judge.

Bill by Franklin J. Russell, trustee in bankruptcy of the estate of Alexander R. Navarre and others against the Feilbach Company and another. From a decree for complainant, defendants appeal. Affirmed.

J. H. Cornelius and C. L. Robertson, both of Adrian, Mich., for appellants.

C. E. Baldwin, of Adrian, Mich., for appellee.

Before KNAPPEN and DENISON, Circuit Judges, and SESSIONS, District Judge.

SESSIONS, District Judge. On the 22d day of January, 1913, the firm of A. R. Navarre & Company and the individual members thereof were adjudged bankrupts. For upwards of eighteen months the bankrupt firm had been engaged in the retail grocery and meat business in the city of Adrian, Michigan, and had been making weekly purchases of grocery stock from the defendant The Feilbach Company, a wholesale grocer of Toledo, Ohio. On October 16, 1912, and thus within four months of the adjudication, A. R. Navarre & Company gave to The Feilbach Company a chattel mortgage upon their entire stock of groceries and store fixtures to secure the payment of a past-due indebtedness for merchandise purchased. The chattel mortgage was immediately filed in the proper office. Thereafter the bankrupts from time to time made payments upon the mortgage and also purchased other goods from The Feilbach Company. The payments so made exceeded such purchases by the sum of $136.54. On November 30, 1912, The Feilbach Company assigned the mortgage to the defendant Peavey. The assignment was not filed or recorded. On December 24, 1912, defendant Peavey took possession of the mortgaged property, foreclosed the mortgage and bid in the property at the foreclosure sale for the balance of the debt then owing to The Feilbach Company and the expenses of the foreclosure. After appellee was elected trustee, he brought this suit to set aside the chattel mortgage as both preferential and fraudulent and to recover the value of the mortgaged property and the payments made by the bankrupt to The Feilbach Company in excess of the goods purchased after the mortgage was given. The

lower court found that the mortgage was preferential and fraudulent and rendered a decree against both defendants for the sum of $1,116.93.

The substantial errors alleged and assigned by appellants are (1) that the evidence did not warrant the finding that the chattel mortgage constituted a preference; (2) that there was no evidence to sustain a personal decree against the defendant Peavey; and (3) that, each of the members of the bankrupt firm having claimed exemptions in their stock in trade, tools and store fixtures, the mortgage was valid as to such exemptions and the decree ought to be diminished by the proportionate amount thereof.

[1] 1. To recite in detail the facts bearing upon the question of whether the chattel mortgage here in controversy was a voidable preference would serve no useful purpose. While the evidence upon this subject is conflicting, it fairly shows the existence of all the essential elements of such a preference. The mortgage was given within four months of the filing of the petition in bankruptcy. It secured the payment of an antecedent debt. At the time it was given the bankrupts were insolvent. Even if no deductions from the cost price of the goods and fixtures or from the face value of the book accounts were made, still the value of all of the property belonging to the bankrupts would have been somewhat less in amount than the firm's debts. By means of the mortgage the defendant creditor's claim has been paid in full, while other creditors will receive little or nothing. The Feilbach Company had been selling goods to the bankrupts from the beginning of their business. Its traveling salesman resided in the city where their store was located and visited them every week. After the first few months, the indebtedness for goods purchased from the defendant constantly increased while the stock did not increase. Defendant knew that the bankrupts were purchasing goods from others upon credit. Confessedly they were unable to meet their obligations. Defendant insisted upon payment in full or security. The mortgage covered the entire stock of goods and fixtures and all future additions thereto. These facts and others shown by the record fully warrant the conclusion that The Feilbach Company had reasonable cause to believe that the enforcement of the chattel mortgage would effect a preference in its favor.

[2, 3] 2. The decree against the defendant Peavey was based upon the finding of the lower court that the defendants had formed and entered into a conspiracy to obtain unlawfully the property of the bankrupts for less than its fair value with the intention and for the purpose of securing the full payment of the claim of the one and a profit to the other, and thus to defraud other creditors of the bankrupt firm. While the evidence tends to sustain this conclusion, we do not find it necessary to go so far. Even if the association of the defendants in the transaction did not amount to a fraudulent conspiracy, the personal liability of defendant Peavey is otherwise clearly established. When the chattel mortgage was assigned to and accepted by him—or, at least, when he became a purchaser by paying the price—he knew, or ought to have known, that it was voidable because of its preferen-

tial character. He obtained possession of the mortgaged property and, through foreclosure proceedings, converted it to his own use. Upon the plainest principles of law, he became liable for its value when the mortgage was set aside. The fact that he was not the creditor for whose immediate benefit the preference was primarily given does not forbid a decree against him. Marsh v. Walters, 220 Fed. 805, 136 C. C. A. 409. The question of Peavey's personal liability for the payments made by the bankrupt in excess of goods purchased after the mortgage was given is not raised by appropriate assignment.

[4] 3. In their petition and schedules in bankruptcy, the bankrupts have claimed exemptions in their stock in trade, tools and fixtures, for themselves and not for the benefit of these defendants. No selection of specific goods has been made and none can be made. Exemptions of this class are personal to the merchant and cannot be claimed by a purchaser under a sale such as this. J. L. Hudson Co. v. No-Name Hat Co., 174 Mich. 109, 140 N. W. 507. In this instance, the property covered by the mortgage was of greater value than the mortgagors' exemptions and, regardless of the exemptions, the transfer was preferential and voidable.

The decree of the lower court is affirmed, with costs, but without prejudice to any proceedings which may be taken in the bankruptcy cause to have the right to exemptions, or their proceeds, determined.

In re KEHOE.

(Circuit Court of Appeals, Second Circuit. February 20, 1916.)

No. 268.

BANKRUPTCY ⇐76(1)—INVOLUNTARY PETITIONS—PETITIONING CREDITORS.

Bankr. Act July 1, 1898, c. 541, § 59b, 30 Stat. 561 (Comp. St. 1913, § 9643), declares that three or more creditors, who have provable claims against any person which amount in the aggregate in excess of the value of securities held by them, if any, to $500 or over, or if all of the creditors be less than 12 in number, then one of such creditors whose claim equals such amount may file a petition to have the debtor adjudged a bankrupt. Section 59d declares that if it be averred in the petition that creditors of the bankrupt are less than 12 in number and less than 3 have joined as petitioners, and the answer avers the existence of a larger number of creditors, there shall be filed with the answer a list of creditors, who shall be notified of the pendency of such petition and given a reasonable opportunity to join in the petition, in which event the case may be proceeded with, but otherwise it shall be dismissed. After an involuntary petition was filed by one creditor, others purchased claims against the bankrupt and sought to intervene as petitioning creditors; the total number of creditors exceeding twelve. *Held* that, as the purpose of the Bankruptcy Act was to give the majority of the creditors an option to refrain from instituting proceedings, persons who purchased claims after the filing of the petition in bankruptcy cannot intervene as petitioning creditors.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 50, 56, 99, 100; Dec. Dig. ⇐76(1).]

⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

In Bankruptcy. In the matter of the alleged bankruptcy of Charles H. Kehoe, in which the Hayden Company and others filed an involuntary petition. On petition to revise an order of the District Court vacating an order permitting two other persons to intervene as petitioning creditors. Order affirmed.

Frank Hall, of San Francisco, Cal. (E. P. Hoes, of New York City, of counsel), for petitioners.

Henry Kuntz, of New York City (Henry Lesser and J. J. Lesser, both of New York City, of counsel), for respondent.

Before WARD and ROGERS, Circuit Judges, and MAYER, District Judge.

MAYER, District Judge. On February 20, 1915, Hayden Company filed an involuntary petition against Kehoe, setting forth the necessary jurisdictional facts, including the allegation that Kehoe had less than 12 creditors. On April 20, 1915, Kehoe filed an amended answer, alleging, among other things, that he had more than 12 creditors. The issues thus raised were pending when, on September 30, 1915, Ailion and Barton each filed a petition to intervene as a petitioning creditor and on the same day an order was made by the District Court ex parte allowing the intervention.

It appeared that Kehoe had more than 12 creditors on February 20, 1915, and that on September 20, 1915, Ailion had obtained an assignment of the claim of one Forgione for $11, and that on September 29, 1915, Barton had obtained the assignment of the claim of the Ritz Carlton Hotel for $20.90. Forgione and Ritz Carlton Hotel were creditors of Kehoe on February 20, 1915, but Ailion and Barton, who bought these claims in September, 1915, were not creditors on February 20, 1915, nor at any time until they, respectively, bought, these claims in September, 1915. When these facts came to the attention of the District Judge, he vacated the order to intervene theretofore made.

It is stipulated that the claims of Ailion and Barton "were purchased for the purpose of securing two additional creditors to sustain the involuntary petition" of Hayden Company while the adjudication was being contested, and that these claims "were not purchased by the Hayden Company with its funds, but were in good faith purchased" by Ailion and Barton "with their own funds." The record does not enlighten us as to the relations between Ailion and Barton with Hayden Company, but we gather from the stipulation and the argument that the claims were bought by two friendly persons to help out the Hayden Company in sustaining the petition.

The single question of law presented is whether the statute requires that intervening creditors shall be original creditors, or may be construed so as to permit persons to intervene who buy claims after the filing of the petition in involuntary bankruptcy.

Section 59b of the Bankruptcy Act provides:

"Three or more creditors who have provable claims against any person which amount in the aggregate, in excess of the value of securities held by them, if any, to five hundred dollars or over; or if all of the creditors of such person are less than twelve in number, then one of such creditors whose

claim equals such amount may file a petition to have him adjudged a bankrupt."

Section 59d provides:

"If it be averred in the petition that the creditors of the bankrupt are less than twelve in number, and less than three creditors have joined as petitioners therein, and the answer avers the existence of a large number of creditors, there shall be filed with the answer a list under oath of all the creditors, with their addresses, and thereupon the court shall cause all such creditors to be notified of the pendency of such petition and shall delay the hearing upon such petition for a reasonable time, to the end that parties in interest shall have an opportunity to be heard; if upon such hearing it shall appear that a sufficient number have joined in such petition, or if prior to or during such hearing a sufficient number shall join therein, the case may be proceeded with, but otherwise it shall be dismissed."

It will be noted that this section requires notification to "such creditors," meaning, of course, those creditors named in the list filed with the answer, and hence necessarily the creditors who were such when the petition was filed. But we do not rest our conclusion on the interpretation of the mere phraseology of the statute.

The fundamental purpose of the statute negatives the contention that any but original creditors can throw a debtor into bankruptcy. Congress undoubtedly intended that, if the great majority of the creditors were unwilling to join in a petition, the debtor could not be adjudicated a bankrupt against his will. Apparently it was recognized that creditors, for reasons of their own—tolerance, business judgment, friendship, or an avoidance of certain set-offs—might prefer to refrain from availing of the bankruptcy statute, and, therefore, where the creditors were more than 12 in number, a minimum of 3 petitioners was required.

Before the petition, creditors may buy claims (Matter of Bevins, 165 Fed. 435, 91 C. C. A. 302), and the bankrupt may induce creditors not to join in the petition (Matter of Brown [C. C.] 111 Fed. 979); but to sustain the petition the requisite petitioners must be those who are creditors when the petition is filed. Little need be added to what was said in Re Lewis F. Perry & Whitney Co. (D. C.) 172 Fed. 752, and on affirmance in the same case, 175 Fed. 52, 99 C. C. A. 68; and in Emerine v. Tarault, 219 Fed. 68, 134 C. C. A. 606.

Any other interpretation would lead to trafficking in claims in contravention of the purpose of the statute. Men in close business or personal relations could readily have a working arrangement by which in one case A. would buy up claims in the interest of B. and in another B. would do the same for A.—all to the detriment, not merely of the debtor, but of the other creditors, who either would prefer to forbear or, because of set-offs from which the petitioning creditors might benefit, would rather pursue their rights and remedies outside of the bankruptcy court.

Matter of Bolognesi, 223 Fed. 771, 139 C. C. A. 351, is not an authority contrary to our view, because in that case the interveners were creditors at the time of filing the petition.

The order is affirmed, with costs.

In re WRAY.

(Circuit Court of Appeals, Second Circuit. May 9, 1916.)

No. 250.

1. BANKRUPTCY ⊂=342½—PROCEEDINGS—REVIEW OF REFEREE'S ORDERS.
Where the referee died after entering an order disallowing the claim, but before he had perfected his findings, the District Judge properly made an order directing the referee's successor to certify the entire proceeding, together with the testimony taken and the exhibits introduced, to the District Court, where the case would be tried de novo.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 530; Dec. Dig. ⊂=342½.]

2. CONTRACTS ⊂=141(1)—IMMORAL CONSIDERATION—PRESUMPTION.
In the absence of proof, an illegal or immoral consideration for advances should not be presumed.
[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 461, 1760, 1761; Dec. Dig. ⊂=141(1).]

3. BANKRUPTCY ⊂=340—CLAIMS—EVIDENCE—SUFFICIENCY.
Evidence in a contest of a claim against the estate of a bankrupt by one with whom the bankrupt prior to her marriage had maintained illicit relations *held* to warrant a finding that advances after her marriage were not tainted with the illegality of the consideration.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 527; Dec. Dig. ⊂=340.]

4. BANKRUPTCY ⊂=325—CLAIMS—CREDITS.
Where claimant made advances to the bankrupt to enable her to buy a motor car, and the bankrupt, being unable to repay the advances, delivered the car to claimant, the amount received by claimant from the sale of the car should be credited on the claim.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 512; Dec. Dig. ⊂=325.]

Appeal from the District Court of the United States for the District of Connecticut.

In the matter of the bankruptcy of Lillian B. Kennedy Wray. From an order allowing in part a claim of Martin Zimmerman against the estate, James E. Wheeler, as trustee, appeals. Modified and affirmed.

James E. Wheeler, trustee of the estate of Lillian B. Wray, a bankrupt, appeals from an order allowing, in part, a claim of Martin Zimmerman against her estate, which order was entered in the District Court for the District of Connecticut July 20, 1915. The claim as originally filed was for $86,677; it was allowed for $21,300.

Samuel E. Hoyt, of New Haven, Conn., for appellant.

George E. Beers, of New Haven, Conn., John M. Gardner, of New York City, and Arvine, Beers & Woodruff, of New Haven, Conn., for respondent.

Before COXE and WARD, Circuit Judges, and AUGUSTUS N. HAND, District Judge.

COXE, Circuit Judge. [1] This case is sui generis in that the referee died after he had entered an order disallowing the Zimmerman

claim but before he had perfected his findings. In these circumstances the District Judge made an order directing the successor of the deceased referee to certify the entire proceeding, together with the testimony taken and the exhibits introduced, to the District Court where the case was tried de novo. Zimmerman whose entire claim was disallowed was entitled to have the referee's finding reviewed by the District Court. As the referee had made and signed an order dated January 24, 1914, disallowing the claim, the verified petition of Zimmerman filed February 3, 1914, and the amendment of the petition for review, apparently filed February 12th, thereafter, were in time and in proper form to present the questions in controversy. Zimmerman was entitled to review the referee's order but as no findings had been made by the referee there was insufficient proof to show the grounds of his decision. However, the judge is the ultimate arbiter in bankruptcy matters; the referees assist and advise him but the final action is that of the court. In the present case it was eminently proper that the District Judge should review the case upon the facts and law. Indeed the circumstances were such that it was his duty so to do. If he had adopted the conclusion of the referee without examination, Zimmerman would have a right to complain that he had never had his day in court.

[2, 3] The District Judge allowed the claim to the extent of $21,300 which was the amount advanced by Zimmerman to the bankrupt after her marriage to Wray and after the illicit relations between her and Zimmerman had ceased. The finding that the money advanced after the 29th of January, 1912, was a loan is supported by the evidence and indeed there was no sufficient reason to suspect that it was advanced to perpetuate the illegal relations existing before the marriage with Wray.

The amount received by the bankrupt from Zimmerman on and after January 29, 1912, was $21,300, the last advance being in May, 1912, after the marriage to Wray which was in June, 1911, and after the improper relations with Zimmerman had ceased.

There was nothing illegal in his advancing money to her to enable her to continue the business. That he should have lent her the money to keep the business, in which he had invested a large sum, from going into bankruptcy is plausible and natural. That he should have given it to induce her to keep up their former relations is, in view of the marriage with Wray, highly improbable.

No collateral agreement express or implied is shown regarding these advances. It may be that they were made as appears on the face of the transactions to keep up and save a business in which Zimmerman had invested so heavily. In the absence of proof, an illegal or immoral consideration should not be assumed. There is nothing to show that the advances which make up the $21,300 were made to continue the illicit relations. This record presents a deplorable situation in which it is difficult from a mere reading of the testimony to determine where the truth lies, but weighing it as best we may, we cannot resist the conclusion that the advances which make up the sum

in controversy, with the exception to be hereafter noted, were loans and not gifts.

[4] The amount loaned to the bankrupt on April 3, 1912, was to enable her to purchase a motor car. She did purchase a car and agreed to return the money to Zimmerman; this she did not do but she did return the car to him, which he sold for $1,600. He was asked:

"Q. Now is it your purpose to credit her with what you have received for it? A. $1,600 without the Edison batteries."

This amount has not been credited; we think it should be, thus reducing the amount of the claim to that extent. The order of July 20, 1915, as so modified, is affirmed.

CENTRAL TRUST CO. OF NEW YORK v. UNITED STATES LIGHT & HEATING CO. et al.

(Circuit Court of Appeals, Second Circuit. April 11, 1916.)

No. 221.

1. APPEAL AND ERROR ⟸78(7)—ORDERS APPEALABLE.
In a creditors' suit, an order finally adjudicating the right of complainant's counsel to allowance of fees and payment of disbursements is appealable, though the principal action may not have proceeded to final decree.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 480, 481; Dec. Dig. ⟸78(7).]

2. APPEAL AND ERROR ⟸87(5)—ORDERS APPEALABLE—DISCRETIONARY ORDERS.
A final disposition of a discretionary matter is appealable, where an abuse of discretion is charged.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 583, 586, 587; Dec. Dig. ⟸87(5).]

3. APPEAL AND ERROR ⟸984(2)—ATTORNEY'S FEES TO COMPLAINANT—ALLOWANCE.
As the amount of fees to be allowed complainant's counsel in a creditors' suit rests peculiarly within the knowledge of the trial judge, unless his discretion is abused an allowance will not be disturbed.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3882; Dec. Dig. ⟸984(2).]

4. CREDITORS' SUIT ⟸59—SOLICITORS' FEES—RIGHT TO.
Where, in a creditors' suit, a fund is recovered or protected by the exertions of complainant's counsel, it is proper for the court, out of the fund, to allow fees to complainant's counsel.
[Ed. Note.—For other cases, see Creditors' Suit, Cent. Dig. §§ 218–221; Dec. Dig. ⟸59.]

5. CREDITORS' SUIT ⟸59—COUNSEL OF COMPLAINANT—DISBURSEMENTS.
In a creditors' suit, where complainant is successful, his counsel are entitled only to their reasonable and necessary disbursements.
[Ed. Note.—For other cases, see Creditors' Suit, Cent. Dig. §§ 218–221; Dec. Dig. ⟸59.]

Appeal from the District Court of the United States for the Western District of New York.

Suit by the Central Trust Company of New York against the United

States Light & Heating Company, in which Adrian H. Larkin and others, solicitors of record for complainant, petition for allowance of fees and payment of disbursements. From an order granting in part the prayer of their petition, they appeal. Affirmed.

The order of the District Court, appealed from, finally settled and decreed payment of the fees and disbursements of the appellants, who are solicitors of record for the complainant herein. The action was a creditors' bill to conserve the assets of defendant corporation, that the same might be applied to the payment of its debts. Complainant sued on behalf of itself and other creditors. The property of defendant corporation was sold pursuant to the prayer of the bill and for a price sufficient to discharge in full the demands of complainant and other like creditors. Appellants then petitioned for an allowance of fees and payment of disbursements. From the order granting (in part) the prayer of their petition, this appeal was taken.

Albert Stickney, of New York City, for appellants.

Morris Cohn, Jr., of Niagara Falls, N. Y., Adolph Rebadow, of Buffalo, N. Y., and Edward E. Franchot, of Niagara Falls, N. Y., for appellee.

Before COXE and ROGERS, Circuit Judges, and HOUGH, District Judge.

HOUGH, District Judge (after stating the facts as above). [1] It is urged that the matter complained of is not appealable. The order was final and conclusively adjudicated something over which the court had jurisdiction and which arose in the progress of the litigation, although distinct from the general subject of suit. Such orders or decrees are appealable although the original or main action may not have proceeded to final judgment. Yorkshire, etc., Co. v. Fowler, 78 Fed. 58, 23 C. C. A. 643; Tuttle v. Claflin, 88 Fed. 122, 31 C. C. A. 419.

[2] Even if the matter be one of discretion it is appealable, if the appellant maintain that discretion was abused. Central Trust Co. v. Chicago, Rock Island, etc., Co., 218 Fed. 336, 134 C. C. A. 144. It is held that appeal lies.

[3] The court below considered the nature of the services rendered by appellants, and divided the same into two classes, awarding compensation for one class of service and denying it as to the other. In so far as fees were given, the order must be affirmed, because no abuse of discretion is shown, and questions of amount are properly and peculiarly within the knowledge of the judge acquainted with the litigation during its entire progress.

[4] Whether the denial of any compensation for certain services was proper depends primarily upon the rules which justify and govern grants of fees to counsel in cases of this kind. They are stated generally in Hobbs v. McLean, 117 U. S. 582, 6 Sup. Ct. 870, 29 L. Ed. 940, and in Buell v. Kanawha, etc., Co. (D. C.) 201 Fed. 767 (with a very complete citation of decisions). The matter is summed up in Harrison v. Perea, 168 U. S. at page 325, 18 Sup. Ct. at page 134, 42 L. Ed. 478, where an allowance to a solicitor was approved because "by the exertions of the solicitor the fund was recovered, and it was properly made to bear some portion of the expense of its administration. The amount was within the judicial discretion of the

court, and in fixing that amount the trial court could proceed upon its own knowledge of the value of the solicitor's services." This is the reason for the general rule that one who is jointly interested with others in trust property, and in good faith maintains for himself and the others the necessary litigation to save it from waste and to secure its proper application, is entitled to reimbursement of his expenses (e. g., largely counsel fees) out of the fund to be administered. Lamar v. Hall, 129 Fed. 83, 63 C. C. A. 521.

Applying the rules thus stated to the matter in hand, the question becomes one of fact as to whether the services for which the lower court refused any compensation did or did not tend to produce or conserve the fund, or to secure its proper and lawful application. Whether any particular service or kind of service responds to these tests is also a matter peculiarly within the knowledge of the trial judge. We have examined the record, and in no substantial respect do we differ from the lower court. It is certainly impossible to discover abuse of discretion.

[5] The appeal brings up also the propriety of refusing reimbursement to appellants for a large part of their bill of expenses. Appellants were entitled only to their reasonable and necessary disbursements. How many of the items stated were both reasonable and necessary is a question of fact, as to which this record is barren of evidence justifying disagreement with the trial judge.

The order is affirmed, with costs.

SEWCHULIS v. LEHIGH VALLEY COAL CO.

(Circuit Court of Appeals, Second Circuit. April 11, 1916.)

No. 193.

COURTS ⇐344—FEDERAL COURT—DISTRICT COURT—SERVICE OF SUMMONS.

Rev. St. U. S. § 914 (Comp. St. 1913, § 1537), declares that the practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the Circuit and District Courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing in the state courts within which such Circuit or District Courts are held. This statute succeeded Act Cong. May 19, 1828, c. 68, § 1, 4 Stat. 278, declaring that the forms of mesne process and the forms and modes of proceedings in some of the courts of the United States shall be the same as those used in the state courts. In the state of New York, summons issuing out of the Supreme Court of the state may be served any place within the state; the Supreme Court being considered one tribunal, operating through many parts. Defendant, who had no office nor agent and transacted no business within the Eastern district of New York was served by delivery of a copy of summons on his agent in the Southern district. *Held* that, as the last statute should be construed in light of the prior act, such service was unavailing, notwithstanding the mode of serving process comes under the category of practice, for the provision is not intended to confer jurisdiction, but merely to regulate the practice, and, until jurisdiction is acquired, does not apply; this being particularly true in view of the limitation of the powers of the marshal to execute writs only throughout his district declared by Rev. St. U. S. § 787 (Comp. St. 1913, § 1311).

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 917; Dec. Dig. ⇐344.]

⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

In Error to the District Court of the United States for the Eastern District of New York.

Action by Charles Sewchulis against the Lehigh Valley Coal Company. There was a judgment or order setting aside service of summons, and plaintiff brings error. Affirmed.

Writ of error to review a judgment or order which set aside the service of a summons issued out of the District Court in an action at common law, and served by delivering a copy thereof to an authorized agent of the defendant at his office in the Southern district of New York. Defendant had no office nor agent, and transacted no business, within the Eastern district.

Baltrus S. Yankaus, of New York City (Frank J. Felbel, of New York City, of counsel), for plaintiff in error.

Allan McCulloh, of New York City (Clifton P. Williamson, of New York City, of counsel), for defendant in error.

Before COXE and ROGERS, Circuit Judges, and HOUGH, District Judge.

HOUGH, District Judge. The sole question for review is whether by virtue of section 914, Rev. St. U. S. (Comp. St. 1913, § 1537), a summons issuing out of any District Court of the United States within the state of New York may be served anywhere within said state, and jurisdiction secured thereby.

The argument for this proposition is that, since said section declares that "the practice, pleadings and forms and modes of proceeding in civil causes [in the District Courts] shall conform as near as may be to the practice and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which [said District Courts] are held," therefore the summons of any District Court sitting in the state of New York is as a matter of practice properly served at any place within the limits of the state, because such service may be made of a summons issuing out of the Supreme Court of the state.

The structural resemblance between the Supreme Court of New York and the four District Courts of the United States sitting in that state is very slight. The state court is one tribunal operating through many parts, sessions, or terms, and having a jurisdiction coextensive with the limits of the state. The District Courts are wholly separate tribunals, whose territorial jurisdiction does not extend beyond the district boundaries. Admittedly the mode of serving process comes under the category of practice and the state court custom may therefore be followed. Amy v. Watertown, 130 U. S. 304, 9 Sup. Ct. 530, 32 L. Ed. 946.

But there is a wide difference between the method of serving a summons and the effect of such service when made. The first relates to the "form, manner, and order of conducting and carrying on suits." [1]

[1] This is the definition of "practice" in Bouvier's Law Dictionary, which in Kring v. Missouri, 107 U. S. 231, 2 Sup. Ct. 443, 27 L. Ed. 506, is said to be "the best work of the kind in this country."

The effect of the formal act called "service" is not a question of practice at all, but one of jurisdiction, and jurisdiction in turn must be tested by substantive law. The portion of the Revised Statutes under consideration is the successor of the Act of Congress of May 19, 1828, c. 68, § 1, 4 Stat. 278, which declared that "the forms of mesne process * * * and the forms and modes of proceedings in suits in [certain] courts of the United States * * * shall be the same * * * as are now used in the highest court of original and general jurisdiction of the" states in which the federal courts are situated. In respect of this statute it was held in Bath County v. Amy, 13 Wall. at page 250, 20 L. Ed. 539, that:

"It was a process act, designed only to regulate proceedings in the federal courts after they had obtained jurisdiction; not to enlarge their jurisdiction. * * * It is quite too much to infer from this [statute] an enlargement of jurisdiction, or an adoption of all the powers of the state courts."

Section 914 must be construed in the same manner.

It may be further noted, as a necessary, if somewhat astonishing, result of the argument for the plaintiff in error, that the construction of the statute contended for would enable the District Court, by intrusting a summons to a private person, instead of to the marshal, to enlarge its jurisdiction to the limits of a state which contains four districts. By section 787, Rev. St. U. S. (Comp. St. 1913, § 1311), the marshal is empowered only to "execute throughout the district all lawful precepts directed to him and issued under the authority of the United States." Obviously, therefore, the marshal of the Eastern district can serve no summons within the Southern district; and it is certain that no law exists giving to a private person an authority in this regard which the marshal does not possess.

The judgment below is affirmed, with costs.

GALLE et al. v. HAMBURG AMERIKANISCHE PACKETFAHRT ACTIEN GESELLSCHAFT.

(Circuit Court of Appeals, Second Circuit. April 11, 1916.)

No. 216.

1. APPEAL AND ERROR ⇐1011(1)—REVIEW—FINDINGS.
A finding of the trial court on conflicting evidence has the effect of a verdict, and cannot be disturbed on appeal.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983–3988; Dec. Dig. ⇐1011(1).]

2. SHIPPING ⇐132(6)—CARRIAGE OF GOODS—ACTIONS—EVIDENCE.
In an action for injuries to cheeses damaged during ocean transportation, the question whether the injuries were caused by the perils of the sea or the unseaworthiness of the vessel *held* for the jury.
[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 487; Dec. Dig. ⇐132(6).]

3. ESTOPPEL ⇐88(1)—"ESTOPPEL IN PAIS"—HOW RAISED.
Where an ocean carrier declined settlement of claim for injuries to cheeses shipped in one of its vessels, suggesting that the loss resulted

from sea water, it is not, the complaint having generally charged negligence, estopped to set up that the injury occurred through leakage of a fresh-water tank occasioned by heavy seas, for an "estoppel in pais" arises only from such acts and declarations as induce another to change his position, and in such case the shipper did not change his position.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 235–238, 240; Dec. Dig. ⟸88(1).

For other definitions, see Words and Phrases, First and Second Series, Estoppel in Pais.]

In Error to the District Court of the United States for the Southern District of New York.

Action by Edward C. Galle and others against the Hamburg Amerikanische Packetfahrt Actien Gesellschaft. Judgment for defendant, and plaintiffs bring error. Affirmed.

This action was brought to recover for injury to certain cheese laden on steamship Hamburg, belonging to defendant in error, and alleged in the complaint to have been damaged "through the negligence and carelessness of the defendant in stowing and carrying them." The case was by stipulation tried without a jury, and the judge found as a fact that the cheese was injured by leakage from a fresh-water tank; that in respect of this tank the Hamburg was seaworthy when she began her voyage; that the leakage and consequent damage were caused by peril of the sea (i. e., heavy weather); and that therefore the loss complained of was within the exception of the bill of lading.

Griggs, Baldwin & Baldwin, of New York City (Martin Conboy, of New York City, of counsel), for plaintiffs in error.

Haight, Sandford & Smith, of New York City (Edward Sandford, of New York City, of counsel), for defendant in error.

Before COXE and ROGERS, Circuit Judges, and HOUGH, District Judge.

HOUGH, District Judge. [1, 2] This being a common-law action, the findings of fact of the trial judge have the effect of a verdict, and the weight of evidence is not a subject of consideration in this court. Flagler v. Kidd, 78 Fed. 341, 24 C. C. A. 123; Kruger v. Constable, 128 Fed. 908, 63 C. C. A. 634; Schmid v. Dohan, 167 Fed. 804, 93 C. C. A. 194; Edenborn v. Sim, 206 Fed. 275, 124 C. C. A. 339. There was evidence that the tank in question did not leak until after five or six days of heavy weather had been encountered. This alone is sufficient to have required the submission of the question of seaworthiness to a jury, had there been no waiver of that method of trial. The court having found what a jury might have found, the fact so ascertained cannot be controverted in this court —whatever may be here thought of the weight of testimony. This rule of law renders unnecessary a consideration of assignments of error based upon the admission of certain other and merely cumulative evidence.

[3] There is one point advanced requiring further consideration. It is contended that because the defendant, when presented with plaintiff's demand (nearly a year before action brought), declined settlement in a letter containing the suggestion (it was no more) that the loss complained of resulted from sea water, therefore defendant is estopped from defending in this suit on the ground that

it was a fresh-water tank that by leakage injured cargo. Undoubtedly a part of the general rule is as stated in Railroad Co. v. McCarthy, 96 U. S. 258, 24 L. Ed. 693, that:

"Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground, and put his conduct upon another and different consideration."

This court has considered the decision just cited in Goodman v. Purnell, 187 Fed. 94, 109 C. C. A. 408, and the subject in Burton v. Berthold, 166 Fed. 416, 92 C. C. A. 168. See also Hine v. New York, etc., Co., 73 Fed. 852, 20 C. C. A. 63. In each of these cases we have expressly or impliedly insisted upon the reason of the rule being apparent in order to justify its application. That reason is well shown in Davis v. Wakelee, 156 U. S. at page 691, 15 Sup. Ct. at page 559, 39 L. Ed. 578, where the appellant (Davis), having in a previous legal proceeding succeeded in upholding the validity of a certain judgment, contended in the cause then under consideration that it was invalid. Brown, J., said:

"It is contrary to the first principles of justice that a man should obtain an advantage over his adversary by asserting and relying upon the validity of a judgment against himself, and in a subsequent proceeding upon such judgment" claim it to be invalid.

Estoppel in pais only arises from such acts and declarations as by reasonable intendment induce another to alter his position injuriously to himself, or enable the first party to reap a personal benefit from what was said or done. This case falls far short of measuring up to the rule. There is no evidence that plaintiff relied upon the statement made, or changed his position by reason thereof, of which perhaps the best evidence is the form of the complaint, which assigns an act of negligence having no necessary or apparent relation to water, either fresh or salt.

The judgment is affirmed with costs.

COOK v. FLAGG.

(Circuit Court of Appeals, Second Circuit. May 24, 1916.)

No. 297.

1. TRUSTS ⇐104—CREATION OF TRUST—TRUSTS EX MALEFICIO.

Where through misrepresentations as to a scheme for speculation on the Stock Exchange, which was carried out, defendant acquired possession of moneys of others, though he had no transactions on the Exchange, he is a trustee ex maleficio.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 155; Dec. Dig. ⇐104.]

2. RECEIVERS ⇐19—APPOINTMENT—RIGHT TO APPOINTMENT.

Where the claims against defendant, arising out of transactions with complainant and others, greatly exceeded the funds in his possession, and it was contended that defendant was a trustee ex maleficio, a receiver to hold the fund pending litigation will be appointed, particularly in view of the fact of defendant's prior conviction of using the mails to defraud

in connection with the scheme by which he obtained possession of the funds.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 27; Dec. Dig. ⟸19.]

Appeal from the District Court of the United States for the Southern District of New York.

Bill by Ellsworth E. Cook against Jared Flagg. From an order appointing a receiver pendente lite of a fund consisting of moneys and securities in the hands of defendant, defendant appeals. Affirmed.

M. W. Littleton, of New York City, for appellant.

G. E. Roe, of New York City, for appellee.

Before COXE and WARD, Circuit Judges, and MAYER, District Judge.

MAYER, District Judge. The opinion of Judge Hough renders unnecessary an extended analysis of the voluminous pleadings and affidavits.

[1] The substance of the bill is that Flagg, not a member of the Stock Exchange, devised a fraudulent scheme for speculating in stocks; that on the faith of his representations plaintiff and many others intrusted him with their money to the extent of an estimated aggregate of $1,100,000; that Flagg never had any real transactions in the purchase or sale of stocks; that the amount obtained by Flagg from plaintiff at different dates and by virtue of the fraudulent representations aggregated $10,020, only $2,800 of which was paid over to plaintiff, and then as pretended profits, when there were no profits; that all the representations made by Flagg were false, and known by him to be false; that the money obtained from others than plaintiff was so obtained on similar representations; that the funds are mingled; and that some $200,000 in Flagg's control will fall short of satisfying the aggregate claims of $1,100,000. The relief prayed for is an injunction, the appointment of a receiver, an ascertainment of the claims to the fund, and an appropriate distribution.

In a letter to Mr. Goodwin, Assistant Attorney General, dated August 25, 1909 (referred to in one of the moving affidavits), Flagg, in explaining his method of doing business, in order to satisfy the officials that he was not using the mails unlawfully, stated:

"Every dollar of the securities and the cash deposited with Mr. Flagg by all the customers belong to them, and not to Mr. Flagg. Mr. Flagg is merely a broker, and is handling his customers' funds, and is charged with the handling of cash and securities as a fiduciary."

In opposition to the motion, Flagg filed an answer and an affidavit, setting forth that his transactions with Cook and others were legitimate, and vigorously taking issue with the condemnatory allegations of the moving papers.

We think the bill states a cause of action in equity in that Flagg became Cook's trustee ex maleficio. Pomeroy's Equity Jurisprudence (3d Ed.) § 1053; In re Berry, 147 Fed. 208, 77 C. C. A. 434; United States v. Carter, 172 Fed. 1, 96 C. C. A. 587, affirmed, 217 U. S. 286, 30 Sup. Ct. 515, 54 L. Ed. 769, 19 Ann. Cas. 594; Marshall v.

de Cordova, 26 App. Div. 615, 50 N. Y. Supp. 294. There is a trust fund ex maleficio participation in which by many people similarly situated is necessary in order to have a just distribution. While the fund is created in a different way from that in Guffanti v. National Surety Co., 196 N. Y. 452, 90 N. E. 174, 134 Am. St. Rep. 848, the ultimate principle is the same.

[2] There being a cause of action in equity, the next question is whether the court abused its discretion in appointing a receiver. The mere denial by a defendant of what is alleged against him by a plaintiff, is not enough to justify the court in refusing to extend its protective arm.

Here was a situation where the fund in hand was far less than necessary to satisfy the total of claims which could be made. The defendant had been convicted of a crime against the United States for using the mails to invite just such transactions as that with plaintiff. It was alleged that he was financially irresponsible and there was no reason to doubt that allegation and no affidavit of any disinterested person to the contrary. If no injunction issued, defendant could do what he pleased with the fund, and at the end of a litigation plaintiff and those similarly situated might have their labor for their pains. On the other hand, if defendant succeeded on the trial, the sole injury to him would be the delay caused by the lawsuit, the expeditious disposition of which could and can be had without difficulty, if defendant himself is diligent.

It seems to us that the District Judge was right, and, had he denied the motion, grave injustice might have been visited upon those who claim to have been defrauded. It will be understood that we do not pass on the merits of the issues which are now being tried, including the complicated transactions in dispute arising out of the system which defendant urgently contends are legitimate. We are considering solely the order here under review on the papers as they were presented to the District Court.

The order is affirmed, with costs.

FRIEDMAN v. UNITED STATES.

(Circuit Court of Appeals, First Circuit. June 15, 1916.)

No. 1163.

1. RECEIVING STOLEN GOODS ⟸2—PROPERTY SUBJECT—INTERSTATE COMMERCE.
Act Feb. 13, 1913, c. 50, 37 Stat. 670 (Comp. St. 1913, §§ 8603, 8604), reaches goods that are being transported, although the property of the carrier transporting them.
[Ed. Note.—For other cases, see Receiving Stolen Goods, Cent. Dig. § 4; Dec. Dig. ⟸2.]

2. RECEIVING STOLEN GOODS ⟸2—INTERSTATE COMMERCE.
Goods that have been transported are under the protection of Act Feb. 13, 1913, until they have reached their ultimate destination, and the act in this light is constitutional.
[Ed. Note.—For other cases, see Receiving Stolen Goods, Cent. Dig. § 4; Dec. Dig. ⟸2.]

3. RECEIVING STOLEN GOODS ⟸2—STATUTES—OFFENSES.
One receiving goods knowing them to be stolen takes the risk of their having been stolen while in the course of interstate commerce, so as to bring the receiver within Act Feb. 13, 1913.
[Ed. Note.—For other cases, see Receiving Stolen Goods, Cent. Dig. § 4; Dec. Dig. ⟸2.]

In Error to the District Court of the United States for the District of Massachusetts; Jas. M. Morton, Judge.

Joseph Friedman was convicted of unlawfully receiving and concealing stolen goods while part of an interstate shipment, and he brings error. Affirmed.

Guy A. Ham, of Boston, Mass. (C. A. Dunham, of Boston, Mass., on the brief), for plaintiff in error.

James S. Allen, Jr., Asst. U. S. Atty., of Boston, Mass. (George W. Anderson, U. S. Atty., of Boston, Mass., on the brief), for the United States.

Before PUTNAM and DODGE, Circuit Judges, and BROWN, District Judge.

PUTNAM, Circuit Judge. This indictment was laid under the act of February 13, 1913 (37 Stat. 670, c. 50 [U. S. Comp. St. 1913, §§ 8603, 8604]), charging the defendant with unlawfully receiving and concealing certain brasses stolen from a box car at Springfield while constituting a part of a shipment from Concord, N. H., to Springfield, Mass. The merchandise belonged to the Boston & Maine Railroad, and was a part of its cars being forwarded to the repair shops of the railroad corporation.

[1] Claim is made that, as this material was carried without compensation, and was all the time the property of the Boston & Maine Railroad, it was not within the statute. However, as it was being transported as freight, it was within the letter of the statute, and we know of no reason which takes it out of it. The same words are often

used in many different senses, but this word is appropriate for the application made of it here.

[2] Once in interstate commerce, we think the goods transported as freight retained the character thus acquired, and were under the protection of the act, like mail matter, until they reached their ultimate destination.

[3, 4] The plaintiff in error fails to satisfy us that the act, thus understood, violates any constitutional provision. Whoever receives stolen goods, knowing them to be stolen, takes the risk, in our opinion, of their having been stolen during transportation in interstate commerce and of their being thus within the protection of the act.

The plaintiff in error also fails to satisfy us that there was prejudicial error in any of the exclusions of testimony to which he excepted.

The judgment of the District Court is affirmed.

GORDON et al. v. TURCO-HALVAH CO., Inc., et al.

(District Court, S. D. New York. November 30, 1915.)

No. 12/51.

1. PATENTS ⟸326(4)—INFRINGEMENT—CONTEMPT—EVIDENCE.

The existence of a subsequent patent for an article said to be produced in contempt of a final decree in an infringement suit is most material in proceeding to punish for such contempt, for it is presumed that the subsequent patent cannot in any way violate the earlier patent.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 615–619; Dec. Dig. ⟸326(4).]

2. PATENTS ⟸326(4)—INFRINGEMENTS—CONTEMPT.

When substantial difference exists between an article the manufacture of which was enjoined as infringing a patent, and an article the manufacture of which is claimed to be in contempt of the decree, the court will not try a new patent case in the contempt proceeding, but will remit plaintiff to a new action, or application for supplementary injunction.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 615–619; Dec. Dig. ⟸326(4).]

3. PATENTS ⟸251—INFRINGEMENT—WHAT CONSTITUTES.

Where a patent for a food product set forth one of the elements as cottonseed oil, it covers no product but that made of cottonseed oil, and a similar food product made of another oil is not an infringement.

[Ed. Note—For other cases, see Patents, Cent. Dig. § 391; Dec. Dig. ⟸251.]

4. PATENTS ⟸251—INFRINGEMENT—FOOD PRODUCT.

Where a patent for a bleached sweetmeat compound showed that it was to be composed partly of oily matter, and specified whitish peanut butter as the oily matter, a subsequently patented compound substituting a different oily matter is merely a patent for an improvement, and the manufacture of such compound without the consent of the original patentee is an infringement.

[Ed. Note—For other cases, see Patents, Cent. Dig. § 391; Dec. Dig. ⟸251.]

5. PATENTS ⟸326(4)—INFRINGEMENTS—PROCEEDINGS.

Where an injunction issued to restrain infringement of a patent is violated, no steps will be taken to punish on the criminal side of the

court, except on interposition of the United States attorney; but the District Court will ascertain the damages, loss of profits, etc.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 615–619; Dec. Dig. ⊂=326(4).]

In Equity. Bill by George S. Gordon and others against the Turco-Halvah Company, Incorporated, and another. On motion to punish for contempt of an injunction issued pursuant to a consent decree. Cause referred to master.

Maurice Block, of New York City, for complainants.
James H. Griffin, of New York City, for defendants.

HOUGH, District Judge. This proceeding to punish for contempt, though begun by an order to show cause against all of the defendants herein, appears to affect only the Turco-Halvah Company, Incorporated, and Nathan Radutsky; these being the only defendants served so far as the papers before me show. The decree, infringement of which is complained of, counts upon two patents, the Gordon patent (1,063,533) and the Wolf patent (1,074,483).

The decree rests upon a consent which is of record, and both the decree and the injunction follow the consent. By it these defendants specifically agree not only to abstain from "directly or indirectly making * * * any candy * * * containing the inventions described and claimed in" said letters patent or either of them, but "any candy or food products like or similar to those that [said defendants] or any of them have heretofore made."

A more comprehensive decree cannot be imagined. The plaintiffs as matter of fact make under their patents a candy consisting of about one half in volume of sugary matter and the other half in volume of oily matter, the whole being bleached by the infusion of a small quantity of soap root. The sugary half of plaintiffs' product is made of glucose and sugar, and the oily half of sesame, cottonseed oil, and peanut butter. There is no difference between what the plaintiffs have long made, what the defendants agreed to abstain from making, and what the defendants are now making, except the substitution of maize oil for cottonseed oil as a part of the oleaginous half of the delicious compound known as Halvah.

[1] Defendants justify their present proceeding by averring that they are not violating either patent in suit, because they operate under the Roselle patent (1,154,059), which was applied for and obtained after the consent decree hereinabove referred to. Undoubtedly the existence of a subsequent patent which reads upon an article said to be produced in contempt of a final decree is a most material piece of evidence. This is because the presumption of validity which attaches to every patent creates a presumption that the subsequent patent cannot be in any way a violation of the rights of an earlier patentee.

[2] It is also admittedly true that, when any substantial difference exists between the article once declared by decree to be an infringement and the article complained of as contemptuous, the court will not

try a new patent case in a contempt proceeding, but will remit the party plaintiff to a new action, or perhaps an application for a supplementary injunction (a practice which seems to be growing, and which I personally look upon with favor).

[3] Applying these principles to the patents mentioned in the final decree herein, it is seen that the Wolf patent is for a food product, the elements of which are specifically set forth in each claim, and one element especially mentioned is always cottonseed oil. I am not prepared to hold that, where one element of a composition of matter is a particular kind of oil, the patent is violated by another product which substitutes an entirely different oil. The Wolf patent is most specific, and I doubt whether it covers anything but a product containing cottonseed oil, even though other oils look the same, taste the same, and would make just as good candy.

[4] I do not think that this kind of argument applies to the Gordon patent. The second claim of that patent is for "a bleached sweetmeat compound composed of approximately 35 per cent. corn syrup, 15 per cent. granulated sugar, and 50 per cent. of a whitish peanut butter." The specification shows that the peanut butter is the oily matter, and the result is in the specification particularly denominated "the Turkish sweetmeat known as Halvah."

Under the Gordon patent, therefore, the question is this: Was Roselle entitled to a patent over Gordon, by substituting in the oily half of his compound a proportion of maize oil, instead of ground peanuts? If the Gordon patent ever should have been granted, I think Roselle was entitled to a patent for this change; but it could never be anything more than an improvement over Gordon, so that, giving full weight to the Roselle patent, it still remains true that Roselle must pay tribute to Gordon, and since the plaintiffs own the Gordon patent, and the defendants operate under the Roselle patent, defendants have no right to make their improved Halvah without paying tribute to the original Gordon patent for Halvah.

The morals of this case do not bolster up the defendants' side. It is quite evident that they agreed to respect the Gordon and Wolf patents and submitted to a decree to that effect, all the while intending to keep on making Halvah by partially substituting one kind of grease for another. They did not intend to make any difference in taste, for the plaintiffs' cottonseed oil element is notoriously inert and tasteless, and the defendants' maize oil element is in the opinion of Roselle, the patentee and affiant for defendants herein, rendered tasteless by heating. In short, defendants have from the time this consent decree was entered intended and contrived to keep the letter and evade the spirit of their own contract and the decree and injunction founded thereon. For present purposes I think they have succeeded so far as the Wolf patent is concerned, but as to the Gordon patent they are in my judgment in contempt.

[5] Under existing practice no steps will be taken to punish on the criminal side of the court, except on the interposition of the United States attorney; but this court will proceed civilly to ascertain the ex-

penses, damages, and loss of profits that the plaintiffs have been put to by reason of the actions of the defendants served with this order to show cause. For the purpose of ascertaining such damages, expenses, and loss of profits, the matter will be referred to Frank J. Kent, Esq.

PRESIDENT SUSPENDER CO. v. MACWILLIAM.

(District Court, S. D. New York. January 10, 1916.)

1. TRADE-MARKS AND TRADE-NAMES ⟸33—CONVEYANCE.
There is no such thing as the conveyance of a trade-mark in gross, but it must as a matter of law be appurtenant to a business.
[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 37; Dec. Dig. ⟸33.]

2. TRADE-MARKS AND TRADE-NAMES ⟸33—CONVEYANCES—EFFECT OF.
Where, by written instrument, a business, the good will and all tangible assets are conveyed, a trade-mark appurtenant to such business is also conveyed.
[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 37; Dec. Dig. ⟸33.]

3. TRADE-MARKS AND TRADE-NAMES ⟸35—CONVEYANCES —EFFECT OF.
An inventor of a new suspender, who licensed plaintiff to manufacture same, conveyed his business as well as the good will and trade-mark. Plaintiff greatly extended the business, by advertising the suspenders which were sold under the name "President" with a tricolored band around the web. *Held* that, on expiration of the patent, plaintiff retained the trade-mark in the name "President," and the right to use the descriptive band, though the patent became public property.
[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 39, 40; Dec. Dig. ⟸35.]

4. TRADE-MARKS AND TRADE-NAMES ⟸35—RIGHT TO TRADE-MARK.
In such case, plaintiff is after expiration of the patent entitled to the trade-mark, where its value lay, not in the worth of the patent, but in plaintiff's advertising campaign by which large numbers of the suspenders were sold.
[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 39, 40; Dec. Dig. ⟸35.]

5. TRADE-MARKS AND TRADE-NAMES ⟸35—RIGHT TO TRADE-MARK.
In such case, the fact that plaintiff in the course of years associated the name "Shirley" with the name "President," so that the trade-mark became "Shirley President," does not diminish its rights.
[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 39, 40; Dec. Dig. ⟸35.]

6. TRADE-MARKS AND TRADE-NAMES ⟸7—WHAT CONSTITUTES.
The word "President," used in connection with suspenders, is not a descriptive term and may be the subject of trade-mark.
[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 11; Dec. Dig. ⟸7.]

7. TRADE-MARKS AND TRADE-NAMES ⟸35—RIGHT TO TRADE-MARK—PAYMENT OF ADVERTISING.
In such case, though defendant bore a part of the cost of the advertising campaign which caused the extensive sale of the suspenders, that

fact does not entitle him to use the trade-mark; his compensation having been received in increased royalties.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 39, 40; Dec. Dig. ⟸35.]

8. TRADE-MARKS AND TRADE-NAMES ⟸70(1)—UNFAIR COMPETITION—WHAT CONSTITUTES.

Defendant, though plaintiff had no trade-mark in the name under which its goods were sold, cannot so dress its own goods as to deceive the public into believing they are purchasing those of plaintiff.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 81; Dec. Dig. ⟸70(1).]

9. PATENTS ⟸71—VALIDITY—ANTICIPATION.

Where a design patent for suspenders accompanied by drawings sufficiently showed how they were made, there is no invention in a subsequent mechanical patent which is a mere expansion of the former.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 63; Dec. Dig. ⟸71.]

In Equity. Suit by the President Suspender Company against Hugh G. Macwilliam, who counterclaimed. Decree for complainant.

Final hearing in equity; suit between citizens of different states; action for unfair competition, for infringement of trade-mark, and also for infringement of Adams patent 687,188, assigned to plaintiff.

Robert Cushman, of Boston, Mass., for plaintiff.
W. P. Preble, of New York City, for defendant.

HOUGH, District Judge. Plaintiff is a corporation which prior to 1914 was known as the C. A. Edgarton Manufacturing Company. It has for many years been engaged in the manufacture and sale of suspenders and garters, and possibly other similar articles. Its corporate existence has been continuous, and it will hereafter be called the "President Company."

Plaintiff's position, summarily stated, is that as the owner of the patent in suit it uses the invention thereof in the manufacture of what it calls and sells as "President Suspenders"; that it has an established trade-mark in the name "President" as applied to suspenders as evidenced by registration and established by long user in connection with its business; and that defendant has lately begun to manufacture and offer for sale a suspender of his own make which he calls by the trade-name "President," dresses or prepares for sale in a manner similar to that long employed by plaintiff, and embodies in his style of suspender the invention of the Adams patent.

It is conclusively proven, and indeed almost admitted, that the alleged infringing article (Macwilliam's suspender) is in all material respects substantially a copy of what defendant has made for at least 14 years.

This litigation grows out of an agreement made between plaintiff and defendant on October 1, 1898, a piece of legal draughtsmanship good enough to withstand criticism under almost any circumstances, yet not drawn with sufficient foreknowledge of the unexampled pecuniary success that lay before the humble invention of a pair of cord back sus-

penders. The parties to this litigation and to that contract are (in a very true sense) here quarreling over the business unexpectedly created by the aforesaid patent and remaining to be fought over upon the expiration thereof.

For some time prior to 1898, Macwilliam was engaged in business in St. Paul, Minn. On August 16, 1898, there was issued to him patent No. 609,286 for a pair of suspenders. It was proven that even in a small way Macwilliam could make this patented suspender and profitably sell it at 50 cents. By October 1, 1898, he could be fairly said to have an established but small business in this patented article. The patent itself was said at bar to have been the subject of some litigation in which success attended the patentee. If this is true, it was not of sufficient importance to give rise to any reported case. See Shepard's Digest of Contested Patents. On the date last mentioned, Macwilliam granted to the President Company a license, exclusive (except as to the state of Minnesota, wherein he had previously made other arrangements with a firm mentioned in the contract) "to manufacture and sell within the United States, to the end of the term for which said letters patent were granted, suspenders containing said patented improvements," subject to certain conditions of which the material ones are as follows:

(a) That Macwilliam should turn over and transfer to the President Company "the good will of his present business of manufacturing and selling said suspenders within the United States, and all orders he now has or may hereafter take within the United States, for the said suspenders."

(b) That Macwilliam will not manufacture or sell suspenders containing said improvements within the United States during the term of said license.

(c) That the President Company should pay Macwilliam a royalty of 25 cents for each dozen pairs of suspenders containing said patented improvement and sold by it, which royalty, however, should not be less than $300 for the first quarter year of the life of the license, and should never thereafter be less than $2,000 per annum.

After the execution of this agreement, Macwilliam closed out his business in St. Paul, shipped to plaintiff his stock in trade, and thereafter and until the expiration of the patent took no part in and exercised no supervision over the business of making suspenders. By agreements, the nature of which is not shown in this litigation, he contributed toward a very extensive advertising campaign on behalf of his suspender, for which he had prior to the grant of his patent devised and used the arbitrary name "President"; and he had also at the same early period habitually put a paper band bearing the colors of the American flag around the web of each pair of his suspenders.

This name and distinctive dressing furnished material for advertising efforts toward which for approximately one-half of the life of the patent Macwilliam contributed two-sevenths and plaintiff five-sevenths.

The expense of advertising was very large, but as a result thereof, and not at all in my opinion as the result of any peculiar merit in

Macwilliam's invention, the business of selling President suspenders enlarged in volume and expanded geographically, until this article of dress has been sold all over the world, and at the rate of 25 cents royalty per dozen pairs Macwilliam has received over and above all his contributions to advertising about half a million dollars.

It is admitted that, not having the benefit of legal advice, the President Company in the early days of its license agreement with Macwilliam conceived the idea that Macwilliam and not themselves should protect by registration the word "President" as a trade-mark. Accordingly, and apparently at the instigation and suggestion of the plaintiff, Macwilliam registered the word "President" as a trade-mark for suspenders on May 16, 1899 (No. 32,965).

As the years passed, as business and profits increased and the termination of the patent began to be thought of, plaintiff (evidently under advice of counsel) conceived the idea that it had come to be the owner of the word "President" as a trade-mark applicable to suspenders, and it in turn registered the same word for the same purpose on February 4, 1913 (No. 90,103).

The President Company has always done business at Shirley, Mass. It manufactured and long had manufactured suspenders of other kinds beside the President, and for some years past and probably as early as 1909 plaintiff began to associate the word "Shirley" with the word "President" in its advertising matter and on boxes and wrappings surrounding its product. It even put the legend (though this was probably at a somewhat later date), "The Shirley President," upon the tricolored paper band which surrounded, and always has surrounded, a part of the webbing of the President suspender.

I believe the fact to be that, as the expiration of the patent loomed near, plaintiff perceived that Macwilliam was intending to do what he could toward resuming the suspender business as soon as the expiration arrived; and therefore associated the word "Shirley" with the "President" partly because, even if it could not maintain an exclusive hold upon the word "President," it was hoped that the two words together might still be its own peculiar property and become associated with a desired article in the public mind.

It is, however, also true that plaintiff used this word "Shirley" in conjunction with the arbitrary trade-names of other articles of its own manufacture. It was and is now a kind of "house flag" or generic trade-name; whereas (e. g.) "President" is a specific trade-name.

Immediately upon the expiration of the patent on August 15, 1915, Macwilliam did begin to do just what I think he was expected to do and what is the cause of this litigation.

A counterclaim has been embodied in the answer in this case in which Macwilliam sets up his own assertion of right to the trade-mark "President" and seeks to enjoin plaintiff from its continued use.

Contemporaneously with the progress of this cause, there have been two interferences in the Patent Office, a reference to which will save some writing on my part. Without any regard to the two registrations of the word "President" as a trade-mark hereinabove referred to, Macwilliam on June 26, 1914, took time by the forelock and applied

for a registration in his own name of the word "President" as a trademark for suspenders. Against this application the plaintiff herein appeared in opposition, and contemporaneously filed a petition in the office for cancellation of the hereinabove referred to certificate 32,865, granted to Macwilliam on May 16, 1899.

[1, 2] The ground of this petition and opposition is the same as the foundation upon which rests the major portion of this suit. A syllabus may be made of it thus: (a) In 1898 Macwilliam owned a suspender business. (b) He also owned the word "President" as a trademark applied to his suspenders. (c) He had also established the habit of dressing his President suspender with a tricolored band around the web. (d) By October 1, 1898, the President suspender so made, dressed, and sold by him embodied the invention contained in his letters patent 609,286. (e) On the date last given, Macwilliam for a valuable consideration sold the good will of his business and the business itself to the plaintiff. (f) There is no such thing as the conveyance of a trade-mark in gross; it must as matter of law be appurtenant to a business. (g) Also, as a matter of law the sale and transfer by paper writing of the good will of a business, accompanied by a delivery of the tangible assets thereof, is a transfer of the business itself and everything appurtenant or belonging thereto. (h) Thereafter by the skill, energy, and capital of plaintiff the business so transferred, i. e., the business of making and selling President suspenders, has grown; such growth not being dependent upon any peculiar merit in Macwilliam's invention, nor to any personal effort on Macwilliam's part.

Each and all of the foregoing propositions have been resolved in favor of the plaintiff by the examiner of interferences, whose opinions have been submitted to me. With them I concur.

The result in the Patent Office has been that Macwilliam's earlier registration has been canceled and his later attempted registration denied, so that, when this case was submitted, so far as the records were concerned, the plaintiff was the registered owner of the trade-mark "President" as a registered device for suspenders.

The foregoing findings of fact do not seem to me to require expansion. The conclusions of law hereinabove stated are, I think, fully sustained both by reason and the authority of the decisions cited by plaintiff, especially Weener v. Brayton, 152 Mass. 101, 25 N. E. 46, 8 L. R. A. 640; Fairbanks Co. v. Ogden Co., 220 Fed. 1002; and Hopkins on Trade-Marks (2d Ed.) p. 23.

[3] I am therefore of opinion that, although when the patent expired the thing advertised as the President suspender became public property, the business of making that thing and vending it under the name "President," and with the descriptive band around the web, remained by assignment in the hands of the plaintiff.

[4] I am also of opinion that the value which attaches to the trademark in question is so wholly the result of plaintiff's activity that, entirely irrespective of what I believe to be the contractual rights of plaintiff, it would be entitled to retain control of the word as long as it manufactures the thing, on the simple ground that, if it were com-

pelled to share the privilege with another (even Macwilliam), that other would be getting something for nothing.

[5] Nor am I convinced that there is any substance in the contention that the association of the word "Shirley" with "President" has either diminished plaintiff's rights or enlarged those of defendant. Even if it be true that the habit of years has transformed the trade-mark "President" into the trade-mark "Shirley President," yet it is also true that another man who manufactured the same thing under the name "President" would infringe upon the trade-mark "Shirley President." Foster v. Foster, L. R. 7 (Chan.) 611; Saxlehner v. Eisner, 179 U. S. 19, 21 Sup. Ct. 7, 45 L. Ed. 60.

[6] So far as the trade-mark part of this cause is concerned, the only point that disturbed me when the matter was argued at bar was an inclination to think that, since Macwilliam might manufacture the thing known as "President Suspender," he might call it by the name to which the public was accustomed. I am convinced that this inclination was erroneous: (1) Because the name "President" is not really descriptive. An arbitrary name may become descriptive when there is no other word by which to make description. This is perfectly illustrated by the famous Linoleum Case, but that is not applicable here. (2) I am also now persuaded that I did not give sufficient weight to the evidence, which on consideration shows that (as above indicated) the vogue and success and importance of the word "President" as a trade-mark is not due to the merit of the thing, but to the persistence of the advertising and the push of the plaintiff.

[7] It was also an attractive suggestion on behalf of the defense that, since Macwilliam had contributed to the advertising, the importance of which was never denied, he ought equitably to be admitted to some share in the profits of the business that grew out of that advertising. Upon the whole, I incline to think he has been sufficiently rewarded by the extraordinary profits that have fallen to his share out of this trivial invention. He did contribute to the advertising, but it was the advertising and not the inventive merit that gave him his royalties. Therefore he got his pay out of the royalties and must be presumed to have had that in contemplation when he made the contributions.

But whether the foregoing be legally conclusive or not, these equitable considerations cannot prevail against what I believe to be the necessary and inevitable legal result of the conveyances and course of business hereinabove sufficiently set forth.

[8] To that portion of the bill which complains of unfair competition, there is substantially no defense. Whatever may be Macwilliam's rights in the trade-mark, he cannot appropriate a form of dress which has nothing to do with the trade-name. Centaur Co. v. Hughes, 91 Fed. 901, 34 C. C. A. 127.

[9] The infringement of the Adams patent, which is the other point in this litigation, is of no great importance to the parties, and the patent itself is of still less importance. The only evidence taken against it, and in my judgment the only evidence necessary to defeat it, is Adams' earlier design patent, 33,635. A pair of suspenders is a gar-

ment supporter; any person who is skilled in making garment supporters could, if he had never before heard of a swivel channel way for a cord, know how to make one and how to use it by looking at Adams' design patent.

It is obvious by examining the drawing of the design patent and the mechanical patent that the latter is but an expansion of the former. Whatever addition to the world's knowledge was needed in this respect was given by the design patent, and especially by the drawing thereof. This having been published some seven months before the mechanical patent was applied for, there can be no invention in the patent in suit.

As to the Adams patent, the bill is dismissed. In all other respects the plaintiff may take a decree as prayed for. Costs are awarded to the plaintiff.

BALDWIN CO. v. R. S. HOWARD CO.

(District Court, S. D. New York. May 15, 1916. On Settlement of Final Decree, May 23, 1916.)

Equity 13-75.

1. WITNESSES ⟸176(2)—COMPETENCY—TRANSACTIONS WITH DECEDENTS.
Under Code Civ. Proc. N. Y. § 829, making a survivor incompetent to testify as to transactions with decedent, one who contracted with a corporation is not after the death of the agent with whom he contracted competent to testify as to such transactions, but, if his testimony be considered, the agent's report to the corporation is rendered competent.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 716; Dec. Dig. ⟸176(2).]

2. TRADE-MARKS AND TRADE-NAMES ⟸33—TRANSFER.
There is no such thing as the transfer of a trade-mark in gross, and a salesman who sold under his own name pianos manufactured by the company for which he worked, but who made no pianos himself, has no trade-mark in the name.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 37; Dec. Dig. ⟸33.]

3. TRADE-MARKS AND TRADE-NAMES ⟸21—RIGHT TO TRADE-MARK.
A piano salesman named "Howard," before entering the employment of plaintiff, sold pianos manufactured by his first employer under his own name; the word "company" being almost always added. After he entered plaintiff's employment, the first company abandoned the manufacture of pianos under the name "Howard," and plaintiff commenced manufacturing such pianos, ultimately using the name "Howard," without any other addition. Thereafter such salesman organized the defendant corporation to make pianos, and it first manufactured pianos under the name "R. S. Howard Co.," or "R. S. Howard." *Held*, that plaintiff alone was entitled to use the single name "Howard," and the defendant corporation could not appropriate it.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 24; Dec. Dig. ⟸21.]

On Settlement of Final Decree.

4. TRADE-MARKS AND TRADE-NAMES ⇐100—RIGHT TO—USE.

In such case, the defendant company will not be allowed to use the name "Howard" without the addition of the word "Company" so as to distinguish its products from those of plaintiff.

[Ed. Note.—For other cases, see Trade-Marks and Trade Names, Cent. Dig. § 114; Dec. Dig. ⇐100.]

In Equity. Bill by the Baldwin Company against the R. S. Howard Company, which counterclaimed. Decree for complainant.

Final hearing in equity, plaintiff suing for infringement of trade-mark 31,411 registered May 8, 1898; also, of trade-mark 46,993, registered October 17, 1905; also, of the name "Howard" as a common-law trade-mark for pianos, and for unfair competition in that the defendant uses, or threatens to use, the name "Howard" in marking, and in connection with the sale of pianos, as distinguished from the name "R. S. Howard Company," "R. S. Howard Co.," or "R. S. Howard."

The registered trade-marks referred to cover the word "Howard" as applied to pianos; the earlier one in connection with certain initials indicative of the selling corporation, and the later one the same word displayed in a peculiar or distinctive matter or type.

The prayer of the bill is for the usual relief, and, in addition, that defendant be enjoined from further prosecuting certain cancellation proceedings now pending in the Patent Office in respect of the said two trade-marks.

The plaintiff company is the successor in interest, title, and business of the concerns (inter alios) which registered said two trade-marks. Those concerns either made or sold (or both) pianos marked conspicuously "Howard" and known as Howard pianos. Since 1896, the plaintiff and its predecessors in title and business have pursued this trade, and the mark "Howard" has always been associated with a continuous trade which now belongs to plaintiff. The foregoing is so abundantly proven (and to a large extent undisputed) that the whole line of corporations or partnerships antecedent in business to the present plaintiff will be hereinafter spoken of as the "Baldwin Co." or the "Baldwin concern."

The defendant company was organized in 1902 for the purpose of manufacturing and selling pianos. In it Mr. Robert S. Howard was and always has been the controlling spirit. The company (so to speak) was made out of a piano factory in the city of New York plus the selling ability and salesman's reputation of Mr. Howard.

The defense is that the R. S. Howard Company is the successor of Mr. Howard, who was the first to adopt and use the name "Howard" as a mark for pianos in the year 1889; that he so continued until 1902, when he transferred his business, including the trade-mark or mark or name "Howard" to the defendant, which has continued to use that name down to the time this suit began.

Defendant therefore counterclaims and prays for affirmative relief, in that it may be adjudged to be the sole owner and entitled to the exclusive use of the name "Howard" as a trade-name or trade-mark applied to pianos, and that the plaintiff be enjoined from using that name or the name "Howard Piano Company" in connection with the manufacture and sale of pianos, and also from registering the name "Howard" as a trade-mark in foreign countries, and be compelled to cancel the existing registrations in the Patent Office.

Lawrence Maxwell, of Cincinnati, Ohio, Edmund Wetmore, of New York City, John E. Cross, of Baltimore, Md., and Oscar W. Jeffery, of New York City, for plaintiff.

Samuel S. Watson, of New York City, for defendant.

HOUGH, District Judge (after stating the facts as above). The cancellation proceedings above referred to were brought long before this suit, and the record herein largely consists of the evidence taken in the Patent Office by both parties. It is exceedingly voluminous, and descends into great detail. About these details there is that uncertainty, if not contradiction in nonessentials, which must always be the case when even intelligent and well-intentioned men testify regarding occurrences of many years ago.

After perusing the entire record, however, I am of opinion that as to all relevant facts (in the sense of visible or audible phenomena) there is almost no difference between the parties hereto. Contradictions exist, but they are rather in the inferences to be drawn from what was said or written, than in respect of the happening of this or that event. I shall therefore make the findings of fact herein comparatively brief.

Mr. Robert S. Howard began his active career as a piano tuner in Ohio about 1877. He plainly developed ability far beyond the usual as a salesman, until in 1889, when he entered the employment of the New England Piano Company of Boston, I have no doubt that Mulcahy (one of the principal employés of the New England concern) testified accurately when he said that, though he had never before met Mr. Howard, he had known of him for years as a piano salesman and traveler, and "we" (the New England people) "all congratulated ourselves on making the connection with him." Nor is it doubted that Mr. Gibbs of Chicago, who has known Howard for a long time, correctly described him as a "very popular and prominent traveler and well liked by the trade."

The New England Company manufactured pianos in a Boston factory, one entrance to which was on Howard street. There are indications that this fact had something to do with the use of the name "Howard" by that concern; but undoubtedly the principal and controlling reason for selling pianos of their make with any variant of the word "Howard" on the "fall-board" was due to the fact that Mr. Robert S. Howard wished to have it done when he became a salesman for the company.[1]

The New England Piano Company's product consisted of two grades of pianos. The superior quality bore and was sold under its own name; the inferior product (consisting of about 40 per cent. of the output) was given any name that any customer wished, and Mr. Howard's selection of his own name was but one instance of a common but harmless trade deception. It assisted Howard in selling pianos. The position of the purchaser is amusingly stated by Scanlon, who, when he was asked as to how a man who bought the piano knew the maker, replied:

"You will have to ask that question of the fellow who sold it to him. I never attempted to explain that."

The first consignment of pianos bearing any variant of the name "Howard" went from the New England factory to the Pacific Coast

[1] The New England Piano Company was the trade-name of one Scanlon, but it will be spoken of throughout this opinion by its corporate sounding title.

in 1889, and I have no doubt from the testimony of Howard himself and from that (inter alios) of Fox, of Chicago, and Dierks, of Pittsburgh, that Howard represented that the pianos he was selling were "made for him" by the New England Piano Company. This statement was not true. Mr. Howard did give to Scanlon and others his views as to how a piano should be regulated, both as to tone and action, and he probably also expressed opinions as to what constituted an attractive case; but it amounted to no more than what Scanlon testified to, viz., that it was always his custom with anybody that he employed to represent the concern outside, to have them go to the factory, see how the product was created, and "we were always glad to get suggestions, and always ready to try the suggestions."

The New England Company's piano that Howard sold was simply its second quality instrument, and he was a salaried employé. He did not buy the pianos, nor sell them at his own risk. Indeed, Howard himself testified (in the cancellation proceeding and before this suit brought), "I never worked on a commission in my life." But he was paid a stipulated salary by the New England Company, which salary was not based on the number of pianos sold in any year, although he did get (apparently as a gratuity) $1,000 more than his agreed salary the first year he worked for the New England concern, and thereafter his salary was increased from year to year.

In 1894, Howard transferred his allegiance to Fischer & Co., but until 1896 or 1897, whenever he got a chance to sell a piano with the Howard mark upon it, he did so and sent in the order to the New England Company. Scanlon says this ceased about 1897; it probably stopped in 1896. No other salesman except Howard sold pianos with the "Howard" mark upon them. No "royalty" was ever paid for the use of this name; but, as Howard himself testified, the sales were made "for the good of the New England Piano Company's business as a whole."

There is no doubt that, from the time any variant of "Howard" was inscribed upon pianos, the retail trade, the user, and the public generally spoke of them as "Howard" pianos; but there is no completely satisfactory proof that the New England Company ever put out any piano bearing the word "Howard" alone. There is evidence that it was done; but, after the most careful search, but one specimen of such a piano has been found in the whole United States, and I do not think that the exact date of this piano has been clearly shown. It is found that any use of the word "Howard" on the fall-board of a piano made by the New England Company was sporadic; but there were thousands sold under the title "R. S. Howard & Co.," "Howard, New York," "Howard & Co., Boston," and "R. S. Howard & Co., Boston." After 1896 the New England Company completely ceased using any variant of the word "Howard"; whatever right or title they had in or to that name was abandoned.

In that year Howard entered the employment of the Baldwin concern. The arrangement was oral, and with a Mr. Wulsin, who died before suit brought. Howard says that pianos bearing his name were to be manufactured for him at an agreed price, of which he had a

memorandum, and he was to be credited with the difference between that price and the price he obtained for them; *which was the same arrangement that he had had with the New England Company.* He guaranteed all the pianos and purchased outright from the Baldwin Company a good many instruments, which he either sold to dealers or consigned to them.

This testimony is untrue, because he never had any such arrangement with the New England Company, and it is utterly inconsistent with his previous oath that he never worked on a commission in his life. The account books produced by the plaintiff persuade me that until 1899 Howard did work on a commission; he did sell pianos bearing the name "Howard" with the adjuncts set forth in the first registered trade-mark; but he also sold all the other makes produced by plaintiff [2] if he could; and any other salesman for the plaintiff sold "Howards" if he found a market for them.

It is true that if Mr. Howard found a customer whom he liked and would take a risk on he guaranteed the account; but the sale was always made by the plaintiff, and the business of selling was the plaintiff's; and it was not until 1896 that the word "Howard" alone was habitually and extensively used on the fall-board of any piano.

In 1899, by written agreement, Howard became a salaried salesman for plaintiff, and within the territory allotted to him continued to do just what he had done from 1896–1899. In 1902, he resigned from plaintiff's employ, established the defendant company, and began to put out pianos uniformly marked on the fall-board with the corporate name. I am of the opinion that there is no evidence that defendant corporation has ever put the word "Howard" alone on the fall-board of a piano; but there is no denial of the statement that, beginning in or about 1913, the name "Howard" unaccompanied by any initials or addendum was placed upon the back of the piano.

The result of the foregoing is that, with the exception of a few sporadic instances of which only one has (even by defendant's contention) been located, the only piano labeled on its front with the word "Howard" (simplicitor) ever put forth is plaintiff's instrument, of which the sales have grown from about $140,000 in 1896 to upwards of a million dollars in 1914. This business is the result of the energy of the plaintiff, undoubtedly assisted from 1896–1902 by Mr. Howard, for which assistance he was fully paid at rates presumably satisfactory to himself.

The foregoing findings of fact (if correct) leave the case resting upon legal principles so simple as to require but little discussion.

In and prior to 1896, if anybody had or could have a trade-mark in the word "Howard" or any variant thereof as applied to pianos, the New England Piano Company had it. Whatever that company had it abandoned.

If Howard's story of the relations established by him with the

[2] It is to be remembered that the word "plaintiff" as used herein covers not only the Baldwin Company, but all its predecessors in business, and assignors of business.

Baldwin concern in 1896 were true, a good deal might be said in favor of the proposition that he had a trade-mark.

[1] But not only is the statement untrue because inconsistent with other testimony of his own, and with the account books of the plaintiff (as above shown), but it largely consists in Howard's narration of what Mr. Wulsin said to him on his becoming a Baldwin salesman. This evidence is obviously obnoxious to section 829 of the New York Code of Civil Procedure; but, if considered, such consideration renders Mr. Wulsin's report to his corporation of the circumstances of Howard's employment competent evidence.

[2, 3] Having regard to the probabilities of the matter and to the contradictions of Howard's testimony, I have no doubt that, as Wulsin stated, it was "clearly understood that the use of this name (Howard) gives no rights to Mr. Howard other than his privilege to sell to dealers acceptable to us; his compensation being price received in excess of $95 for style 7."

If Howard had no business when he entered the Baldwin employ, and his agreement with plaintiff was as above found, he certainly created no business during his period of employment in the sense that must be assigned to that word in order to sustain trade-mark rights.

Down to 1902 Howard was not a manufacturer, a jobber or a retailer of pianos; he was a salesman, receiving (as he says) a salary only, or (as I believe) sometimes a salary and sometimes a commission, perhaps at times both; but always and all the time his relation to his employers was exactly that of a highly favored clerk who sells (for example) neckties over a counter, and being a well-dressed man himself is permitted to call one of his employer's styles of neckties by his own name.

That there can be no such thing as a transfer of a trade-mark in gross is too true to need citation to support it. If in 1902 Howard had no established business of his own, he had no trade-mark.

That Mr. Howard had an established and well-tested capacity to get business and make business is an entirely different thing; this he had, and this, and this alone, he contributed to the R. S. Howard Company. It seems to have turned out a valuable contribution. But because he had no business other than his own active mind and winning ways in 1902, he could not hand over to the defendant any rights even in his own name which were appurtenant to and dependent upon a business of manufacturing, buying, and selling belonging to him. As above pointed out, he was not even a jobber, and never had been, and therefore the case much relied upon by defendant of Nelson v. Winchell, 203 Mass. 75, 89 N. E. 180, 23 L. R. A. (N. S.) 1150 is inapplicable.

What Howard did have in 1902 was the undeniable right to use his own name in his own business, and this he has done, and this is all he hoped to do (in my judgment) until about 1904, when he began to talk with plaintiff's New York representative about getting sole control of the name "Howard." He followed up this thought in 1905 by beginning two actions in the Supreme Court of this state against plaintiff and some of its officers. The complaint in that case is instruc-

tive. It sets forth over Howard's verification that since 1889 Howard had manufactured or caused to be manufactured and sold a style of piano "created by him" which he caused to be marked with the name "Howard"; that in 1897, after Howard had been manufacturing or causing to be manufactured and sold pianos bearing this name of "Howard" for upwards of eight years, he entered into an agreement with D. H. Baldwin & Co., whereby that concern "agreed to manufacture said pianos bearing the name "Howard" for said Robert S. Howard"; and finally this complaint states that in consideration of this agreement he permitted Baldwin & Co. to use his name "Howard" upon pianos manufactured by them for sale in their stores.

It is further instructive to compare this verified complaint with defendant's verified application to cancel plaintiff's trade-marks herein. In that application it is said that in 1889 and prior thereto Howard was engaged in New York in the sale of pianos manufactured for him, and in that year he adopted "Howard" as his trade-mark for the pianos manufactured for him and sold by him, and that he continued to have pianos so manufactured and marked continuously until the time he transferred said trade-mark, together with his business of manufacturing and selling pianos to the defendant herein.

The pleadings in the New York Court, in the Patent Office, and in this court, when compared with the testimony, appear to me to furnish a very strong confirmation of the result in matters of fact above attempted to be set forth. This course of pleading and defendant's line of argument all rest, I think, upon the assumption that a trade-mark or trade-name is something that belongs to the first devisor thereof through every change of his business relations, and follows him like a patent or a copyright. On this point the recent decision in Hanover Co. v. Metcalf, 240 U. S. 403, 36 Sup. Ct. 357, 60 L. Ed. 713, is perhaps sufficient authority. My own views I have set forth at some length in Carroll v. McIlvaine (C. C.) 171 Fed. 125, affirmed 183 Fed. 22, 105 C. C. A. 314, and lately in President Suspender Co. v. McWilliams, 233 Fed. 433 (opinion dated January 10, 1916).

The net result is that plaintiff, and plaintiff alone, is entitled to use the word "Howard" (simplicitor) on the fall-board of pianos, in the name of the company that manufactures those pianos or handles them or sells them, and in advertising matter relating to pianos. Similarly the defendant and defendant alone is entitled to use "R. S. Howard" or "Robert S. Howard" in like manner. In other words, their relations to the word "Howard" must remain as heretofore, and as acquiesced in by both parties until in 1914 Mr. Howard began the cancellation proceedings in the Patent Office.

I am inclined to think, if this court has the power, it is inadvisable to seek to prevent the continuance of the cancellation proceedings in the office.

It is plain to me that the object of these proceedings is primarily to get rid of something which constitutes an obstacle to the extension into certain foreign countries (e. g., Cuba and Uruguay) of the business of the R. S. Howard Company.

I doubt whether under our law the name "Howard," being a not

infrequent surname and place name, can be appropriated as a strict trade-mark. I have no doubt that the original registration in 1898 was made with the full knowledge and consent of Mr. Robert S. Howard. He admits the knowledge; the consent is implied from the course of business. But if he could not make a strict trade-mark out of his own name, I am unable to see how anybody else could do it even with his consent.

The defendant's counterclaim must be dismissed, with costs, and the plaintiff given a decree, with costs; but I incline to ground that decree solely on principles of unfair competition, and leave the trade-mark situation to take care of itself; but upon this point I am willing to hear further argument if the matter is pressed, as it was not much alluded to in argument.

On Settlement of Final Decree.

[4] After reflection, I am convinced that the proper order should preserve that status of the parties to this suit which existed until the defendant began to stamp "Howard" merely on the back of its pianos and to encourage advertising (if not to advertise itself) under the name "Howard" alone.

The defendant has never used "Robert S. Howard" or "R. S. Howard" without the suffix "Company" or "Co." There is no reason why it should do it; there is no evidence that it has any right to do it—although Mr. Howard could doubtless create that right (so far as he is concerned) at any moment.

The plaintiff has the superior right, and that superior right can best be maintained by requiring the suffix "Company" or "Co." to be used by the defendant.

I have therefore signed the decree as propounded by plaintiff.

In re SCHMICK HANDLE & LUMBER CO.

In re HOLLINGSWORTH & WHITNEY CO.

(District Court, D. Maine. June 24, 1916.)

No. 324.

1. BANKRUPTCY ⟸288(1) —JURISDICTION—SUMMARY PROCEEDINGS.

Where a fund is within the jurisdiction of a bankruptcy court, it may summarily, and without the plenary suit authorized by Bankr. Act July 1, 1898, c. 541, §§ 23, 60, 30 Stat. 552, 562 (Comp. St. 1913, §§ 9607, 9644), adjudicate disputed rights thereto.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 447; Dec. Dig. ⟸288(1).]

2. BANKRUPTCY ⟸ 288(1) —COURTS—JURISDICTION.

Where the claimant of timber agreed with the receivers in bankruptcy to manufacture it into lumber, and, after deducting the cost, to pay over the proceeds for the receivers, or their successors, to hold as officers of the bankruptcy court, the bankruptcy court had possession of the fund,

and so could summarily determine whether the bankrupt's estate or the claimant was entitled to it.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 447; Dec. Dig. ⊂=288(1).]

In Bankruptcy. In the matter of the bankruptcy of the Schmick Handle & Lumber Company. Proceedings to review the order of the referee, denying the claim of Hollingsworth & Whitney Company to a fund in possession of the trustees in bankruptcy. Order affirmed.

Andrews & Nelson, of Augusta, Me., and Butler & Butler, of Skowhegan, Me., for claimant.

William R. Pattangall and Thomas Leigh, both of Augusta, Me., for trustees in bankruptcy.

HALE, District Judge. This case brings before the court the report of the special master, Fremont J. C. Little, on petition of the trustees in bankruptcy for an order directing Hollingsworth & Whitney Company to show title to a certain fund of $16,128.86 and accrued interest thereon, deposited in the custody of the trustees, under terms of a stipulation filed in this court. The master has found that the fund is the property of the bankrupt estate. The report of the master presents the controversy. The master acted under a commission, as follows:

"In re Fund of $16,128.86 in the Custody of the Trustees in Bankruptcy and Claim of Ownership Thereto by Hollingsworth & Whitney Company.

"Whereas a petition by the trustees in bankruptcy of the Schmick Handle & Lumber Company for an order directing Hollingsworth & Whitney Company to set up and present any claim of ownership, or of right, title, or interest, which it may have to a fund of $16,128.86 in the custody of the trustees in bankruptcy, as by said petition more fully appears, or show cause why it should not do so, and in default thereof to be forever barred, was filed in said court on May 12, 1915;

"And whereas, upon said petition, an order to show cause duly issued by order of court returnable May 28, 1915;

"And whereas, on the return date of said order, to wit, on May 28, 1915, service of the same was duly proved as ordered;

"And whereas, on said May 28, 1915, the special appearance of Butler & Butler and Andrews & Nelson was entered for the Hollingsworth & Whitney Company, for the purpose of filing a motion to dismiss;

"And whereas, on said May 28, 1915, a motion to dismiss was filed by the Hollingsworth & Whitney Company, and upon hearing was denied by the court;

"And whereas, on May 28, 1915, it was ordered (Hale, J.) that the defendants file their answer to said petition on or before July 6, 1915;

"And whereas, on July 5, 1915, there was filed answer in lieu of demurrer, and answer of the Hollingsworth & Whitney Company;

"It is, this 6th day of October, A. D. 1915, ordered (Hale, J.):

"That the issue made by said petition and said answer be referred to Fremont J. C. Little, Esq., of Augusta, in the district of Maine, as a special master in chancery, who is hereby directed to take testimony concerning the same and report said testimony, with the findings of fact and conclusions of law thereon, to the court with all convenient speed."

The principal question of fact referred to the special master was whether the bankrupt estate, or the claimant, is entitled to the net proceeds of the sale of 1,862,000 feet of pine, fir, and hardwood logs, amounting to $16,128.86 and accrued interest thereon, since July 1,

1915, now deposited in the Granite National Bank of Augusta, in the name of the trustees of the bankrupt estate as a special deposit.

After a full hearing, the special master decided that the bankrupt estate is entitled to the proceeds of the sale. He made further findings, both of law and fact, which are now before the court.

[1, 2] At the threshold of the proceeding, the jurisdiction of the court is denied by Hollingsworth & Whitney Company, the claimants, who contend that the question of title now before the court cannot be decided in a summary proceeding in a bankruptcy court, but must be decided in a court having jurisdiction over the claimant, or the property held by him; and if the matter be taken up in the bankruptcy court it must be taken up in plenary proceedings, rather than in a summary proceeding.

On this question of jurisdiction it appears that the petition in bankruptcy was filed against the Schmick Handle & Lumber Company on the 20th day of January, 1914; that immediately thereafter the court appointed Frank E. Boston and John Howard Hill receivers in bankruptcy for the bankrupt corporation; that the receivers qualified as such, and took charge of the bankrupt estate until later, when Frank E. Boston, Carroll N. Perkins, and Harold E. Cook were appointed trustees of the bankrupt estate; then the management of the estate came into the hands of these trustees.

On February 12, 1914, the receivers entered into an agreement with the claimant company, which agreement was approved by this court The agreement is as follows:

"Memorandum of agreement this day made and entered into by and between Frank E. Boston and John Howard Hill, receivers in bankruptcy of Schmick Handle & Lumber Company, duly appointed by the United States District Court for the District of Maine on January 22, 1914, and as such duly qualified, party of the first part, and Hollingsworth & Whitney Company, a corporation having a principal place of business in Boston, Massachusetts, party of the second part, witnesseth:

"That whereas, there are now in the woods in Bald Mountain township, Somerset county, Maine, a quantity of pine, fir, and hardwood logs, approximating one million eight hundred sixty-two thousand (1,862,000) feet, which said logs are claimed both by said receivers as the property of said bankrupt, and also by said Hollingsworth & Whitney Company as its property; and

"Whereas, unless said logs are forthwith hauled from the woods and manufactured into lumber they will become a total loss;

"Now, therefore, it is hereby mutually stipulated and agreed:

"1. That the said Hollingsworth & Whitney Company will advance the necessary funds to pay off and discharge all valid lien claims for labor or on account of said logs, and will further advance the necessary amount to defray expenses of hauling said logs from the woods and loading them on the cars, and will forthwith, as soon as may be, proceed to sell said logs at the most advantageous price or prices the said company can obtain for the same in the market.

"2. It is further agreed that the question of the ownership of said logs shall as soon as possible be submitted by the parties hereto for determination by the court or courts having jurisdiction thereof, and that the proceeds of said sale, when received, after deducting the amounts paid by said company in discharging all lien claims and all expenses of hauling and loading said logs, together with interest at the rate of 6 per cent. per annum upon the moneys advanced and employed by said company in the premises, and together also with proper compensation to said company for its services or those of its agents and employés herein, shall be paid by said company to said

receivers or their successors in authority, and shall be held in their hands as officers of the bankruptcy court, subject to the final judgment of the court or courts having jurisdiction of the premises, determining all questions concerning the ownership of said logs and the net proceeds received from the sale thereof as between said receivers or their successors in office and said Hollingsworth & Whitney Company, or any other persons or parties.

"3. And it is hereby further stipulated that nothing contained in this agreement shall in any way prejudice any claim of ownership, right, or title of either party hereto, in or to said logs or the proceeds of the same, but said claim of ownership shall be determined by the court or courts having jurisdiction of the premises in all respects as if this agreement had never been made.

"In witness whereof the said receivers have hereunto set their hands and seals, and the said Hollingsworth & Whitney Company has caused these presents to be signed and its seal to be affixed by its president hereunto duly authorized this 12th day of February, 1914.

"Frank E. Boston,
"John Howard Hill,
"Receivers of Schmick Handle & Lumber Co.
"Hollingsworth & Whitney Company [Seal]
"By Waldo E. Pratt, President."

In pursuance of this agreement, the Hollingsworth & Whitney Company converted the logs in question into cash, paid the bills on them, and rendered an account to the trustees in bankruptcy, who had succeeded the receivers. This account shows a balance in the hands of the claimant company of $16,128.86. This sum was accordingly paid over by the claimant company to the trustees in bankruptcy, and becomes the subject of this controversy. The learned counsel for the claimant contends that this court has no jurisdiction of the merits of this matter in a summary proceeding, for the reason that neither the trustees, nor other officers of the court, have ever reduced, or attempted to reduce, the property to possession as assets of the bankrupt. The contention is that the trustees are not in actual possession of the fund in question in a legal sense; that the claimant is asserting adverse claim of ownership in good faith; and that the rights of the parties must be settled in a plenary suit, and not in a summary proceeding in bankruptcy. The claimants' specific proposition is that a plenary suit against a third person, to assert title to property claimed as assets of the bankrupt, can be brought only in a court having jurisdiction generally over such a suit, and cannot be maintained as a step in bankruptcy proceedings; but that the rights of the parties must be settled in a plenary suit brought by the trustee, either in a state court or in this court, under sections 23 and 60 of the Bankruptcy Act. The claimant presents this contention with force, and cites, among others, the following cases: Mueller v. Nugent, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405; Bardes v. Hawarden Bank, 178 U. S. 524, 532, 20 Sup. Ct. 1000, 44 L. Ed. 1175; Louisville Trust Co. v. Comingor, 184 U. S. 18, 22 Sup. Ct. 293, 46 L. Ed. 413; First National Bank v. Title & Trust Co., 198 U. S. 280, 25 Sup. Ct. 693, 49 L. Ed. 1051; Babbitt v. Dutcher, 216 U. S. 102, 30 Sup. Ct. 372, 54 L. Ed. 402, 17 Ann. Cas. 969; In re Rathman, 183 Fed. 913, 106 C. C. A. 253; In re Shea (D. C.) 211 Fed. 365.

The test upon which the question before the court must be decided was stated by Judge Sanborn in the Rathman Case, 183 Fed. 913, 106

C. C. A. 253: That the summary jurisdiction of the court can be sustained only when the bankruptcy court, through the acts of its officers, such as referees, receivers, or trustees, has taken possession of the res as the property of the bankrupt. In Plaut v. Gorham Manufacturing Co. (D. C.) 159 Fed. 754, Judge Holt followed this test, and said:

"I understand the test to be whether the property is or has been in the possession of an officer of the bankruptcy court. If it is in such possession, claimants can be cited into the bankruptcy court to determine the validity of any claims or liens asserted against them."

In the McMahon Case, 147 Fed. 684, 77 C. C. A. 668, in speaking for the Circuit Court of Appeals, Judge Lurton said:

"Possession of the res draws to the court jurisdiction of all questions in respect to title or liens." Krippendorf v. Hyde, 110 U. S. 276, 4 Sup. Ct. 27, 28 L. Ed. 145; Toledo & Railroad Co. v. Continental Trust Co., 95 Fed. 497, 36 C. C. A. 155; Chauncey v. Dyke Bros., 119 Fed. 1, 55 C. C. A. 579; In re Rochford, 124 Fed. 182, 59 C. C. A. 388; In re Eppstein, 156 Fed. 42, 84 C. C. A. 208, 17 L. R. A. (N. S.) 465.

In the case at bar the agreement recites that there are now in the woods in Bald Mountain township a certain quantity of logs claimed by the receivers and also by Hollingsworth & Whitney Company; that Hollingsworth & Whitney Company will advance the necessary funds to pay off and discharge all liens and to defray expenses of hauling, and will proceed to sell the logs at the best price possible; that the question of the ownership of the logs shall, as soon as possible, be submitted for determination, by a court or courts having jurisdiction thereof; and that the proceeds of the sale, when received, after deducting the amounts to be paid by the company in discharging liens and expenses of hauling, together with certain interest, after proper compensation to the company, shall be paid by the company to the receivers or their successors, and "shall be held in their hands as officers of the bankruptcy court," subject to the final judgment of the court or courts having jurisdiction of the premises.

The funds are now held by the trustees, as officers of the bankruptcy court. I am constrained to hold that the agreement itself fixes the jurisdiction of the court. The claimant company has submitted to the jurisdiction of the court, and has placed the funds in the hands of the officers of the court. Hence summary process is the proper method to determine the final ownership of the fund. I can have no doubt that the facts meet the test to which I have referred. The property is in possession of officers of the bankruptcy court. This court, then, has jurisdiction of the matter.

The ownership of the fund in question depends upon the ownership of the logs on Bald Mountain town, which were the subject of the agreement. That question of fact has been decided by the special master in his report. The special master had before him a large number of witnesses, and examined a mass of documentary evidence, as is shown by his report. He gives clearly the reasons for his decision.

After a careful examination of his report, the testimony, and the exhibits, I am satisfied with his conclusions, both of law and of fact.

I do not think it necessary to state in detail the facts to which the proofs relate, or to restate the conclusions of the special master. I affirm the findings of the special master, and I order that the fund of $16,128.86 now held by the trustees, as officers of this court, shall be made a part of the assets of the estate in bankruptcy.

In re HAWLEY DOWN-DRAFT FURNACE CO.

(District Court, E. D. Pennsylvania. June 14, 1916.)

No. 4521.

1. ASSIGNMENTS ⟸34—VALIDITY—BOOK ACCOUNTS.
Under the Pennsylvania laws there can be no valid assignment of book accounts without delivery of a written assignment or other equivalent.
[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 67–71; Dec. Dig. ⟸34.]

2. ASSIGNMENTS ⟸115—PRIORITY—SEVERAL ASSIGNMENTS.
Between two assignments of the same book account under otherwise like circumstances, the assignee who first gives notice to the debtor is first in right.
[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 161, 163, 171, 181; Dec. Dig. ⟸115.]

3. ASSIGNMENTS ⟸57—RIGHTS OF ASSIGNEES—CREDITORS.
A creditor assignee of a book account is, in respect to giving notice to the debtor, in the same position as an assignee for value.
[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 116–120; Dec. Dig. ⟸57.]

4. GARNISHMENT ⟸51—RIGHT OF ASSIGNEE.
A paper assignment, without other delivery, is valid as against the assignor, and because of this is good against the plaintiff in foreign attachment or other appearance process.
[Ed. Note.—For other cases, see Garnishment, Cent. Dig. §§ 74, 97–101; Dec. Dig. ⟸51.]

5. ASSIGNMENTS ⟸48—RIGHTS OF ASSIGNEES—EQUITABLE ASSIGNMENT.
The only difference between an assignment, which by compliance with the statute carries the legal title, and an equitable assignment, is that in one case the assignee may sue in his own name, but in the other must sue in the name of the assignor.
[Ed. Note.—For other cases, see Assignments, Cent. Dig. § 133; Dec. Dig. ⟸48.]

6. BANKRUPTCY ⟸155—TRUSTEE—RIGHT OF.
The trustee in bankruptcy merely takes rights which the bankrupt may have had, coupled with those any creditor might have asserted against the bankrupt's property; but third persons may assert against the trustees any rights which they might have asserted against the bankrupt.
[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. ⟸155.]

7. BANKRUPTCY ⟸184(1)—ASSIGNMENTS OF CHOSES IN ACTION.
There is no difference between transfers of tangible personalty and choses in action, but both must be followed with delivery, and on assignment of book accounts notice to the debtor is necessary to complete a title against the trustee in bankruptcy, who represents the assignor, as well as the assignor's creditors.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 275; Dec. Dig. ⟸184(1).]

On reargument of petition to review. Rehearing denied.
For former opinion, see 230 Fed. 471.

John W. Creekmur, of Chicago, Ill., and Kirkpatrick & Maxwell, of Easton, Pa., for petitioner.
E. J. & J. W. Fox, of Easton, Pa., for trustee.

DICKINSON, District Judge. The occasion for the allowance of a reargument in this case is disclosed by a statement of the two points to which the reargument was limited. The pending ruling was based upon the finding as a fact by this court of the insolvency of the bankrupt at the time of the assignment of the book accounts, the proceeds of the collection of which is the subject-matter of this controversy. It further followed the conclusion of law that an insolvent could not, by simply entering into a paper writing, make a valid transfer of his property as against attacking execution creditors, unless there had been such a delivery of possession as the circumstances and conditions demanded, or at least if the insolvent became a bankrupt, and the property which was the subject-matter of the intended transfer was turned into money and received by the trustee in bankruptcy, the mere paper transfer would not constitute good title to the money. The evidentiary facts upon which the question of delivery must be determined were not in dispute.

The petition for a reargument averred the finding of insolvency to be without any supporting facts in evidence, and to have originated with the court, and that the conclusion of law stated had not been anticpated by counsel, and because of this had not been discussed. The insolvency fact has been disposed of by a formal concession at bar of the insolvency of the assignor before and at the time of the assignment. The evidentiary facts involved are now all settled, and we are concerned wholly with the proper inferences of law, or otherwise, to be drawn.

There is an apparent, and, if real, a somewhat puzzling, reluctance on the part of counsel for petitioner to face the real question involved. The occasion for this observation leads to the elimination of another possible feature of the case. We are concerned with an assignment. This means a contract. This implies as an element the law of the contract, which, in turn, suggests the thought of locus. This might be expected to be found to be either an Illinois or a Pennsylvania contract. Counsel for petitioner confidently assert the law of Illinois to be with them. We had been furnished no information (beyond this statement) of what the law of Illinois on the subject is. The referee disposed of it as a Pennsylvania contract. The information (too meager to be called such) which outside sources had brought to us was that the law of Illinois is otherwise than as above stated. We are relieved of any inquiry into it by the finding of the referee and by the agreement at bar that the case is to be disposed of as one arising wholly out of a Pennsylvania contract, made here and so far as executed carried into effect here. In other words, it is to be disposed of as if everything which has been done had been done in Pennsylvania. Let us, therefore, try to squarely present the case to be ruled.

The Hawley Down-Draft Furnace Company had customers against whom it expected to have choses in action in the form of book accounts. It anticipated a need for money. It entered into an agreement with the National Trust & Credit Company by which it agreed to sell and assign to the Credit Company any of its accounts which it should decide to sell, and the Credit Company agreed to buy them on certain terms and advance a certain percentage of what we will call their par value. The Furnace Company became insolvent, and assigned certain listed book accounts to the Credit Company, receiving advancements, as it had been agreed. There was nothing to evidence delivery beyond the delivery of the paper agreement and the paper assignment following it, and, particularly, there was no notification to the debtors of the Furnace Company. The affairs of the assignor went into the hands of a receiver appointed by the state court, and afterwards were turned over to the trustee in bankruptcy. The accounts were paid to the receiver and by him passed on to the trustee. The Credit Company demanded these moneys (or what remained of them) of the trustee as its property. We have ignored, as of no real value, the provision in the agreement that the proceeds of the accounts, when collected, were to be sent by the Furnace Company to the Credit Company in the "original package," or, if retained by the assignor, were to be held as collections made by the Furnace Company for the Credit Company as its agent. The real question is:

"Does the money in the hands of the trustee belong to the Credit Company, or is it to be distributed among the creditors of the bankrupt?"

Inasmuch as the conclusion reached is to adhere to the findings already made in the opinion before handed down, we will confine ourselves, in the present discussion, to a review of the argument presented to us by counsel for the Credit Company, premising it with the statement of certain propositions which we regard as settled, coupled (when called for) with a reference to a sanctioning authority. These propositions are as follows:

1. If the property, here claimed to have been sold, had been tangible personal property, undelivered and suffered by the vendee to remain in the possession and dominion of the vendor, the asserted transfer would have been void against subsequent bona fide purchasers or execution creditors of the assignor. This we assume to be admitted.

2. Trustees in bankruptcy may now assert on behalf of creditors all the rights which would have belonged to execution creditors had there been such. This we assume to be likewise admitted.

[1] 3. Under the law of Pennsylvania there can be no valid transfer of book accounts without delivery of a written assignment or other equivalent. American Bank v. Federal, 226 Pa. 483, 75 Atl. 683, 27 L. R. A. (N. S.) 666, 134 Am. St. Rep. 1071, 18 Ann. Cas. 444.

[2] 4. Between two assignments of the same book accounts under otherwise like circumstances, the assignee who first gives notice to the debtor is first in right. Phillips' Estate (3), 205 Pa. 515, 55 Atl. 213, 66 L. R. A. 760, 97 Am. St. Rep. 746.

[3] 5. A creditor assignee is in this respect in the same position as an assignee for value.

[4] 6. A paper assignment, without other delivery, is valid as against the assignor, and because of this is good against the plaintiff in foreign attachment proceedings or other appearance process. Phillips' Estate, 205 Pa. 525, 55 Atl. 216, 97 Am. St. Rep. 750.

The propositions which for the purposes of this argument may be considered as open ones are the following, one of which may not be essential to the decision of the cause:

7. Is an attachment in execution to be deemed execution process, and the plaintiff an execution creditor, as is the plaintiff in a fi. fa., or is it appearance process, and the plaintiff regarded as merely succeeding to the rights of the defendant, as is a plaintiff in foreign attachment?

8. Is a trustee in bankruptcy, to whom the title passes by operation of law, within the rule which pertains to voluntary assignees for value and creditor assignees?

9. Is the National Trust & Credit Company entitled to the fund in the hands of the trustee in preference to the claim of the trustee as the representative of execution creditor claimants?

[5] The whole discussion is summed up in this final question. The first complaint (designated 2) which counsel make must be based upon a misapprehension of the intended meaning of the quoted extracts from the opinion heretofore filed. The thought was wholly academic, and its expression had no other than a clarity purpose. The distinction is what may be termed wholly technical. It is that between legal and equitable titles. The ancient prejudice against assigned rights of action having worn itself out, the only practical consequence left is the manner of naming the plaintiff. Unless the legal title passes by the transfer, the one in whom was originally the right of action must be named as the plaintiff in any suit brought. If the right to receive the funds has passed to another, the action is brought in the name of the legal plaintiff to the use of the assignee, who becomes the equitable plaintiff. If the legal title has passed, the assignee brings suit in his own name as the assignee of the legal plaintiff. An illustration is afforded by the Pennsylvania statute on the subject of the assignment of bonds. The act requires (among other things) two witnesses to an assignment. If such an assignment is made, the assignee may sue as such. If the assignment, although the same in all other respects, has but one witness, it does not pass the legal title, and suit is brought in the name of the obligor to the use of the obligee. Either assignment is good to all intents and purposes. One is a legal assignment; the other an equitable one; but one is as good as the other. There is no other difference than this: If, for instance, one is void or voidable, because in fraud of creditors, the other is.

[6] There is a like futility in discussing the title of a trustee in bankruptcy. The Bankruptcy Law does not enlarge (in the sense discussed in the submitted brief) the property rights of the bankrupt. In the proper sense of the phrase, all that passes to the trustee is what the bankrupt had. We may start with the observation that the property of the bankrupt remains subject to all claims and equities. Any one who could assert a title to or equity in the property before bankruptcy may do so afterwards. To say that it is only the prop-

erty rights of the bankrupt which pass is no more than to say that, if the bankrupt had two horses, the Bankruptcy Law does not increase the number to three or more. Under the provisions of that law, however, there does pass to the trustee, not only all rights which the bankrupt had, but also all rights which execution creditors (if there had been any) might have asserted, as well as the power to set aside certain transfers which the bankrupt may have made, and by which he, in consequence, had parted with all his rights. When, therefore, the inquiry is as between the claimant and the trustee, the question is not merely what rights had the bankrupt, but what are such rights plus the rights of execution creditors.

[7] Complaint II of the brief goes to the proposition which we give as 7 in those enumerated. Noble v. Oil Co., 79 Pa. 354, 21 Am. Rep. 66, to which we have been referred, rules it only as to foreign attachment. This is not disputed. Pellman v. Hart, 1 Pa. 263, was the case of a promissory note assigned (or indorsed over) and delivered. The latter fact made the purchaser's title a good one. The opinion, it is true, does not distinguish between attachment proceedings, which are appearance process, and those which are execution process. This case in the reasoning of the opinion (although not its facts), and those which follow it, supply the line of thought which, logically applied, admittedly supports the referee, and, if they are controlling, lead to the conclusion reached by him. The two views are here presented in a nutshell. The foreign attachment cases are aside from the point, because the rights of execution creditors are not involved; foreign attachment not being execution process. The plaintiff in an attachment in execution, however, necessarily must be, not only a creditor, but it is difficult to understand why he is not an execution creditor as well, and, if he is, then the assignments which figured in these cases are good against execution creditors, and the conclusion cannot be resisted that they are good against trustees in bankruptcy. We must either follow these cases (as did the referee), or it must be held that a plaintiff in such an attachment is not an execution creditor, or the assignments there must have been good on other grounds, or the final stand that for some reason these cases are not to be followed as ruling the point involved. The cases so far discussed can thus be passed.

U. S. v. Vaughan, 3 Bin. 394, 5 Am. Dec. 375, arose in 1811. This we think (although we have not the means at hand to verify this statement) was before the statutes giving attachment in execution process. The process, therefore, must have been foreign attachment. The report of the case does not inform us, but the case may be passed as not authoritative in other cases. The language of the opinion implies this. La Barre v. Doney, 53 Pa. Super. Ct. 435, is supported by the fact that the notice, essential to the validity of the assignment, had been given. It is true the ruling is put on both grounds, but the distinction between appearance and execution process is ignored. Hemphill v. Yerkes, 132 Pa. 545, 19 Atl. 342, 19 Am. St. Rep. 607, was decided upon its facts. The transferred thing was a check, which had been indorsed over and delivered before the attachment. The reasoning of the opinion does not reach the facts of the present case, and

there is the same omission to meet the precise point here involved. It therefore is not authoritatively ruled by the cases cited. Phillips' Estate, 205 Pa. 525, 55 Atl. 216, 97 Am. St. Rep. 750, was a case of foreign attachment.

Jarecki v. Hart, 5 Pa. Super. Ct. 422, more nearly than any other meets the needs of the petitioner. The case was, beyond room for difference of opinion, well decided on its facts. It was to all intents and purposes a case stated, inasmuch as it came up on a motion for judgment on a special verdict. The verdict really settled all disputable questions, because all that remained was whether "a valid assignment" passed title to a chose in action beyond the reach of an attacking creditor. It is clear that it did. The point here made was not really present in that case. It must be admitted, however, that substantially the same point was attempted to be made by counsel for appellant. His widely recognized ability gives assurance, as the report itself discloses, that it was well argued. It received the attention of the court. It was disposed of in an opinion written by a judge who had a firm grasp of legal principles and the powers of reasoning which lead to sound conclusions. The very vitals of the question were exposed by contrasting the case of a transfer of tangible personal chattels and of choses in action. The ruling can be accepted as an authoritative declaration (in accordance with the prior adjudications) of the law of Pennsylvania to be that an assignment of a chose in action is good as against the assignor without delivery and that notice to the debtor of the assignment of a book account is (again as against the assignor) not essential, and that a plaintiff in an attachment in execution acquires no greater rights than those of an assignee of the defendant. If he is to be regarded as such subsequent assignee, the effect given this would seem to be inconsistent with Phillips' Estate, 205 Pa. 525, 55 Atl. 216, 97 Am. St. Rep. 750, wherein it was held that, as between two such assignees, the one who first gave notice to the debtor was first in right.

Giving the ruling in the Jarecki Case its full application, there yet remains room for the thought that a trustee in bankruptcy is entitled to more consideration than one who (as a plaintiff in an attachment was held to do) stands in the shoes of the bankrupt. He is an execution creditor as well, and has all the rights of such creditors. The consequences of this will be later stated. We are unable to discover anything in the Cotton Sales Company Case (D. C.) 209 Fed. 629, which touches, or anything in the opinion of Judge Thompson, or the referee, which was meant to touch, the question before us.

We state frankly our utter inability to understand what is meant by complaints III, IV, and V. Time and again the attention of counsel was directed to the fact that the referee and the court had disposed of the case as one arising out of a Pennsylvania contract. If the contract was an Illinois contract, both the referee and the court had been proceeding on a wrong assumption. Counsel then stated this would be conceded, and the case heard as a Pennsylvania case. In the face of this stipulation the argument recurs to the assertion of an Illinois contract. Into this discussion we decline to go.

The same comment applies to complaint VI. There was an ex-

press admission and stipulation of insolvency. The only possible explanation of the discussion of features which have been eliminated by such clear and specific stipulations is that (which we assume to be the case) the paper book was prepared in advance of the argument at bar and before the stipulation was made. In this connection the observation before made that cases in the federal courts before the amendment of 1910 to the Bankruptcy Law can have no possible application is again repeated. Trustees then stood simply where the bankrupt stood, and had none of the rights of execution creditors. The same observation applies to cases in other state jurisdictions than Pennsylvania. It is well known that in some states assignments such as this would be held valid. What we are concerned with is federal cases since the amendment and Pennsylvania cases. The case of Greey v. Dockendorff, 231 U. S. 513, 34 Sup. Ct. 166, 58 L. Ed. 339, was the case of a New York contract and was ruled in accordance with the laws of that state.

Complaint VI evades the question. It is not contended that anything further in the way of delivery could have been done, other than to notify the debtor. It is an indisputable fact that this notice was not given.

Complaint VII, therefore, meets the whole question. Here again (although it is conceded the conclusion may be sound) we have the same sideling away from meeting the issue. Cases are again cited showing that in some jurisdictions notice to the debtor is not necessary. This is admitted. Cases are cited ruling that "as against the assignor" notice is not required. This must be admitted. Nothing is added to aid us to the conclusion asserted, except the case of Shepherd v. Railroad, 29 Pa. Super. Ct. 291. That was an administrator's case, and was planted upon the familiar ground that the administrator did not represent creditors. It is worthy of passing comment that Nonantum v. Webb, 124 Pa. 125, 16 Atl. 632, is cited as an authority for the proposition that the assignee of a book account is vested with "the right to sue thereon in his own name." This is in curious conflict, not only with all accepted principles, but with the express statement in the opinion in that case that the suit could not be maintained in the name of assignee, but only in the name of the assignor to the use of the assignee.

The concluding complaint brings us back to the attachment in execution cases and the difficulty in reconciling them with the ruling now made. As before remarked, it was to be expected the referee would do as he did do in following them. The question is wide open to difference of opinion. In many jurisdictions it is settled in favor of such assignees. The attachment in execution cases can, however, be distinguished, and they are seemingly as inconsistent with the ruling in the Phillips Case as with the ruling now made. The law vests the title, not only of the bankrupt, but the claims of execution creditors, in the trustee. He, therefore, is at least in the position of a subsequent assignee. As between him and the first assignee the one who first gives notice to the debtor is first in right. We have followed in this opinion, doubtless at painful length, the brief submitted with the reargument.

We adhere to the conclusion before reached, and restate it thus: A fund in the hands of a trustee in bankruptcy, arising from the collecton of book accounts due the bankrupt, will not be charged with a lien in favor of an assignee of such book accounts, to whom no delivery was made, except of the paper assignment, and who gave no notice thereof to the debtors, nor will such assignee be held to have an equitable title to the fund.

We are of opinion, although this is probably not necessary to the decision of the case before us, but in case it is held to be, that there is no distinction in Pennsylvania between transfers of tangible personalty and choses in action. Both must be followed with delivery, and notice to debtors of book accounts is necessary to a completed title against those in whom title is vested by operation of the law as representing creditors.

In re COBB'S CONSOL. COS.

In re CLAPP.

(District Court, D. Massachusetts. May 12, 1916.)

No. 20237.

1. BANKRUPTCY ⟸20(1)—JURISDICTION OF BANKRUPT—BANKRUPTCY COURT—FUNDS.

Where the trustee of a bankrupt corporation had in his possession a fund claimed by corporate creditors and also by creditors of an insolvent firm, the bankruptcy court has exclusive jurisdiction to decide the conflicting claims.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 23; Dec. Dig ⟸20(1); Courts, Cent. Dig. § 1331.]

2. PARTNERSHIP ⟸181—CREDITORS—RIGHTS OF.

Property of a member of a firm is liable, first for his individual debts, and then for partnership claims; therefore firm creditors, the firm being insolvent, have a prior right to share in fund belonging to a partner, over creditors of a corporation in which the partner was interested.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 310, 316, 317; Dec. Dig. ⟸181.]

3. BANKRUPTCY ⟸351—CLAIMS—MARSHALING OF ASSETS.

A partner, who was interested in a corporation, assigned to the trustee in bankruptcy of the corporation a fund due him. It had been the intention of the partnership to induce partnership creditors to agree to a novation, accepting the corporation as their debtor. Some of the partnership creditors did so, but others refused. The trustee in bankruptcy of the corporation took the fund as a stakeholder. The firm and partners also were insolvent. *Held* that, notwithstanding Bankr. Act July 1, 1898, c. 541, § 5, subd. "g," 30 Stat. 547 (Comp. St. 1913, § 9589), relating to proof of claims against partnership assets and individual assets, those firm creditors who did not accept the corporation as their debtor are entitled to priority; the section merely having relation to marshaling of assets.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 563, 564; Dec. Dig. ⟸351.]

In Bankruptcy. In the matter of the bankruptcy of Cobb's Consolidated Companies. Petition by John C. Clapp, Jr., to share in certain

assets. On certificate of review after decree of the referee in favor of the trustee. Decree of referee vacated.

Stoneman, Gould & Stoneman, of Boston, Mass., for trustee.
John F. Neal, of Boston, Mass., for creditors.

MORTON, District Judge. This case involves somewhat intricate questions of marshaling assets between the bankrupt corporation and a partnership to the assets and liabilities to which it succeeded within four months preceding petitions in bankruptcy against both concerns. The material facts are as follows:

The partnership traded under two names, viz., Cobb's Boston Tea Company and C. D. Cobb & Bro. It was composed of three partners, of whom only one, Albert C. Aldrich, need be referred to. When the corporation, the present bankrupt, took over the assets of the partnership, it agreed to assume the debts thereof. This arrangement was concluded in October, 1913. On January 7, 1914, an involuntary petition in bankruptcy was filed against the corporation, and on January 20, 1914, another petition against the partnership and the individual partners. At that time Aldrich had a claim for money loaned against a third concern which was also in bankruptcy, amounting to about $30,000, on which, through subsequent composition proceedings, about $15,000 was paid, and which therefore may be considered as worth the latter sum. This claim Aldrich assigned, on or about December 16, 1914, to Charles B. Jopp, who on August 21st previous had been appointed the trustee in bankruptcy of the corporation. The assignment explicitly stated:

"The said Jopp, trustee as aforesaid, accepting and receiving said fund as trustee or stakeholder, the same to be held subject to the further order of this court without prejudice to the rights of any parties, either creditors of Cobb's Consolidated Companies, creditors of the partnership of Cobb's Boston Tea Company, and C. D. Cobb & Bro., with reference to the marshaling of said fund and the distribution thereof, the rights of all of said parties to be determined as of the dates of the filing of the respective petitions in bankruptcy."

This arrangement was substantially modified, as hereinafter noticed, by a later agreement dated February 15, 1915, between Jopp, trustee, and Aldrich, and the petitioning creditors in the bankruptcy case against the partnership. In accordance therewith, the $15,000 was paid to Jopp. Certain portions of it were paid out by him in accordance with the agreements, and are not now in question. There remains a balance of about $8,500, which he still holds, and which forms the subject-matter of the present controversy. It is claimed on the one side by the petitioners, who are creditors of the partnership who have not proved their claims against the corporation, and on the other by him as trustee in bankruptcy of the corporation, for distribution among its creditors. The matter was heard by Mr. Referee Olmstead, who found in favor of the trustee; and it is here on a certificate of review.

The first point, somewhat preliminary in character, urged by the trustee is that the petitioners are estopped from making the claim here presented, by reason of their having joined in the agreements above referred to. It is, however, clear upon the agreements that the

creditors reserved their rights against the fund in question, and that this point is not well taken.

[1] The petitioners, before proceeding here, brought a bill in equity in the state court to determine their rights in the fund. Proceedings thereon have been stayed pending the determination by this court, as to whether it has exclusive jurisdiction of the matter. The petitioners contend that the state court has jurisdiction, and that they have the right to proceed there. The fund, whoever may be ultimately entitled to it, was assigned to the trustee in bankruptcy of the corporation, and reduced to possession by him before the bill in equity in the state court was filed. It is in his hands now, and he claims it in his official capacity. Possession by a trustee in bankruptcy of property which he claims as a part of the estate suffices to give this court exclusive control and jurisdiction to determine the ownership of it. Collier on Bankruptcy (10th Ed.) p. 502, collecting cases. I therefore proceed to the merits of the controversy.

[2, 3] The only right which the corporation, or Jopp, as trustee in bankruptcy of it, has to the fund rests on the assignment which was made about 11 months after the filing of the involuntary petition on which the corporation was later adjudicated. At the time when the assignment was made, Aldrich owned the claim and still had power to deal with it. In his hands the fund would have been available, first, for his individual creditors, and, after their claims had been satisfied, for the creditors of the partnership. His individual indebtedness appears not to have amounted to enough to absorb it. The right of his individual creditors to priority was recognized; and I infer that the surplus now in Jopp's hands represents the sum not required for their claims.

The partnership was deeply insolvent; the firm assets, plus the individual assets of the partners, did not amount to enough to pay its indebtedness. The effect of the assignment was to give the benefit of the fund to such creditors of the partnership as had accepted, or should accept, the corporation as their debtor in place of the partnership. It also operated to give the benefit of the fund to such other creditors of the corporation as had come into existence after it began business and who were never creditors of the partnership. In other words, the present balance, which would otherwise have been an asset available to the partnership's creditors generally, was converted into an asset available only to a limited class of such creditors, and was further subjected to an additional class of claims, which seem, however, not to amount to enough to have been regarded as an important factor. The arrangement was unquestionably made in entire good faith in pursuance of a plan to settle all matters connected with the partnership through the corporation which had succeeded it, and to eliminate the partnership from the situation. The facts concerning the condition of the various concerns in question were known to all the parties; and they are fixed with notice that the effect of the arrangement would be as above stated. It is evident from the agreements that doubt was entertained as to its effect upon the rights of creditors of the partnership who had not accepted the corporation as their debtor. After

the assignment had been made, the bankruptcy petition brought by the present petitioner and others against the partnership was, in accordance with the provisions of the agreement, dismissed by consent.

The supplemental agreement, dated February 15, 1915, in which the petitioner assented to the dismissal of that petition, explicitly provides that:

"* * * The rights, if any, of said present creditors of said copartnership, in and to said funds, are to be determined in the same manner and to the same effect as though the petition in bankruptcy against said copartnership had not been dismissed and the copartnership had been adjudicated bankrupt thereunder, * * * it being the intention of this instrument to reserve and save to the present creditors of the copartnership doing business under the name and style of Cobb's Boston Tea Company and C. D. Cobb & Bro., other than those creditors whose claims are settled and adjusted or waived as aforesaid, each and every right, both at law and in equity, that they would have had in and to said fund had said petition against said copartnership not been dismissed."

If the partnership had been adjudicated and were being liquidated separate from the corporation, it seems clear that its creditors would be entitled to the benefit of this asset, and that it could not be transferred away from them, without consideration, after the filing of the petition. The learned referee was of opinion that:

"The petition against Cobb's Boston Tea Company having been dismissed, the relation of the partners to their creditors may be considered as if such petition had never been filed."

Apart from the agreements, this would be true. But these explicitly provide otherwise, and the rights of the parties must be determined in accordance with them. He was also of opinion that to allow this petition would be to work a preference in favor of the petitioner at the expense of other creditors of the partnership who have proved against the corporation. The petitioner is, in effect, acting for himself and all other creditors of the partnership, and is endeavoring to obtain the fund for distribution among the class so composed. They are not, in my opinion, deprived of that right because other persons, originally creditors of the partnership, chose to relinquish their hold upon it, and to accept in lieu thereof the liability of the corporation. Section 5, subdivision (g), referred to by the learned referee, relates to the marshaling of assets between the partnership estate and individual estates of the partners. It does not cover the questions here presented.

I therefore conclude that the fund should be administered for the benefit of the present petitioner and such other persons, if any, as are of right entitled to share therein as creditors of the partnership.

The decree entered by the referee is vacated. The petitioner may present a decree in accordance with this opinion.

In re DAVIDSON.

(District Court, M. D. Alabama, N. D. May 13, 1916.)

No. 3733.

1. COURTS ⟸366(1)—PRECEDENTS—FEDERAL COURTS.
The federal courts will follow the construction of a state statute made by the state courts.
[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 956, 957, 967; Dec. Dig. ⟸366(1).]

2. BANKRUPTCY ⟸348—CLAIMS—PREFERENCE CLAIMS—RIGHTS OF WIFE.
Code Ala. 1907, § 4492, declares that the wife has full legal capacity to contract as if she were sole, except as otherwise provided by law. Section 4494 declares that the wife, if the husband be of sound mind, and has not abandoned her, or be not a nonresident, or under conviction of crime for two years or more, cannot alienate or mortgage her lands without the consent of her husband, but if the husband be non compos mentis, etc., the wife may alienate her lands as if she were sole. Sections 4487, 4497, declare that the husband and wife may contract with each other, but such contracts are subject to rules of law as to contracts between persons standing in confidential relations, but the wife shall not become surety for her husband, and that the earnings of the wife are her separate property, but she shall not be entitled to compensation for services rendered to or for her husband, or to or for the family. A wife, who discharged her marital duties, became a clerk in her husband's store at an agreed salary. *Held* that, on the bankruptcy of the husband, the wife was entitled to priority as to her claim for wages due, for the provision that contracts between husband and wife should be subject to the rules of law as to contracts between persons standing in confidential relations merely declares a rule of evidence.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 536; Dec. Dig. ⟸348.]

In Bankruptcy. In the matter of the bankruptcy of Jesse Davidson. Proceeding to review the finding of the referee allowing the preferential claim of Dora Davidson. Order of referee affirmed.

Weil, Stakely & Vardaman, of Montgomery, Ala., for trustee.
Steiner, Crum & Weil, of Montgomery, Ala., for claimant.

HENRY D. CLAYTON, District Judge. This matter is submitted for decree upon the claim of Dora Davidson for wages due her by the bankrupt. The claim is resisted by the trustee, on behalf of the creditors of the bankrupt, on the sole ground that the services, the foundation of the claim, were rendered by her, the wife, to her husband, the bankrupt.

There is no question of fact in dispute. Jesse, the bankrupt, and Dora, the claimant, were husband and wife. While they were living together as such, he and she entered into a contract whereby he agreed to pay her a salary for her services as clerk to him in his jewelry store in the city of Montgomery, where they reside, and she earned the amount agreed upon, and it is reasonable and fair compensation. Under this contract, if it be valid, Mrs. Davidson has a preferential claim.

Of course, there is no sound ethical reason why the wife may not perform, outside of her marital duties, services as clerk for the hus-

band, and be paid therefor. Here she is not asking any recompense for the discharge of her duties as wife and housekeeper. But it may be observed that she made the home comfortable and attractive for her family; that she was always considerate of the sometimes neglected individual, the husband; and it is probable that, if Jesse had been altogether as industrious and competent a merchant or storekeeper as Dora was a housekeeper, he would never have failed in his business. Certain it is that Dora deserves commendation for her efforts to make the marriage venture with Jesse a success at home and down town at the store.

The opposing creditors, however, contend that the wife was under the disability of that relic of barbarism which denied her the right to enter into the contract with her husband. This archaic rule was a part of the rich inheritance from the common law, and, of course, at one time obtained in Alabama. It is sufficient to say for the purposes of this case that the common law treated the wife as though she were the chattel of the husband, and then, as if to treat her in more sympathetic fashion, declared that upon her marriage the existence of the wife became merged into that of the husband. This ought not to be, this cannot be, the idea now. There are several statutes in Alabama which evidence the fact that this commonwealth has liberated the wife from such indefensible thralldom and recognizes her as having an individual legal entity. For instance, why should she not have the right, as she now has under the Alabama law, to prosecute suits in her own name for the recovery of her property, or damages for her own personal injuries, notwithstanding her coverture? And it is true that she cannot be compelled to testify against her husband, but ought she not to have, as she now has in Alabama, the right to testify against him in case she is the victim of his cruelty? Or why may not the husband and wife voluntarily testify for or against each other in criminal cases? Gen. Acts Ala. 1915, p. 942.

[1, 2] It is gratifying that under the laws of Alabama the rights of the wife are just as much to be respected as the rights of the husband. It is a beautiful relation, a commendable partnership, that of husband and wife, where the two work in harmony in the pursuit of happiness. But, whatever progress may have been made in the art of enlightened government, we are in this case to look to the statutory laws of Alabama to determine the contractual ability of the wife—to ascertain her legal status, whether she could lawfully enter into the contract with her husband here involved.

Section 4492 of the Code of Alabama declares:

"The wife has full legal capacity to contract as if she were sole, except as otherwise provided by law."

It goes without saying that this statute confers upon the wife every right to contract which the husband has, unless there is some law restricting her right.

Section 4494 of the Code provides:

"The wife, if the husband be of sound mind, and has not abandoned her, or be not a nonresident of the state, or be not imprisoned under a conviction for crime for a period of two years or more, cannot alienate or mortgage her

lands, or any interest therein, without the assent and concurrence of the husband, the assent and concurrence of the husband to be manifested by his joining in the alienation in the mode prescribed by law for the execution of conveyances of land. But if the husband be non compos mentis, or has abandoned the wife, or is a nonresident of the state, or is imprisoned under a conviction for crime for a period of two years or more, the wife may alienate or mortgage her lands as if she were sole."

Section 4497 of the Code provides:

"The husband and wife may contract with each other, but all contracts into which they enter are subject to the rules of law as to contracts by and between persons standing in confidential relations; but the wife shall not, directly or indirectly, become the surety for the husband."

Section 4487 of the Code declares:

"The earnings of the wife are her separate property; but she is not entitled to compensation for services rendered to or for the husband, or to or for the family."

These are all the statutes of Alabama cognate to the right of the wife to contract.

A consideration of these several sections shows, so far as they are concerned, that the wife has full power to contract as though feme sole, except that she cannot become the surety for her husband (section 4497), and except she cannot alienate her lands without regard to the limitations set forth in section 4494.

But it is insisted that the words, "all contracts into which they enter are subject to the rules of law as to contracts by and between persons standing in confidential relations" (section 4497, supra), qualify or abridge the right of the wife to contract with her husband. I do not think this is true, for I believe it is manifest that the particular office of the clause quoted is to furnish a rule of evidence and no more. As such it is a wise rule, reasonable and cautionary, to be observed when contracts between husband and wife are under consideration.

It is further insisted that section 4487, supra, is such a delimitation of the power of the wife to contract as to preclude her from entering into a contract with her husband for services outside of those required by the marital relation. I cannot agree that this is a sound contention. I have not found any decision of the Supreme Court of Alabama decisive of this question.

The attorneys for the respective parties have each cited the case of People's Home Tel. Co. v. Cockrum, 182 Ala. 547, 62 South. 86, in support of their divergent views. That was a case brought by the husband for personal injuries to the wife, and not under any contract. In the opinion, rendered for the court by Chief Justice Anderson, it was said, inter alia:

"It will be observed that our statute is not as unrestricted as the statutes of New York and Nebraska are in giving to the wife her 'earnings,' but, on the contrary, contains an express limitation that she shall not be entitled to any compensation for services rendered *to or for her husband, or to or for the family*, or, in other words, *for any services performed by her in discharge of any duty or obligation growing out of the marriage relation.*" (Italics are mine.)

There can be no doubt that the interpretation of the statute then under consideration by the Supreme Court of Alabama must be fol-

lowed by a federal court. However, it does not seem that the decision in that case is a narrowing interpretation of the statute which the contesting creditors insist that it is. Pretermitting the suggestion made in the argument that the above quotation taken from the opinion is obiter dictum, undoubtedly the court meant to say and did say no more than that the statute does not permit the wife to have compensation for services rendered the husband or family by virtue of her marriage relation, and not outside of the duties incumbent upon her as wife. The statutes and the decision do not deny the right of the wife to contract with the husband for services rendered outside of her marital duties. Her right to contract under section 4492 is not abridged by section 4487. It appears to me that the court, in deciding People's Home Tel. Co. v. Cockrum, supra, held the view merely that the wife cannot contract for remuneration for her services rendered in discharge of her duties growing out of and inseparably connected with the marriage relation.

In Nuding v. Urich, 169 Pa. 289, 32 Atl. 409, the Supreme Court of Pennsylvania, interpreting the language of their statute, "Hereafter a married woman may, in the same manner and to the same extent as an unmarried person, make any contract in writing or otherwise," etc., held that the wife was entitled to her earnings for services to her husband outside of the marital duties.

In Roche v. Union Trust Co. (Ind. App.) 52 N. E. 612, the Indiana statute was under consideration, and the language is quoted:

"All legal disabilities of married women to make contracts are hereby abolished, except as herein * * * provided."

And further:

"The earnings and profits of any married woman, accruing from her trade, business, * * * or labor, other than labor for her husband or family, shall be her sole and separate earnings."

Roche, a dry goods merchant, made an assignment to the trust company for the benefit of his creditors, and the wife sought to recover from the company for services as a clerk in her husband's store and for money loaned by her to her husband. The court, among other things said:

"At common law, contracts between husband and wife are absolutely void, for the want of parties and the wife's power to consent. * * * At common law, also, the earnings of the wife, from whatever source derived, belonged to the husband. * * * If we could determine the question by the common-law rule, it would be one of easy solution. The strictness and rigidity of that rule, however, have been greatly relaxed and modified by legislative enactments, and by a liberal construction of such enactments by the courts, to the end that married women may be better protected in their rights. * * * It must be conceded that, if the contract between appellant and her husband related to services performed by her in discharge of her household duties, and the duties incumbent upon her to perform by reason of her marital relations, then there would be no consideration to support the contract. * * * But here appellant performs services for her husband which the marital relation did not enjoin upon her. * * * She was under no obligation to leave her home and its surroundings, and spend many years of her life clerking in a store for her husband, and yet she did this under a contract that she was to be paid for it."

An array of authorities is cited by the court to sustain the very illuminating and satisfactory reasoning in the opinion.

The only case I find bearing directly upon the instant one is In re Davidson, which was never printed. There, in the opinion and order of the court in the case (in bankruptcy, Minute Book 10, p. 500, Mid. Dist. Ala.) United States District Judge Jones said:

"The court, upon consideration, is of the opinion that under the laws of Alabama a wife can recover for services rendered her husband other than domestic services."

In my opinion, there is nothing in morals, nothing in sound public policy, or general law, and nothing in the laws of Alabama, which inhibited the making of the contract between the wife and the husband under which she earned her compensation now claimed. On the contrary, the laws of Alabama were intended to so emancipate the wife as to allow her the largest latitude in contracting for her services, rendered outside of her domestic relation of wife and housekeeper, and that the only restriction imposed upon her is that she shall not be entitled to any compensation for services ordinarily and naturally incumbent upon her in that beautiful relation which she assumed by her marriage vows.

The finding and conclusion of the referee are correct, and a decree will be entered overruling the objections to the claim of Dora Davidson, which has heretofore been filed and allowed.

HUDSON NAV. CO. v. MURRAY.

(District Court, D. New Jersey. February 14, 1916.)

1. COURTS ⇐269—FEDERAL COURTS—JURISDICTION—DISTRICT IN WHICH SUIT MUST BE BROUGHT.

Under Judicial Code (Act March 3, 1911, c. 231) § 57, 36 Stat. 1102 (Comp. St. 1913, § 1039), declaring that when, in any suit to remove any incumbrance or lien or cloud upon the title to real or personal property within the district, the defendant shall not be an inhabitant of or found within the district, it shall be lawful for the court to make an order directing the absent defendant to appear and plead, it is immaterial, in a suit to cancel stock certificates on the ground that they cast a lien or cloud upon the title of the corporation to its property, whether the certificates themselves be within the district, as such illegal certificates are not the property from which it is sought to remove a cloud.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 809; Dec. Dig. ⇐269.]

2. COURTS ⇐269—FEDERAL COURTS—JURISDICTION—DISTRICT IN WHICH SUIT MUST BE BROUGHT.

In such case, where the property of the corporation was not within the district where it was incorporated, and suit was brought, such suit cannot, on the theory that it was sought to remove a cloud from the title of the duly issued stock, be maintained in such district, for the illegally issued stock can only cast a cloud upon the equitable title of the legal stockholders to the property of the corporation, which was without the district.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 809; Dec. Dig. ⇐269.]

In Equity. Bill by the Hudson Navigation Company against Edward F. Murray. On motion to vacate an order, made pursuant to Judicial Code, § 57, directing defendant, a nonresident of the district of New Jersey, to appear and plead, and to set aside the substituted service made upon him by virtue of such order. Motion granted.

Wm. J. & Wm. C. Roche, of Troy, N. Y., and Alfred H. Strickland, of New York City, for the motion.

Barber, Watson & Gibboney, of New York City, opposed.

HAIGHT, District Judge. The defendant has appeared specially to challenge the jurisdiction of the court to proceed against him, and seeks to have set aside the order authorizing the substituted service, as well as the service.

[1, 2] The order in question was made pursuant to section 57 of the Judicial Code (36 Stat. 1087), which was formerly the eighth section of the act of March 3, 1875 (18 Stat. 470, c. 137). When the order was made the defendant was not an inhabitant of this district, nor could he be found therein; he was and still is a resident and citizen of the state of New York. No question is raised as to the regularity of the manner in which the substituted service was made; but the insistment is that the order should not have been made. The statute in question is, by its terms, applicable only to a suit—

"to enforce any legal or equitable lien upon or claim to, or to remove any encumbrance or lien or cloud upon the *title to real or personal property within the district where such suit is brought.*"

It is necessary, therefore, at the outset, to ascertain the nature and object of this suit. The bill alleges in substance that the plaintiff is a New Jersey corporation, and that certain shares of its capital stock were illegally and fraudulently issued to, and are now claimed to be owned by the defendant, and that the stock certificates therefor are now within the state of New Jersey. It also alleges that:

The "action is brought to remove the incumbrance or lien or cloud upon *the title of the property of the plaintiff* caused by the wrongful issuance of said stock certificates to the defendant as aforesaid, and his claim to the ownership thereof and to the property represented thereby."

It prays that the stock so issued to the defendant be decreed to be void, that the defendant be required to surrender the certificates, and that the plaintiff be authorized to cancel them. The defendant has submitted affidavits, the main avowed object of which is to show that the certificates for the stock in question were fraudulently brought into the state of New Jersey, by the plaintiff, for the purpose of investing this court with jurisdiction in this suit. Their relevancy is sought to be sustained upon the theory that the physical presence of these certificates within this district is essential to authorize the substituted service provided for in the above-mentioned section of the Judicial Code. But I think this contention is based upon a misconception of the nature and object of the suit. It is not sought to remove any incumbrance or cloud upon the title to those certificates; but the object of the suit is to remove a "cloud upon the *title* of the property of the plaintiff," or a cloud upon the *title* of the genuine stockholders, which

cloud, it is alleged, has been created by the alleged invalid issue of stock, of which the certificates are merely evidence of ownership. Hence, whether or not the certificates are within this district, or the manner in which they were brought here, is quite immaterial on this motion. The important question is whether the property, upon the *title* of which, it is alleged, the invalid issue of stock creates a cloud, is within this district.

It is therefore necessary to determine upon the *title* of what property, if any, a cloud has been so created, and whether such property is within this district. If it be assumed that a cloud has been cast upon the property, as distinguished from the capital stock, of the plaintiff, it is clear that substituted service was unauthorized, because such property, the affidavits show, is not located within this district. The allegations of the bill of complaint, on the other hand, preclude the assumption that the stock in question was once lawfully issued, and which, therefore, might be held by or on behalf of the plaintiff and lawfully transferred at any time, or, in other words, stock which would remain definite personal property of the plaintiff, having the same legal status as if it were stock in some other corporation, which the plaintiff was authorized to hold. If it were such stock I could readily conclude that the defendant's title would create a cloud upon the plaintiff's title thereto, and that, as will be hereinafter shown, this court could acquire jurisdiction by substituted service in a suit to remove the cloud, because the situs of the stock would be in this district. But the allegations of the bill are that the stock was never lawfully issued. The plaintiff does not, in a legal sense, therefore, seek to establish its title thereto, but rather to have it canceled and judicially declared to be invalid. I think it clear, therefore, that there is no property of the plaintiff within this district upon which the stock held by the defendant has created a cloud.

It then becomes necessary to ascertain whether the stock in question has cast a cloud upon the title of the genuine stockholders to any property within this district. For this purpose I will assume that, if any such cloud exists, the plaintiff, as distinguished from the stockholders, may maintain a suit to remove it. It was held by the Supreme Court in Jellenik v. Huron Copper Mining Co., 177 U. S. 1, 20 Sup. Ct. 559, 44 L. Ed. 647, that a suit for the purpose of removing a cloud upon the plaintiffs' title to shares of stock of a Michigan corporation, the legal titles to which were held by residents of a district other than that in which the suit was brought, could be maintained in the district of the state where the corporation was created, and jurisdiction could be acquired over the nonresidents by virtue of the eighth section of the act of 1875, upon the theory that, for such purpose, the situs of the stock of the corporation was in the state where the corporation was created. The statutes of Michigan, quoted in the opinion of the Supreme Court, providing for the incorporation of companies such as that by which the stock was issued, are in all material respects the same as the New Jersey Corporation Act, under which the plaintiff in this case was incorporated. Amparo Mining Co. v. Fidelity Trust Co., 75 N. J. Eq. 555, 557, 73 Atl. 249; 2 N. J.

Comp. Stat. p. 1592 et seq., and page 2244. The state courts of New Jersey have also uniformly held that shares of stock in a New Jersey corporation, held and claimed to belong to a resident of another state, who must be brought in by substituted service, have such a situs in New Jersey as to confer upon its courts jurisdiction to determine questions regarding the title to the stock; that such a proceeding is quasi in rem. Amparo Mining Co. v. Fidelity Trust Co., supra (Err. & App. affirming, Id., 74 N. J. Eq. 197, 71 Atl. 605 Ct. Chan.); Andrews v. Guayaquil & Quito Ry. Co., 69 N. J. Eq. 211, 60 Atl. 568 (Ct. Chan.); affirmed 71 N. J. Eq. 768, 71 Atl. 1133 (Err. & App.); Sohege v. Singer Mfg. Co., 73 N. J. Eq. 567, 68 Atl. 64.

It is clear, therefore, that if the alleged illegal shares of stock cast a cloud upon the title to the shares belonging to the genuine stockholders, jurisdiction in a suit to remove such cloud may be acquired by this court over the defendant by the substituted service provided for in section 57 of the Judicial Code, because the situs of the valid shares is within this district. But there is a well-defined difference between the object of the suit at bar and that of the Jellenik and New Jersey cases above cited. In the latter cases it was sought to remove a cloud upon the legal title to stock, or to determine the legal title, while in the former such is not the purpose, because the illegal stock cannot cast a cloud upon the *legal title* to the genuine stock of the holders thereof. But the illegal stock probably does cast a cloud upon the equitable title or the interest which the genuine stockholders have, by virtue of their shares of stock, *not in the stock,* but in the property of the corporation, since it impairs that title or interest. N. Y. & N. H. R. R. Co. v. Schuyler, 17 N. Y. 592. However, that fact does not bring the case within the provisions of the statute in question, for the property, upon the equitable title to which the cloud rests, is not the stock, but the property, of the corporation, and that, as before shown, is not within this district. The statute makes the location of the property, upon the *title* to which the cloud exists, the decisive factor.

Applicable, also, to the situation here presented, I think, are the remarks of the Chief Justice in Chase v. Wetzlar, 225 U. S. 79, 88, 32 Sup. Ct. 659, 56 L. Ed. 990. In Citizens' Savings & Trust Co. v. Illinois Central R. R. Co., 205 U. S. 46, 27 Sup. Ct. 425, 51 L. Ed. 703, a stockholder sued to set aside certain leases and deeds which affected the properties and franchises of the corporation. The Supreme Court held that the suit came within the act of 1875, because the property which was affected by the leases and deeds was *wholly within the district* where the suit was brought. The leases and deeds in that case probably cast, at least to the same extent as the illegal stock in this case, a cloud upon the equitable title of the stockholders in the property of the corporation, but the controlling consideration was the location of the property of the corporation.

I have not overlooked the broad statement in 1 Cook on Corporations (7th Ed.) § 297, that a suit in equity to prevent the transfer, the voting of, or payment of dividends upon illegally issued stock is in the nature of a bill to quiet title, or to remove a cloud from the title, of the genuine stock. But this statement has no reference to the statute

now under consideration, and I think refers, not to the legal title of the genuine stock, but to the equitable title of the holders of the genuine stock to the property of the corporation. This is clearly the effect of the decision in N. Y. & N. H. R. R. Co. v. Schuyler, supra, which is cited by Mr. Cook. The other cases cited by him had nothing whatever to do with this statute, or the question now under consideration. Jurisdiction, by substituted service, could probably be secured in the state courts of New Jersey, in a suit such as this, upon the theory that it is a suit quasi in rem; the situs of the stock which it is sought to have judicially declared to be invalid being in this state. But, if such is the correct assumption, it affords no assistance to the plaintiff in this action, because the statute of New Jersey, which provides for substituted service upon absent defendants, is much broader than the federal statute now under consideration, and is not, as is the latter, limited in its application by the object of the suit, except by the constitutional requirement of due process of law. 1 N. J. Comp. Stat. p. 414, §§ 12 to 18. Hence, as the object of this suit is not to remove a cloud upon the legal title to the genuine stock or any equitable title thereto, but is to remove a cloud upon the equitable title of the holders of the genuine stock to the property of the corporation, and as such property is not within this district, jurisdiction cannot be acquired by the substituted service provided for in section 57 of the Judicial Code.

The defendant's motion will therefore be granted, with costs.

RODMAN CHEMICAL CO. v. E. F. HOUGHTON CO.

(District Court, E. D. Pennsylvania. May 18, 1916.)

1. PATENTS ⟸292—INTERROGATORIES—PRACTICE.

In a suit for infringement of a patent, where plaintiff also prayed for an injunction restraining defendant's publication, after notice of infringement, of articles denying the validity of the patent and encouraging others to infringe, interrogatories concerning the publication and seeking admission as to defendant's authorship and the meaning were propounded. Equity Rule 58 (198 Fed. xxxiv, 115 C. C. A. xxxiv) authorizes the propounding of such interrogatories, while Rules 30 and 33 (198 Fed. xxvi, xxvii, 115 C. C. A. xxvi, xxvii) authorize the answer to contain statement of facts in avoidance and abolish exceptions to answers. *Held*, that as defendant could answer interrogatories concerning the publications without admitting the materiality of such questions, though as an injunction was prayed such matters cannot be treated as immaterial, and as plaintiff could obtain an answer to such questions only by means of interrogatories, answers should be required; the purpose of interrogatories being to simplify trials.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 446; Dec. Dig. ⟸292.]

2. COURTS ⟸351—PRACTICE—INTERROGATORIES.

Where defendant is in doubt, or the meaning of interrogatories does not clearly appear, defendant may require a restatement.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 924; Dec. Dig. ⟸351.]

3. PATENTS ⊂292—PRACTICE—INTERROGATORIES.

A defendant cannot through the guise of interrogatories be required to construe a patent claim or admit or deny infringement as a legal conclusion.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 446; Dec. Dig. ⊂292.]

In Equity. Bill by the Rodman Chemical Company against E. F. Houghton Company. Sur defendant's objections to plaintiff's interrogatories and plaintiff's motion to enforce answers objected to as evasive. Defendant required to answer interrogatories as indicated. In the suit which was for infringement of a patent, the bill also alleged that defendant by means of printed publications denied the validity of the patents and encouraged others to infringe; wherefore an injunction was prayed.

Jo. Baily Brown, of Pittsburgh, Pa., and Cyrus N. Anderson, of Philadelphia, Pa., for plaintiff.

Mason & Edmonds and Howson & Howson, all of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. Interrogatories were filed by plaintiff under equity rule 58 (198 Fed. xxxiv, 115 C. C. A. xxxiv). They number 21. Answers have been filed to those numbered consecutively 1 to 12, both inclusive, and the remaining ones are left unanswered, pending disposition of objections made to them.

[1] We will take up, first, defendant's objections. The general purpose of rule 58 is to expedite the decision of causes by eliminating the necessity for inquiry into the uncontroverted features of what is included in the issues as made up of record. The rule embraces all material inquiries. One of them here is the fact of infringement. The answer denies infringement. It also denies the existence of any proprietary right. The plaintiff must prove infringement. If it be not a contested fact, it can be admitted before trial. Interrogatories will test this. Any material inquiry, subject to the qualification next noted, may therefore be made, the effect of an answer to which may narrow the field of controversy at the trial. The distinction between facts and judgment from the facts, and between facts to be proven and evidentiary facts, so clearly expressed by Judge Thompson in Luten v. Camp (D. C.) 221 Fed. 424, and Blast Furnace v. Worth (D. C.) 221 Fed. 430, must be kept in mind. These lines are not always easy to draw in particular cases. Ignoring for the present the distinction between infringement as a conclusion or judgment and infringement as a fact, and between the fact of a printed publication having been made by the defendant and the inferences of fact or otherwise fairly to be drawn from the publication, this bill of complaint, by paragraphs VII and IX, specifically avers the fact of infringement and the fact of the circulation of printed publications. With respect to the latter, this averment is fourfold. There is involved the existence of the publication, its circulation, its authorship and publisher, and its meaning. The

answer meets paragraph VII by a denial of the legal conclusion of infringement. It meets paragraph IX with an inferential denial of the charged effect or meaning of the publication. At the trial, in the absence of answers to the interrogatories, the defendant must admit himself to be the author and publisher, or the plaintiff must make proof of this fact before the issue raised by the bill and answer can be determined. It was one of the objects of rule 58 to save the necessity for this proof if the fact was not really in controversy.

It is to be further observed that the answer, as under rule 30 (198 Fed. xxvi, 115 C. C. A. xxvi) it might, does not admit, deny, or explain the averred fact of publication. Exceptions to answers being abolished by rule 33 (198 Fed. xxvii, 115 C. C. A. xxvii) plaintiff can require an answer only through the means evoked. None of the objections applies unless it be those designated as (b), (d), and (h). We do not think the suggestion of immateriality or that proof at the trial would be untimely to be well founded. Notice was given the defendant to desist from the averred infringement. The charge is that the defendant answered this demand by the publication. In an injunction bill we cannot find the fact averred to be either immaterial or its proof premature. The fact not now being found to be immaterial or an anticipation, the ascription of improper motives in seeking to elicit it cannot be regarded. The plaintiff may now, as at the trial, admit the fact without admitting materiality. All, however, to which the plaintiff is entitled is an admission of the fact if it be the fact of authorship and publication. It cannot, through interrogatories, as it could not, through testimony, introduce secondary evidence without first laying ground. The lines asked to be drawn in this respect and also in respect to the innuendo features are extremely fine. They must, however, be respected, if there is insistence upon them, to this extent. The plaintiff has the right to interrogate the defendant in order to identify the author and publisher and to require an answer. The same candor and frankness and disposition to save the time of the court, which counsel would be expected to show at the trial, is not out of place in answers to interrogatories. The object which rule 58 has in view is to bring down every case to its controverted points. If the fact of the publication and to whom it referred would not be denied after the plaintiff had offered evidence on the subject the court should be relieved now of the necessity of going into the evidence. The defendant can protect itself in all its rights by limiting its answers so that they may be used only for the purposes of this case.

The disposition now made of the case is that, unless the defendant withdraws its objections to all the interrogatories by answering to such as it is herein indicated it is proper for it to make answer, plaintiff is granted leave to amend the interrogatories filed by reframing them in accordance herewith.

[2] This brings us to the answers to interrogatories 1 to 12. The criticism directed to the answers to 1 and 2 is well founded; as to 4, 6, and 12 we do not feel any call upon us at this time to express an opinion upon a question as to which two well qualified experts differ. The quoted phrase does, however, express a meaning. It may be that

it does not express the same meaning to the expert as to the common mind and, possibly, to the expert mind may not express its meaning accurately and clearly and in that sense may be said to be meaningless. The question may, however, be answered. If the defendant is in doubt as to the meaning intended to be conveyed, or if the meaning does not certainly appear from the question itself, all needed protection in the answer can be provided by a restatement of the question so as to bring out clearly the meaning defendant understands the question to have. The answer following 7 is also open to the criticism directed against it, as also are answers 9 and 10.

[3] Defendant is right in its contention that it cannot be required through the guise of interrogatories to construe a patent claim or to admit or deny infringement as a legal conclusion. Aside from either of these things, however, there are facts upon which this legal conclusion is based. Wise tactics in the trial of a case impels the admission of facts not in controversy. Sometimes the admission is deferred until after the opposing side has made proof of them. We observe again that rule 58 was framed to afford an opportunity to obtain this admission in advance of trial and save the necessity of proving that which is only formally and not really in controversy.

The defendant is required to answer over to the interrogatories indicated.

SCHEUER v. KATZOFF (two cases).

(District Court E. D. New York. May 5, 1916.)

1. BANKRUPTCY ⊂=164—VOIDABLE PREFERENCES.

Payments by a bankrupt to relatives within four months prior to his bankruptcy *held* to have been made while he was insolvent, with intent to give preferences, and with knowledge of such facts on the part of the persons paid as to constitute voidable preferences.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 267; Dec. Dig. ⊂=164.]

2. BANKRUPTCY ⊂=166(1)—FRAUDULENT PREFERENCES.

The knowledge of a creditor that payment to him is out of fund which, if the debtor became bankrupt, would be needed equally by other creditors, renders the transfer to him voidable, under Act July 1, 1898, c. 541, § 60b, 30 Stat. 562 (Comp. St. 1913, § 9644), where bankruptcy intervenes within four months.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 250, 251; Dec. Dig. ⊂=166(1).]

In Equity. Suits by Jonas Scheuer, trustee in bankruptcy of David Weiss, against "Rebecca" Katzoff (real first name unknown) and against Rudolph Katzoff. Decrees for complainant.

Goldman, Heide & Unger, of New York City, for plaintiff.
Henry W. Fried, of New York City, for defendants.

CHATFIELD, District Judge. The plaintiff in each action is the trustee in bankruptcy. In the first action he seeks to recover certain payments made upon the 5th, 8th, and 9th of October, to the defend-

ant Rebecca Katzoff, aggregating the sum of $900. Rebecca Katzoff is the mother-in-law of the bankrupt, David Weiss, against whom a petition was filed in the Southern district of New York, upon the 17th day of October, 1914, following the making of an assignment by the bankrupt upon the 14th day of October, 1914. This assignment was the direct consequence of a creditors' meeting called for that day, at which the bankrupt offered 10 per cent. in cash and 25 per cent. in notes to his creditors, stating to them that some of his brothers-in-law, who are involved in these transactions, would indorse his notes.

It also appears that the bankrupt had (at least two days prior to the 10th of October, when notices of this meeting were sent out) retained an attorney, paying him $200, which he had borrowed from his brother-in-law Rudolph Katzoff, who is the defendant in the other action. In this second action the trustee in bankruptcy seeks to obtain the return of $800 paid upon October 5th and October 9th to Rudolph Katzoff, being the balance of a debt of $1,000 upon which $200 had been paid in September. It appears from the testimony that Rudolph Katzoff borrowed $1,000, giving his savings bank account as collateral, in order to loan this money to the bankrupt, and that when his note became due in July, 1914, he (Rudolph Katzoff) had to take up the note and thereafter demanded payment from time to time from the bankrupt.

On October 3d, the bankrupt secured from another brother-in-law the sum of $1,200 by pledging or selling his business accounts. He continued his business until the creditors' meeting, and his books show the payment of $13.29 to merchandise creditors between the 5th and the 9th of October, while he paid $2,008.90 to himself and his brothers-in-law and his mother-in-law. On October 3d, the day upon which he deposited the check of $1,200 from his brother-in-law, two checks seem to have been used from his check book, and on the stubs of these checks is entered the amount of a check given to the defendant Rudolph Katzoff for $700, dated October 5, 1914, and a check to the order of I. Shapiro, another brother-in-law, also dated October 5, 1914. These two checks were made by the bankrupt, instead of by his bookkeeper, and are upon so-called "counter check" blanks. The absence of the original checks is not explained.

On October 5th the bankrupt also paid to another brother-in-law the sum of $450 by his own check, and transferred to his mother-in-law the checks received from two customers, one for $304.20 and one for $60.68 (this last being that of the same person who received the $450 payment). On October 8th the bankrupt paid to his mother-in-law, one of the defendants herein, a check for $400, which he had received from another customer, and on the 9th paid to her the balance of her $900, amounting to $135.12. This was a part of the money received from another customer, and out of the same sum the bankrupt also paid, on October 9th, $100 to the defendant Rudolph Katzoff, and the balance to another brother-in-law upon the same day.

An examination of the books (starting with the value of the stock fixed in the bankrupt's schedules) shows that the bankrupt was insolvent at all these times. As a matter of fact the value placed upon the stock by the bankrupt in his schedules is $9,500, while the value

presented to his creditors at the meeting at which he offered 10 cents cash on the dollar was $5,500, and the amount realized upon the auction sale (as well as the appraisal) was less than $2,000.

The defendant Rebecca Katzoff loaned the $900 to her son-in-law, the bankrupt, in March, 1914, and testifies that during the summer of that year she was at Sharon Springs. From time to time during the summer she needed money, but was unable to obtain it from the bankrupt, and it was advanced by her son, Rudolph Katzoff, who thus gave her $500 up to October, and the balance, $400, after the receipt of these moneys from the bankrupt. She had no dealings with the bankrupt in October, 1914, except through her son, Rudolph Katzoff, who made the demands for her.

The bankrupt testifies that he was compelled to make these payments because of the demands of Rudolph Katzoff on behalf of his mother and on his own account. Rudolph Katzoff testifies that he made no difference in demanding the amount due upon both accounts, and substantially indicates that he had taken over his mother's claim against the bankrupt to the extent of the amount which he had advanced to his mother.

But whether Rudolph Katzoff demanded payment as assignee, or whether he demanded payment simply as agent for his mother, with the idea of holding the amount which he might receive to reimburse himself, does not alter the situation in this case. The bankrupt and Rudolph Katzoff apparently carefully kept account of the amounts which were paid upon each claim, and the items were entered in the bankrupt's books by his bookkeeper, and at his direction, as paid on account of his mother's loan and of Rudolph Katzoff's loan, respectively, instead of applying the payments of October 5th entirely to one loan and the later payments to the other.

The defendant Rebecca Katzoff was therefore bound by the actions of her agent in so far as the circumstances under which the money was collected are concerned. Knowledge of the condition of the bankrupt's finances and of the likelihood of possible avoidance of any preferential payment would depend upon the knowledge which Rudolph Katzoff had at the time when he demanded and received the payments both for himself and as his mother's agent.

[1] There is no question that the bankrupt was insolvent throughout the entire period. There is no question that the payment to these creditors was preferential, and that the bankrupt knew it to be so, and therefore in that sense intended to pay them in preference to the other creditors, and the payments were within four months of bankruptcy. Upon the testimony it must also be held that Rudolph Katzoff had reasonable ground to know that he was compelling payment of a claim which could only be paid with funds that were not being used for the payment of other debts of equal rank.

[2] Under such circumstances, if bankruptcy intervenes within four months, the creditor runs the risk of the avoidance of a payment of this nature by the trustee. The knowledge which a creditor has that his payment is out of funds which (if liquidation were had) would be needed equally by other creditors brings him within the language of the statute making a transfer voidable (section 60, subd. "b")—

"if a bankrupt shall have given a preference, and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference." Act July 1, 1898, c. 541, 30 Stat. 562 (Comp. St. 1913, § 9644).

But, further than this, the facts in this case indicate to the entire satisfaction of the court that the borrowing of money from one brother-in-law (by the transfer of accounts) and the payment of this money to the other members of the family, when viewed from the precise way in which the items were transferred and the whole matter conducted, were parts of a deliberate plan, in which the various parties were all concerned, to protect the members of the family and to distribute the assets of the bankrupt in such a way that they would be in a position to help him in offering a composition to his creditors. The defendant Rudolph Katzoff was apparently careful not to know exactly what the others were doing, but it is plain from the testimony that he had knowledge that something of the sort was being done, and that he was a party to the transaction.

The plaintiff may have a decree in each case.

In re YLIA.

(District Court, N. D. New York. June 26, 1916.)

1. USURY ⇐80—EFFECT OF—CHATTEL MORTGAGES.
   Where, when a loan was made, it was agreed that the borrower should pay, not only the amount of the loan and lawful interest, but an additional sum and interest thereon, such agreement is usurious, and avoids a chattel mortgage given to secure the loan.
   [Ed. Note.—For other cases, see Usury, Cent. Dig. §§ 158–160; Dec. Dig. ⇐80.]

2. BANKRUPTCY ⇐228—REFEREE—ORDER OF.
   An order of the referee in bankruptcy, based on the testimony heard by him and not heard by the court, should be given the weight of a verdict, and, where supported by evidence, will not be disturbed.
   [Ed. Note.—For other cases see Bankruptcy, Cent. Dig. § 387; Dec. Dig. ⇐228.]

3. USURY ⇐117—TRUTH OF—EVIDENCE.
   For an agreement to be held bad for usury, the proof of usury must be clear and satisfactory.
   [Ed. Note.—For other cases, see Usury, Cent. Dig. §§ 328–340; Dec. Dig. ⇐117.]

In Bankruptcy. In the matter of the bankruptcy of Trendafil Ylia. On review of an order of the referee in bankruptcy, holding that a certain chattel mortgage is not void for usury and directing that same be paid from the proceeds of the sale of the mortgaged property; the property having been sold and the proceeds held for determination of the question of title or right under such mortgage. Affirmed.

Higbee, Lay & Malpass, of Syracuse, N. Y., for trustee.

Nash, Britcher & Eckel, of Syracuse, N. Y., for mortgagee claimant.

RAY, District Judge. [1] July 16, 1914, George Powell loaned to Trendafil Ylia, now bankrupt, the sum of $1,200, and in consideration thereof and to secure the payment of the loan Ylia gave to Powell his promissory note and a chattel mortgage to secure same, each for $1,284, with interest. This was $84 more than the loan, and the mortgage recited a present indebtedness of $1,284. Later Powell attempted to collect this entire amount, with interest on the entire amount, and filed a claim in bankruptcy therefor, reciting the mortgage and that $1,285 and interest was due him thereon November 19, 1915, but later this was changed to a claim for $1,200 and interest, after an answer had been interposed pleading usury.

If there was an agreement entered into at the time this loan of $1,200 was made that the now bankrupt should pay, not $1,200 and lawful interest thereon, but $1,284 and interest thereon, and pursuant thereto a note of $1,284, secured by a mortgage, the mortgage in evidence and claimed on here was given, and this agreement was mutual, and understood by both the parties to the transaction, such agreement would be usurious, and the chattel mortgage in question would be void. It is not questioned in the case that Ylia, the now bankrupt, intended to make such an agreement, and have it accepted, and become bound thereby so far as the papers executed under such an agreement would or could bind him.

[2, 3] But the claimant, George Powell, contends, and the referee has found, in substance, that both parties are Macedonians, with a limited knowledge and vocabulary of the English language, and a slight knowledge only of our commercial and business terms and usages, and that the now bankrupt had greatly the advantage of Powell in those respects; that Powell had never given or received a note or a chattel mortgage, and was not eager for interest, but desired security for the loan, and was prevailed on to make the loan, and was willing to make it because of a former favor rendered by the bankrupt to a brother of Powell; that Powell at no time expressed a desire for an excessive or unlawful rate of interest, or made a request or demand therefor; that, on the other hand, the now bankrupt, after he found Powell was willing to make the loan, expressed his gratitude and eager willingness to pay liberally up to 7 or 8 per cent. interest, but that Powell declined all such offers, and, on the other hand, only required, requested, or demanded that he have at the end of the year his $1,200 and 4 per cent. interest. The referee also finds that the papers, note and chattel mortgage, were drawn by a lawyer at the request and under the direction of Ylia, and that, while Powell was present at the time, he was so ignorant of English and of what was said that he did not understand or comprehend that $1,284 and interest, instead of $1,200 and interest, was expressed in the papers.

In short, the referee finds as a fact on all the evidence that Powell never knowingly entered into or assented to any contract or agreement by which he was to receive for or on this loan an excessive rate of interest, more than 6 per cent., and that the directions to the attorney who drew the note and mortgage, and which directions came from

Ylia, were unknown to Powell and "emanated from generous and persistent impulses to reciprocate the kindness of his fellow countryman," Powell. The referee exonerates Ylia from any design or purpose to secure a usurious contract or agreement of which he could take advantage and escape payment of the principal and interest. It takes two to make a contract, and while, ordinarily, we would conclude that a person who takes a note and a chattel mortgage for $1,284, when the loan was $1,200 only, ought to understand and know what he was doing and receiving, we have here a finding by the referee, who saw and heard all the witnesses, that Powell did not in fact know or understand what was proposed by Ylia, and never made or assented to any agreement by which he was to have an excessive rate of interest or any bonus for the loan in any form.

I am not disposed to disturb this finding of the referee, which was based on evidence, and the truthfulness of those who gave the evidence was peculiarly for the referee, who had opportnuity to both see and hear. It cannot be said as matter of law that the finding of the referee was either contrary to or unsupported by the evidence, and it should be treated as the verdict of a jury. This court did not have an opportunity to either see or hear these witnesses. Then, again, an agreement to take usury ought to be clearly and satisfactorily proved.

There will be an order affirming the decision and order of the referee, and for the payment of the amount of the chattel mortgage from the proceeds of the sale of the mortgaged property now in court.

Ex parte NG KWACK KANG.

(District Court, W. D. Washington, N. D. January 14, 1916.)

No. 3157.

1. ALIENS ⟸32(9)—ADMISSION—PROCEEDINGS.

The examination of an alien for admission to the United States is necessarily summary and informal, and where he was denied neither right to produce testimony and summon witnesses to establish his right, nor counsel, the fact that counsel was not present, or was not given opportunity to cross-examine witnesses, furnishes no ground for complaint.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 94; Dec. Dig. ⟸32(9).]

2. ALIENS ⟸32(13)—ADMISSION—AUTHORITY OF COURT.

As Chinese Exclusion Act Feb. 20, 1907, c. 1134, § 25, 34 Stat. 906 (Comp. St. 1913, § 4274), declares that, in every case where an alien is excluded from admission into the United States, the decision of the immigration officers, if adverse to the admission of such alien, shall be final, unless reversed on appeal to the Secretary of Commerce and Labor, the courts, having only such power as conferred by law, cannot review an

order of the immigration officials excluding a Chinese person, where there is any evidence on which to predicate it.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 95; Dec. Dig. ⟸32(13).]

3. ALIENS ⟸32(13)—EXCLUSION—PRESUMPTIONS.

In the absence of a showing to the contrary, a memorandum decision excluding a Chinese person from the country will be held the decision of the Secretary of Labor within the Chinese Exclusion Acts.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 95; Dec. Dig. ⟸32(13).]

At Law. In the matter of the application of Ng Kwack Kang for a writ of habeas corpus. Writ denied.

Beeler & Sullivan, of Seattle, Wash., for petitioner.

Clay Allen, U. S. Atty., and Albert Moodie, Asst. U. S. Atty., both of Seattle, Wash., opposed.

NETERER, District Judge. The petitioner applied for admission to the United States as the son of an American-born Chinaman. His application was denied by the Commissioner of Immigration, an appeal was prosecuted to the Secretary of Labor, the Commissioner affirmed, and a warrant of deportation issued. Petition for writ of habeas corpus was made, in which he charges: First, that he was not accorded a fair hearing, in that he was denied the right of counsel, and the evidence adduced at the preliminary examination was wrongfully and unlawfully used against him at the hearing after arrest; second, that there is no evidence in the record to support the findings of the immigration officers, and that the decision of the Department of Labor is arbitrary and should be set aside; and third, that the applicant is entitled to have his appeal heard and determined by the Secretary of Labor, and that the record discloses that it was heard and determined solely by one Alfred Hampton, and approved by Louis F. Post, Assistant Secretary of Labor.

[1] An examination of the entire record shows that the petitioner was accorded a fair trial. While an alien cannot claim the constitutional rights guaranteed to a citizen, he has rights which, under treaty stipulations and the law, must be respected. None of the treaty rights nor provisions of the law applicable to this case appear to have been violated. The examination of an alien for admission is necessarily summary and informal. The record shows that no opportunity was denied the applicant to produce testimony, and all witnesses sought were examined. There is nothing in the record to show that the right of counsel was denied. The fact that counsel was not present, or was not given opportunity to cross-examine the witnesses, did not deprive him of a right. Ex parte Chin Quock Wah (D. C.) 224 Fed. 138; United States v. Williams (C. C.) 190 Fed. 898.

"If the petitioner was not denied a fair opportunity to produce the evidence that he desired or a fair, though summary, hearing, the case can

proceed no farther." Chin Yow v. United States, 208 U. S. at page 11, 28 Sup. Ct. 201, 52 L. Ed. 369.

[2] Courts have such jurisdiction only as is conferred by Congress. No discretion is vested, and Congress has the right to prescribe rules, fix limitations, and confer authority where it deems wise. By provision of section 25 of the Chinese Exclusion Act of February 20, 1907 (34 Stat. at Large, 906, c. 1134 [Comp. St. 1913, § 4274]), it is provided:

"* * * That in every case where an alien is excluded from admission into the United States, under any law or treaty now existing or hereafter made, the decision of the appropriate immigration officers, if adverse to the admission of such alien, shall be final, unless reversed on appeal to the Secretary of Commerce and Labor. * * *"

The Supreme authority is conferred upon the immigration officers, and when it appears that petitioner was given a fair hearing, Moola Singh et al. (D. C.) 207 Fed. 780, the writ must be denied. Even though the court might arrive at a different conclusion or decision (Chin Yow v. United States, supra), such fact would not give the court the right to review, when there is any evidence upon which to predicate the finding.

[3] There is nothing in the record to show that the appeal to the Secretary of Labor was not determined by the proper official, and in the absence of a showing to the contrary the memorandum decision will be held to be the decision of the Secretary of Labor within the provisions of the act. In re Jem Yuen (D. C.) 188 Fed. 350; Keyser v. Hitz, 133 U. S. 138, 10 Sup. Ct. 290, 33 L. Ed. 531.

The writ is discharged, and the petitioner remanded to the Department of Immigration.

FLAGG v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. May 9, 1916.)

No. 196.

CRIMINAL LAW ⊂=395—EVIDENCE—VALIDITY OF SEARCH—CONSTITUTIONAL PROVISION.

Const. U. S. Amend. 4, declares that the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated, and no warrant shall issue but upon probable cause, while Amendment 5 declares that no person shall be compelled in any criminal case to be a witness against himself, or be deprived of life, liberty, or property without due process of law. Accused was taken by the municipal police to the post office building, where he was arrested under a warrant charging a violation of Criminal Code (Act March 4, 1909, c. 321) § 215, 35 Stat. 1130 (Comp. St. 1913, § 10385), in that he had devised a scheme to defraud and used the mails in furtherance thereof. At the same time all the books and papers at his place of business were seized and taken to the post office building, where during a course of years they were examined by federal authorities, notwithstanding accused made appropriate demands for return. Subsequently the papers were returned, but in a prosecution for using the mails to defraud secondary evidence gleaned from such documents was offered. *Held* that, as the seizure was illegal, being without warrant, such evidence was incompetent against accused, and a conviction based thereon must be reversed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 877; Dec. Dig. ⊂=395.]

In Error to the District Court of the United States for the Southern District of New York.

Jared Flagg was convicted of devising a scheme to defraud and using the mails in furtherance thereof, contrary to Criminal Code, § 215, and he brings error. Reversed and remanded.

This writ of error seeks to review a judgment of conviction upon six counts of the indictment charging the defendant with having violated section 215 of the Criminal Code, in that he devised a scheme to defraud and used the mails in furtherance thereof.

Martin W. Littleton and Owen N. Brown, both of New York City, for plaintiff in error.

H. Snowden Marshall, U. S. Atty., Claude A. Thompson, Sp. Asst. U. S. Atty., and Ben A. Matthews, Asst. U. S. Atty., all of New York City, for the United States.

Before COXE and WARD, Circuit Judges, and VEEDER, District Judge.

COXE, Circuit Judge. The defendant insists that he was convicted by methods prohibited by the fundamental law of the land. The Fourth Amendment to the federal Constitution provides:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

The Fifth Amendment provides, inter alia, that no person—

"shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law."

These amendments were intended to safeguard the rights of the people of the United States against the encroachments of unlawful and arbitrary power and to preserve the rights of the humblest as well as the most powerful citizen. They were passed to perpetuate in our law the English doctrine proclaimed by Sir Edward Coke and eloquently reasserted by Chatham in his memorable address on the Excise Bill, as follows:

"The poorest man may in his cottage bid defiance to all the forces of the crown; it may be frail, its roof may shake, the wind may blow through it; the storm may enter, the rain may enter; but the king of England cannot enter; all his forces dare not cross the threshold of the ruined tenement."

What becomes of this defendant, important as it is, sinks into insignificance when compared with the right of the people of the United States to be protected from unlawful search.

On September 23, 1911, the defendant was arrested at his place of business and all his books and papers, including securities and cash, were seized by the parties making the arrest and were carted away to the post office building, in which is the office of the United States attorney. The courtrooms of the United States are also located therein. It is contended by the counsel for the United States that the seizure was made by members of the local police force. His version of what occurred when the books and papers were seized does not differ materially from the defendant's version. He contends that the municipal police made the arrest of the defendant and the seizure of the books and papers but he does not pretend that they had any process which warranted the seizure. He admits that the defendant was taken by the municipal police to the United States post office building, where he was arrested under a warrant issued by a United States commissioner upon the verified complaint of Post Office Inspector Kincaid, charging a violation of section 215 of the United States Criminal Code. The brief on behalf of the United States dismisses the unlawful arrest by the police with the following statement:

"Under what process or authority the arrest and seizure were made by the municipal police officers does not appear in the record. Nor does the record show whether at that time Flagg was charged with having violated any state law or municipal ordinance. When the marshal made the arrest under the federal warrant, he seized only the person of the defendant, and he never seized and never had possession of any of the defendant's books and records. On the trial the government conceded that the United States marshal had no process authorizing him to seize anything other than the person of the defendant."

In other words, when the defendant was arrested at his place of business on Fortieth street and his books and papers were seized, there was no warrant or process of any kind either of arrest or of search issued against him. The defendant insists that his books and papers were taken possession of by the postal authorities of the United States

under direction of the Department of Justice without process or legal authority of any kind. This matter might have been made perfectly clear but it has been left largely to inference and conjecture. Who the police officers were, where they got their orders, who the United States official was who apparently was directing the so-called "raid" does not satisfactorily appear, but it does appear that the papers and books were all carted to the federal building where they remained for several years and where the government officials worked over them for 18 months, although the defendant applied for their return September 26th, 3 days after they were seized. Some conclusions may be left to presumption, and it is impossible to believe, in the face of these facts, that the United States, acting through its accredited agents, was not responsible for the arrest of the defendant and the seizure of his property. To attribute such an elaborate and carefully prepared proceeding as was planned to convict the defendant, to a few local patrolmen or to some unknown parties, in the face of the fact that the property was immediately carted to the federal courthouse and remained there till the federal officials had obtained all the information desired, makes too severe a demand upon the imagination.

The fact that the government officials returned the books after they had worked over them for a year and a half and had obtained all the information possible, is not of the least importance in considering the question of the initial illegality. We have, then:

First, a seizure of the defendant's books and papers without warrant or legal process of any kind—an unlawful entry and an unlawful taking.

Second, a presumption, well nigh conclusive, that the United States, whose agents took the books and papers into custody, and who alone was interested in prosecuting the defendant, was the party who made or instigated the unlawful seizure through its agents and servants.

The question then is reduced to this—can a party be convicted of a crime upon proof procured from books and papers which have been taken from him by force and without a pretense of legal authority?

Will the people be secure in their persons, papers and effects if seizures and searches made without pretense of legality are sustained by the courts?

The case of Boyd v. United States, 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746, goes further in protecting the rights of the citizen than is required in the case at bar for it holds that a compulsory production of private papers under an act which provides that, if not produced, the prosecutor's version of their contents shall be taken as true, is as much within the prohibition of the Fourth Amendment as is a forcible entry and seizure of the books and papers. In other words Judge Bradley construes the amendment to mean what it says and holds it to be a constitutional barrier in the path of him who seeks to seize another's property without due process of law. He says:

"The search for and seizure of stolen or forfeited goods, or goods liable to duties and concealed to avoid the payment thereof, are totally different things from a search for and seizure of a man's private books and papers for the purpose of obtaining information therein contained, or of using them as evidence against him."

Again he says:

"The principles laid down in this opinion (Lord Camden's) affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employés of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, * * * that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offense—it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation of that judgment. In this regard the Fourth and Fifth Amendments run almost into each other."

It is unnecessary to quote further from Judge Bradley's opinion. No one can read it without being impressed by its learning and the force of its logic. It is a powerful argument for sustaining broadly the protection provided by the Constitution against unreasonable seizures and searches.

The case of Adams v. New York, 192 U. S. 585, 24 Sup. Ct. 372, 48 L. Ed. 575, differs from the case at bar in many important particulars but chiefly in the essential feature that in that case a valid search warrant was issued and incidentally the letters were seized in executing it. Had there been such a warrant issued on proper proof by competent authority in the case at bar the defendant's contention that the seizure of his property was unlawful, wanton and in violation of his constitutional rights might have been unavailing. Such a warrant issued by a court of magistrate having jurisdiction protects the officer executing it even though he may transcend his authority; but did the court intend to hold that a naked trespasser may seize the entire business including the books and papers of another and use them to convict him of a crime? We think not. To hold such a proposition is to give judicial sanction to a wholly illegal proceeding and make the necessity for a search warrant unnecessary. If parties without authority may enter another's place of business and carry away all his books and papers and use them in criminal proceedings against him, the constitutional amendments and the laws passed to prevent such invasions of his rights become dead letters. There are numerous cases which hold that where an officer executing a legal search warrant seizes property, not mentioned in the warrant, which may properly be considered in evidence, the right to introduce it is not lost by reason of its unlawful seizure, but we know of no case where a conviction has been sustained upon evidence obtained by such methods as were here employed. The Adams Case proceeds upon the theory that having a legal right to search for property relating to the offense charged, such property will not be excluded from evidence because it is not specifically mentioned in the search warrant. Nowhere in the opinion is there any sanction for the proposition that one man may enter another's home, seize all his books and papers without process and procure his indictment and conviction upon the proof so obtained. In

every case, so far as we are able to discover, where the court has permitted evidence taken from the defendant to be used against him it was obtained by legal methods—a search warrant issued by the court or judge.

In Weeks v. United States, 232 U. S. 383, 34 Sup. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834, the opinion was written by Mr. Justice Day, who wrote in the Adams Case. The facts are in many respects similar to those in the case at bar. The defendant was arrested by a police officer, so far as the record shows without warrant. The opinion (232 U. S., at page 386, 34 Sup. Ct. 342 [58 L. Ed. 652, L. R. A. 1915B, 834]) states as follows:

"Other police officers had gone to the house of the defendant and being told by a neighbor where the key was kept, found it and entered the house. They searched the defendant's room and took possession of various papers and articles found there, which were afterwards turned over to the United States marshal. Later in the same day police officers returned with the marshal, who thought he might find additional evidence, and, being admitted by some one in the house, probably a boarder, in response to a rap, the marshal searched the defendant's room and carried away certain letters and envelopes found in the drawer of a chiffonier. Neither the marshal nor the police officers had a search warrant."

The defendant filed in the cause before the time for trial a petition for the return of the private papers, books and other property so seized. The opinion inter alia states as follows:

"The case in the aspect in which we are dealing with it involves the right of the court in a criminal prosecution to retain for the purposes of evidence the letters and correspondence of the accused, seized in his house in his absence and without his authority, by a United States marshal holding no warrant for his arrest and none for the search of his premises. * * * If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution. The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land. The United States marshal could only have invaded the house of the accused when armed with a warrant issued as required by the Constitution, upon sworn information and describing with reasonable particularity the thing for which the search was to be made. Instead, he acted without sanction of law, doubtless prompted by the desire to bring further proof to the aid of the government, and under color of his office undertook to make a seizure of private papers in direct violation of the constitutional prohibition against such action. * * * We therefore reach the conclusion that the letters in question were taken from the house of the accused by an official of the United States acting under color of his office in direct violation of the constitutional rights of the defendant; that having made a seasonable application for their return, which was heard and passed upon by the court, there was involved in the order refusing the application a denial of the constitutional rights of the accused, and that the court should have restored these letters to the accused. In holding them and permitting their use upon the trial, we think prejudicial error was committed. As to the papers and property seized by the policemen, it does not appear that they acted under any claim of federal authority such as would make the amendment applicable to such unauthorized seizures. The record shows that what they did by way of arrest and search and seizure was done before the finding of the indictment in the federal court, under what supposed right or authority does not appear.

What remedies the defendant may have against them we need not inquire, as the Fourth Amendment is not directed to individual misconduct of such officials. Its limitations reach the federal government and its agencies. Boyd Case, 116 U. S. [616, 6 Sup. Ct. 524, 29 L. Ed. 746] supra, and see Twining v. New Jersey, 211 U. S. 78 [29 Sup. Ct. 14, 53 L. Ed. 97]."

The return of the defendant's books and papers, after all the information contained therein had been obtained by the prosecuting officers, did not cure the original trespass. The wrong had then been done. The information illegally obtained was in the possession of the United States attorney whose agents had been working over the papers "for three long years." Their return at that time was an idle ceremony. The government officials possessed the "secondary evidence" and were not concerned about the disposition of the "primary evidence."

We do not deem it necessary to discuss all the questions mooted on the briefs relating to the admission and exclusion of evidence at the trial. We prefer to rest our decision upon the broad ground that the constitutional rights of the defendant were violated by the unlawful seizure of his books and papers by the officers and agents of the United States acting without warrant or pretense of legal authority.

The judgment is reversed.

VEEDER, District Judge. I concur in the result, not in the exercise of my own judgment, but in submission to the authority of the Supreme Court. If the course of authority were clear, it would suffice to follow it without hesitation. But it is not clear, and it leads to dangers which should be explicitly recognized. That there was in this case a willful violation of the fundamental personal right secured by the Fourth Amendment admits of no question. The normal way to treat such offenses would seem to be to punish the offender directly. Prior to the decision in Boyd v. United States, 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746, the judicial rules of evidence had never been used as an indirect process of punishment. According to the uniform course of authority a criminal court would not permit a collateral issue to be raised with respect to the source of competent evidence. Wigmore on Evidence, §§ 2183, 2263. In the Boyd Case an order for the production of documents involving self-incriminating matter, on pain of having the allegations taken as confessed, was very properly held to be within the privilege secured by the Fifth Amendment. But the majority of the court declared the privilege applicable also to documents obtained by officers' search or seizure, legal or illegal, irrespective of testimonial process, thus enforcing the Fourth Amendment by means of the Fifth. When, however, the subject again came before the court this view was substantially modified. In Adams v. New York, 192 U. S. 585, 24 Sup. Ct. 372, 48 L. Ed. 575, the issue "arose upon objection to the introduction of testimony clearly competent as tending to establish the guilt of the accused," but which had been seized in the execution of a search warrant for lottery slips. "In such cases," the court said, "the weight of authority as well as reason limits the inquiry to the competency of the proffered testimony, and the courts do not stop to inquire as to the means by which the evidence was ob-

tained." While the court disclaimed any wish to detract from the authority of the Boyd Case, it held that there had been no error. "The security intended to be guaranteed by the Fourth Amendment against wrongful search and seizures is designed to prevent violations of private security in person and property and unlawful invasion of the sanctity of the home of the citizen by officers of the law, acting under legislative or judicial sanction, and to give remedy against such usurpations when attempted. But the English and nearly all of the American cases have declined to extend this doctrine to the extent of excluding testimony which has been obtained by such means, if it is otherwise competent." Accordingly, "subsequent cases," as the court said in Hale v. Henkel, 201 U. S. 43, 26 Sup. Ct. 370, 50 L. Ed. 652, "treat the Fourth and Fifth Amendments as quite distinct, having different histories, and performing separate functions." Yet in Weeks v. United States, 232 U. S. 383, 34 Sup. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834, the court unanimously held it to be reversible error to admit in evidence documents which had been obtained by a marshal without search warrant. The opinion, which is written by the Justice who wrote in the Adams Case, distinguishes the two cases on the ground that the decision in the Adams Case "rests upon incidental seizure made in the execution of a legal warrant and in the application of the doctrine that a collateral issue will not be raised to ascertain the source from which testimony, competent in a criminal case, comes." Still, the seizure involved was without lawful warrant; and it is not explained how a defendant can turn a collateral fact into a material fact merely by making a formal motion before trial. And inasmuch as the court had expressly stated in the Adams Case that the Fourth Amendment was intended "to give remedy against such usurpations when attempted," but not to "exclude testimony which has been obtained by such means, if it is otherwise competent," it is not clear how the two cases can be reconciled in principle. Nevertheless, the Weeks Case, as the latest expression of the Supreme Court, requires a reversal of this conviction. Certain incidental differences exist, but they do not affect the principle involved. In the result, however, the defendant is released, not because he is innocent, but because a postal inspector secured without instead of with a warrant the proofs of his guilt. The sins of the postal inspector, for which the person aggrieved has not chosen to seek redress or punishment, are visited upon the only party whose claim to consideration is unimpeachable, namely, the United States. Moreover, this procedure places the administration of the criminal law entirely at the mercy of subordinate agents of the government. Whether actuated by zeal, caprice or corruption, they have it in their power to confer by their illegal act immunity from successful prosecution.

MILLER RUBBER CO. et al. v. CITIZENS' TRUST & SAVINGS BANK.

In re NEWERF'S ESTATE.

(Circuit Court of Appeals, Ninth Circuit. May 1, 1916. Rehearing Denied June 2, 1916.)

No. 2737.

1. BANKRUPTCY ⟸140(3)—RECLAMATION OF PROPERTY—CONSIGNMENT OR SALE.

By a contract claimant made bankrupt its exclusive agent for the sale of its goods within a certain territory, and agreed to keep him supplied with a stock which should remain claimant's property until sold to bona fide customers in the usual course of business. The contract did not fix, nor reserve the right to fix, prices at which the goods were to be sold nor require bankrupt to account for the proceeds, but required him to report those on hand each month, and pay for those sold at a stated discount from list price, with provision for a credit of four months, if desired, up to a certain amount. Bankrupt was permitted to mingle the goods with his other stock, and the contract required claimant to furnish him free of charge with advertising matter imprinted with his business name. *Held*, that while, as between the parties, the contract was one of consignment, as to creditors of the bankrupt title to the goods passed to him, and they could not be reclaimed from his trustee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 225; Dec. Dig. ⟸140(3).]

2. PRINCIPAL AND AGENT ⟸82—CONTRACT OF AGENCY—COMMISSIONS.

A contract under which goods were furnished to an agent for sale construed, and *held* that the commissions were based on the sum named in the price list, less 5 per cent. discount for cash.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 216–219; Dec. Dig. ⟸82.]

Appeal from the District Court of the United States for the Southern Division of the Southern District of California; Robert S. Bean, Judge.

In the matter of the estate of W. D. Newerf, doing business as the W. D. Newerf Rubber Company, bankrupt; the Citizens' Trust & Savings Bank, trustee. From an order, made on the petition of the Miller Rubber Company and the Miller Rubber Company of California to reclaim property, both petitioners and the trustee appeal. Affirmed.

W. Scott Bicksler, W. C. Smith, and Dale H. Parke, all of Los Angeles, Cal., for appellants.

W. T. Craig, Dave F. Smith, and Norman A. Bailie, all of Los Angeles, Cal., for appellee.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge. This case presents cross-appeals from the judgment of the District Court, in part confirming and in part rejecting the recommendations made to it by the special master in pursuance of his findings of fact and conclusions of law.

The appeal of the two rubber companies presents the question of the title to certain goods delivered to the bankrupt by the Miller Rub-

ber Company, a corporation of the state of Ohio, under and in pursuance of a contract dated November 6, 1911, entered into between that company and the bankrupt, Newerf, then doing business as W. D. Newerf Rubber Company; and the appeal of the trustee in bankruptcy involves the question as to the compensation the bankrupt was entitled to under a contract entered into between the Miller Rubber Company, a corporation of California, and the bankrupt, Newerf, of date June 11, 1914, to take effect July 1, 1914, and a supplemental contract between the two last mentioned parties. For the proper disposition of the appeals, it is therefore necessary to state the substance of the three contracts.

[1] It will be in order to take up first the appeal of the rubber companies, involving the contract of November 6, 1911, to which contract the Prudential Rubber Company, also an Ohio corporation, was a party of the first part with the Miller Rubber Company of Ohio, and to which W. D. Newerf Rubber Company, of Los Angeles and San Francisco, Cal., was the party of the second part. By its terms the party of the second part was made the sole agent of the parties of the first part "in making sale of first parties' automobile tires and tubes in the states of California, Oregon, Washington, Idaho, Nevada, Arizona, and British Columbia, and Hawaiian Islands"; the party of the second part agreeing to maintain at its own expense an office and showroom at a convenient location in the cities of Los Angeles and San Francisco. The parties of the first part agreed to furnish the party of the second part "on consignment a stock of above goods manufactured by the first parties, for the purpose of supplying customers and prospective customers in the territory mentioned, the quantity of such stock to be at all times limited to a reasonable amount"; the party of the second part expressly agreeing "that all goods or stocks of goods so furnished by the first parties shall at all times be and remain the property of the first parties until sold and delivered to bona fide customers in the usual manner." The party of the second part agreed to furnish the parties of the first part each month a complete inventory of all goods in its hands belonging to the parties of the first part, or at their option to permit them to have their representative take an inventory of such stock. The contract provided that the party of the second part should make monthly settlements "for all purchases from and all shortage in stock of first parties"—remittances to be mailed to the parties of the first part on the 10th of each month for previous month's sales. It provided that, when desired by the party of the second part, "four months notes drawing interest at 5 per cent. will be accepted by first parties in settlement for all purchases made by second party from first parties: Provided, however, that the total maximum of such notes shall not exceed twenty-five thousand dollars ($25,000.00) at any one time during the first year of this contract, and that such maximum after the first year is to be subject to the mutual agreement of both parties, but not less than twenty-five thousand dollars ($25,000.00), unless credit of second party becomes impaired." It provided that all goods should be delivered by the parties of the first part f. o. b. Los Angeles or San Francisco, Cal., or Seattle, Wash.;

that upon the expiration or termination of the agreement, or any renewal thereof, or upon its abrogation as therein provided, the party of the second part should "surrender and turn over to the first parties all the property belonging to the first parties, of whatsoever nature, and will make full and complete settlement and accounting to the first parties of all property that may have been intrusted to second party's custody by virtue of this agreement."

After fixing a schedule of prices and discounts therefrom, and providing that for any reduction in prices by the parties of the first part during the life of the contract the party of the second part shall be entitled to a credit for the amount of such reduction on all stock on hand at the time such reduction goes into effect, and providing that the parties of the first part will also give to the party of the second part the lowest prices that they give to any one for goods in any quantity, except for demonstrating or advertising purposes, the contract further provided that when shipments are made from Akron, Ohio, by the parties of the first part to the party of the second part in the territory covered by the contract, the parties of the first part would render a credit memorandum of the difference between the net amount realized for such sales and the net value of such goods charged at prices made to the party of the second part by the parties of the first part, and further provided that all "replacements only on Miller tires and tubes are to be wholly under the control of the first parties, but it is agreed that all replacements shall be made by second party, and that a compensation of 10 per cent. of amount received be paid by first parties to second party for handling such replacements. All replacements to be made from consigned stock of first parties and to be reported in writing by second party to first parties: Provided, however, that first parties are to have the option of putting in their own adjuster, if at any time the adjustments made by second party are not satisfactory to first parties." The contract further provided that the parties of the first part should pay to the party of the second part the actual cost of repair work done on all the Miller tires and tubes, invoices to be rendered at the time to the parties of the first part of such repairs. It further provided that the parties of the first part would furnish the party of the second part free of charge all samples of tires and accessories and necessary advertising matter, imprinted with the name and address of the second party, and to allow one-half of the expense of Newerf or his manager to the factory at Akron, Ohio, at least once a year during the life of the contract, which, together with its termination, was also specified.

Evidence was introduced on behalf of the respective parties before the special master, who made certain findings of fact, among which was one to the effect that the contract of November 6, 1911, continued in force as to the goods shipped by the Miller Rubber Company of Ohio to the bankrupt prior to the making of the subsequent contract of July 1, 1914, $7,685.23 worth of which goods remained in the possession of the bankrupt at the time of his adjudication in bankruptcy, and which goods were, during the time the bankrupt was engaged in the business, commingled with other goods in his possession, but sub-

sequent to the adjudication in bankruptcy were segregated and are held by the trustee subject to the present suit for their reclamation. The conclusion of the special master, in view of the facts stated, was that the title to the goods held by the bankrupt under the contract of November 6, 1911, was in the bankrupt, and that the goods therefore were not subject to reclamation by the Rubber Company, which conclusion was sustained by the court below. And that is the question for decision upon the appeal of the Miller Rubber Companies.

As between the parties to this contract, we are unable to make anything more of it than what it purported to be, namely, a mere consignment of the goods to the W. D. Newerf Rubber Company, for sale upon the terms and conditions therein stated. Its first provision expressly declares the party of the second part thereto the agent of the parties of the first part and its agreement to act in that capacity in making sales of the consigned property. It subsequently expressly declares that all the goods so consigned shall at all times be and remain the property of the parties of the first part until sold and delivered by the agent to its bona fide customers in the usual manner, monthly settlements of which are required to be made by the agent, as well as for any shortage in the consigned stock, and that upon the expiration or other termination of the contract the agent should surrender and turn over to the parties of the first part all of the remaining consigned property, and make "full and complete settlement and accounting to the first parties for all property that may have been entrusted to second party's custody by virtue of this agreement." As said by this court in General Electric Company v. Brower, 221 Fed. 597, 602, 137 C. C. A. 321, 326:

"To constitute a sale, there must have been in the contract a vendor and a vendee, and a provision for a transfer of property by the vendor to the vendee, and an obligation by the vendee to pay an agreed price therefor, *or the circumstances outside of the contract must have been such as to show that it was the intention of the parties to make of the contract a fraudulent concealment of an actual sale.*" (Italics ours.)

The same thing was in effect held by the Supreme Court in the case of Ludvigh v. Am. Woolen Co., 231 U. S. 522, 528, 34 Sup. Ct. 161, 58 L. Ed. 345. There were in neither of those cases such fraudulent circumstances; but we do not think that that can be affirmed of the present case, for here, not only was the agent permitted to mingle the consigned goods with his own stock, but the contract expressly provided that the consignors would furnish the consignee "free of charge all samples of tires and accessories and necessary advertising matter, imprinted with the name and address of the" consignee. It is difficult to see how the consignors could have more effectually held the consignee out to its customers as the real owner of the consigned property. To permit them to retake from the stock of the bankrupt the remaining portion of the consigned goods would, in our opinion, operate as a fraud on the creditors of the bankrupt.

We find confirmation of this view in the failure of the consignors to fix by the contract the prices at which the agent could sell the goods to its customers, and in their failure to therein make any provision for

the remitting to the consignors of the proceeds received by it for the goods so sold; the agent being required by the contract to itself pay to the consignors for the goods so sold by it prices fixed in the invoice, less the deductions specified, and in the provision that, when the agent desired, "four months notes drawing interest at 5 per cent. will be accepted by first parties in settlement for all purchases made by second party from first parties: Provided, however, that the total maximum of such notes shall not exceed twenty-five thousand dollars ($25,000) at any one time during the first year of this contract, and that such maximum after the first year is to be subject to the mutual agreement of both parties, but not less than twenty-five thousand dollars ($25,000), unless credit of second party becomes impaired." For the reasons stated, we think the court below was right in confirming the conclusion of the special master that, as to the creditors of the bankrupt, the title to the consigned goods in question should be held to have passed to the consignee.

[2] In respect to the commissions to which the bankrupt is entitled under the contracts of 1914, involved in the cross-appeal of the trustee, we must turn to those contracts, first observing that it appears from the findings of the special master that the Miller Rubber Company of California was organized under the laws of that state for the purpose of acting as agent in handling and selling the goods of the Miller Rubber Company of Ohio, and to enable the latter company to have a representative in California, "thereby saving the Miller Rubber Company of Ohio from filing a certificate and paying license fees and being licensed to do business in the state of California," and "to protect the name of the Miller Rubber Company in California, and to prevent, so far as possible, trade competition therewith." The contract dated June 11, 1914, expressly declares that it "shall take effect on the 1st day of July, 1914, and expires on the 1st day of July, 1919, unless sooner terminated," and was made between the Miller Rubber Company of California as party of the first part and W. D. Newerf as party of the second part. Among the recitals contained in the contract last mentioned are the following:

"Whereas, it is the desire of the party of the first part to employ party of the second part as its agent within and for the following territory, viz.: The states of California, Oregon, Idaho, Washington, Nevada, and Arizona, and in addition thereto British Columbia and the Hawaiian Islands: Provided, however, that this provision shall be null and void as to any portion of the aforementioned territory, providing the sales made by the party of the second part do not, in the opinion of the party of the first part, warrant the continuance of any portion of said territory, it being understood and agreed that sixty (60) days' written notice by the first party to said second party of said first party's dissatisfaction with the sales made by the second party in any portion of said territory shall be sufficient to eliminate any portion of the aforementioned territory from this contract; and it is furthermore mutually agreed that such agency is and shall be restricted to such matters as are in this agreement, and supplement thereof, set forth, the headquarters and office of the said agent to be at the cities of Los Angeles and San Francisco, Cal., under and pursuant to the terms and conditions incidental thereto, which party of the second part hereby accepts and agrees to perform."

After that preamble the agreement declares that the party of the second part shall enter into the employment of the party of the first

part within the territory specified for the term of five years; that that agency shall cover only automobile casings and tubes manufactured by the Miller Rubber Company of Akron, Ohio, unless in express terms otherwise agreed; that the main office of the agency shall be Los Angeles, Cal.; that the party of the first part will place in stock in that city and in San Francisco a general and assorted stock of automobile casings and tubes manufactured by the Miller Rubber Company of Akron, Ohio, and other products of the same manufacture, if mutually agreed upon, and keep and maintain such stock equal to the net value of not less than $20,000, nor more than $60,000, according to the demand of the trade—the party of the second part agreeing to provide a suitable place to store the goods and to protect them from all damage except such as may arise from deterioration from lapse of time.

Omitting immaterial matter, the agreement further provides that the party of the second part "shall make sales from the said stock of casings and tubes to responsible purchasers and at prices not lower than 10, 12½ trade discount, and 5 per cent. additional for cash, from the 1914 price list of the Miller Rubber Company of Akron, Ohio, a copy of which is hereto attached and marked Exhibit A and made a part hereof, and dated as effective December 1, 1913, subject to changes in said list and discounts as hereinafter set forth (and sales of other products at such prices as may be agreed upon from time to time), and make collections upon all sales and deposit the funds from said sales in such depositary in Los Angeles and San Francisco, as the party of the first part may select, such funds to be deposited in the name of and to the credit of the Miller Rubber Company of California, subject to the check of the treasurer, or the duly authorized officer of the Miller Rubber Company of California, and said second party shall make a statement of said bank account to the party of the first part on the 1st day of each and every month commencing August 1, 1914"—all sales from such consigned stock to be made in the name of the Miller Rubber Company of California, on terms not to exceed 30 days net, except as may otherwise be mutually agreed upon in writing by the parties, and except as otherwise provided in the contract, which further provided that the party of the second part should receive—

"in full payment for his services as such agent, and in full payment of all salaries, rent, clerk hire, and other expenses incurred by him, the difference between the price, or prices, at which goods are actually sold by said party of the second part, and the price of 10—12½—12½—5 per cent. from the Miller Rubber Company's 1914 price list effective December 1, 1913, a copy of which is hereto attached and marked Exhibit A and made a part hereof, which prices and list are subject to change as hereinafter provided; it being understood that the party of the second part shall assume and pay all collection expense, and assume all losses for bad accounts, and said second party shall execute and deliver to first party a bond or security of equal protection to first party, and to the approval of first party, in the sum of twenty thousand dollars ($20,000), guaranteeing the payment to it of all accounts for goods sold by second party, the liability on said bond or other security to become fixed, at the option of first party as to each account, on failure to pay the same within 60 days after maturity, and the surety on said bond shall waive all notice of default in the payment of any account, and shall

consent to any extension of time of payment thereof, and said bond shall further be conditioned to secure the safe-keeping and redelivery to first party of all stock so placed in the hands of second party, as hereinafter provided."

This contract, of date June 11, 1914, contained various other provisions not important to the point under consideration, and also a further provision reserving to the party of the first part "the right to change at its option all price lists and discounts aforementioned, but it agrees to advise the party of the second part immediately when any changes are made: Provided, however, that the net difference between the Miller Rubber Company's prevailing special dealer's price and the price on which second party's compensation is figured shall be not less than 10 per cent." It declares that upon its termination for any reason, "and unless in express terms renewed, party of the second part agrees to deliver to the order of the party of the first part, or to return to Akron, Ohio, free of all charges, all consigned stock not paid for," with conditions unimportant here. It provides for its cancellation in a certain prescribed way, and concludes with this clause:

"This contract and supplement shall supersede all contracts, agreements, or understandings of any nature now existent between the Miller Rubber Company, or the Miller Rubber Company of California, and W. D. Newerf Rubber Company, or W. D. Newerf, and such contracts, agreements, and understandings shall be and are considered null and void, except as to the unpaid accounts."

The supplementary agreement, of date June 11, 1914, between the Miller Rubber Company of California and Newerf, recites the employment of the latter by the Miller Rubber Company of California as its selling agent in the territory and under the conditions specified in the preceding contract of the same date, and the desirability "that the same arrangement, with certain exceptions, shall be made and applied to the handling of automobile repair materials and automobile tire accessories," and then declares that the respective parties mutually agree:

"First. That automobile tire repair materials and automobile tire accessories shall be handled in the same manner as is contemplated with regard to casings and tubes in said contract of June 11, 1914, and that all of said contract, except as to the basis on which sales shall be made, shall apply to automobile tire repair materials and automobile tire accessories, the same as if said repair materials and accessories had been originally included in said contract.

"Second. That the compensation to said second party for the fulfillment of that part of this contract shall be the difference between the prices at which sales are actually made to their customers and the prices on attached sheet marked Exhibit C. Party of the first part reserves the right to change their list prices and discounts at any time, and agrees to notify said party of the second part immediately of such action.

"Third. That the party of the second part shall have the right under this contract to make sales of automobile tires, repair materials, and tire accessories in the territory specified in the original contract, such right to be exclusive as to territory, except as hereinafter provided. However, party of the second part agrees to handle the aforementioned materials and accessories to the exclusion of all competitive goods: Provided, further, however, that the party of the first part reserves the right to sell any and all concerns located in the territory granted as exclusive in the original contract, and to which this is a supplement, if the party of the second part is for any reason unable

to do so; but first party agrees to pay to the party of the second part the difference in price or prices between the actual sales price to the customer and the prices at which the materials sold would have been charged to the said second party, and be it provided, further, that the party of the first part shall reserve the right to make sales of fabrics and other materials under this supplement direct to manufacturers of reliners and blow-out patches, and that no commission shall accrue to second party for sales of fabrics and other materials sold to manufacturers of reliners and blow-out patches, unless such sales are actually made by the second party, and at an advance over the minimum price or prices listed on the attached Exhibit C.

"Fourth. Furthermore, this supplement may be canceled at any time by either party on ninety (90) days' written notice, one to the other."

As will be seen from the foregoing, the agent's commission is declared to be the difference between the price at which the goods are *actually sold,* and 10—12½—12½—5 per cent. from the price list. There is here a clear distinction made between the prices specified in the list or invoice of the goods and the price at which they were actually sold by the agent. To purchasers who availed themselves of the 5 per cent. allowed for cash it cannot, in our opinion, be properly said that the goods were actually sold for the prices specified in the lists, and therefore we agree with the court below that in such cases the percentage to which the bankrupt was entitled must be based on the sum named in the price list, less the 5 per cent. deducted for cash.

The judgment is affirmed.

SAFFORD v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. May 9, 1916.)

No. 113.

1. CRIMINAL LAW ⊜1043(2)—APPEAL—OBJECTIONS.

Where testimony is inadmissible, and could not under any state of facts be rendered admissible, a general objection is sufficient to present for review the question of the admission of such evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2654; Dec. Dig. ⊜1043(2).]

2. CRIMINAL LAW ⊜417(10)—EVIDENCE—DECLARATIONS.

A woman, who charged that the prosecuting witness seduced her, was accused of using the mails with intent to defraud. Defendant was charged with perjury in identifying, at the examining trial before the United States commissioner, the prosecuting witness as the man who stopped with the woman at a hotel in which defendant was clerk. *Held,* that testimony of the prosecuting witness that a third person had visited him, and told him he was the man guilty of the seduction, and had promised to assist the prosecuting witness in defending a civil action brought against him by the woman, was hearsay, and was improperly received.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 950; Dec. Dig. ⊜417(10).]

3. WITNESSES ⊜287(4)—CROSS-EXAMINATION—REBUTTAL.

In such case, cross-examination of the prosecuting witness as to whether he had presented to his wife a man, stating that he was the one who took the excursion with the woman, and whether he had delivered to such

man letters written by the woman to him, did not justify the admission of the hearsay testimony as rebuttal.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1002; Dec. Dig. ⊂=287(4).]

4. WITNESSES ⊂=287(1)—CROSS-EXAMINATION—SCOPE.

In such case, where the prosecution brought out on cross-examination of the woman that she had admitted she falsely charged the prosecuting witness with her seduction, defendant is, on redirect examination, entitled to bring out her explanation, if any, for the statement, which the witness then testified was false.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 930, 1000; Dec. Dig. ⊂=287(1).]

5. CRIMINAL LAW ⊂=663—TRIAL—EXAMINATION OF DOCUMENTS.

Where the prosecution introduced in evidence a diary of the prosecuting witness to show that he could not have been at the place which accused, who was charged with perjury, had testified that he was, accused's counsel is entitled to examine the book to determine whether it is a diary.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1602; Dec. Dig. ⊂=663.]

In Error to the District Court of the United States for the Southern District of New York.

Frank D. Safford was convicted of perjury, and he brings error. Reversed and remanded.

Slade & Slade, of New York City, for plaintiff in error.

H. Snowden Marshall, U. S. Atty., and Roger B. Wood, Asst. U. S. Atty., both of New York City.

Before WARD and ROGERS, Circuit Judges, and MAYER, District Judge.

WARD, Circuit Judge. March 16, 1915, one Rae Tanzer instituted a civil suit for breach of promise against James W. Osborne, charging that under the name of Oliver Osborne he had seduced her under a promise of marriage. March 19th James W. Osborne swore to a complaint charging Rae Tanzer with a violation of section 215 of the United States Criminal Code (Act March 4, 1909, c. 321, 35 Stat. 1130 [Comp. St. 1913, § 10385]) for using the United States mails to execute a scheme to defraud, upon which a warrant of arrest was issued, under which she was arrested. March 24th a hearing was held before a United States commissioner, at which the defendant, Safford, testified that in October, 1914, he was clerk of the Kensington Hotel in Plainfield, N. J., and that on the 18th of that month the person calling himself Oliver Osborne, accompanied by a lady, took a room together in the hotel, and he then and there identified James W. Osborne, who was present, as the person.

Thereafter the defendant was indicted under section 125 of the United States Criminal Code (section 10295) for falsely swearing that James W. Osborne was the man whom he saw as aforesaid. April 19th he pleaded not guilty, and his trial began April 27th, ending May 5th with a verdict of guilty and a recommendation for mercy. May 10th he was sentenced to a term of nine months and to pay a fine of

$1 and to stand committed in the New York County Penitentiary until the fine be paid. This is a writ of error to the judgment.

[1, 2] At the trial James W. Osborne was examined in rebuttal as follows:

"Q. Mr. Osborne, take the stand. A. (Witness complies.)

"Q. Mr. Osborne, on the day you swore out the complaint charging Rae Tanzer with using the mails in a scheme to defraud, was a letter—Exhibit—A. Mr. Wood, that was not in that shape. Give me the envelope, please—the white envelope.

"Q. Was the letter, Defendant's Exhibit R, delivered to you?

"Mr. Slade: I object to that as not a proper rebuttal, if your honor pleases. The witness' attention should be specifically directed to some specific question and he might be inquired of.

"The Court: I think the investigation into that exhibit is legitimate rebuttal.

"Mr. Slade: Exception.

"A. May I see the date of the complaint, please, that was made in this case?

"Q. (Hands witness paper.) A. On the 19th day of March, 1915, the paper, sealed up, was delivered to me at my house, the Sherman Square Hotel.

"Q. And was Exhibit—Defendant's Exhibit—R in the envelope which you now have?

"Mr. Slade: I object as incompetent, irrelevant, and immaterial—improper rebuttal.

"The Court: Overruled.

"Mr. Slade: Exception.

"A. The two papers, one of which is dated October 24, 1914, and the other paper dated Brooklyn, March 19, 1915, were in the envelope delivered to me. "Q. Where were they delivered to you, Mr. Osborne? A. They were delivered to me in the parlor of my apartment at the Sherman Square Hotel.

"Q. Who was present? A. My wife was present, and also Mr. Wilcox, of my office.

"Q. Will you please state the circumstances under which those papers were delivered to you? A. I was called on the telephone—

"Mr. Slade: Wait a minute. Mr. Osborne, I object, if the court please.

"The Court: Please state the question. (Question read by the stenographer.)

"The Court: Overruled.

"Mr. Slade: Exception.

"A. I was called on the telephone, and somebody spoke to me on the telephone from my office, and— Shall I state the conversation?

"Q. It was not with anybody connected with your office? A. It was Mr. Kennarck, who has charge of our board, told me—

"Mr. Slade: I object.

"The Court: Sustained.

"Q. After that telephone conversation what happened? A. In consequence of that somebody came to my house.

"Q. Was it a man or a woman? A. It was a man.

"Q. Please describe him. A. I should say he was a man of at least half an inch or three-quarters taller than I was, with light eyes, of very fine features, I should say, very straight nose, I remember particularly, with hair I should say slightly lighter than my own, dressed in a gray overcoat, with very broad shoulders, and a trim figure. He did not have a big stomach at all. And in the presence of my wife he came into the room and his name was given.

"Q. What name did he give? A. He gave the name of Oliver Osborne and—Shall I state the conversation or not?

"Q. Yes, state the conversation.

"Mr. Slade: I object.

"The Court: Overruled.

"Mr. Slade: Exception.

"A. He said that he had read in the newspapers that this woman Rae Tanzer had accused me of having been around with her and having seduced her, and that he knew that I was a man of honor and character from what he

had read about me, and he was not going to allow a man of that type to suffer for anything that he himself done, and he said he came and stated these things in the presence of Mr. Wilcox and my wife—that he came for the purpose of exonerating me, and he said: 'I wrote you this letter in Brooklyn last night, and I intended to mail it to you.' You see there are two uncanceled stamps on it. 'But instead of that I came and delivered it to you myself in person.' He said, 'I am the man that has been going around with this girl;' and then he said, 'I want to have a talk with you privately and apart;' and he took me in the back room—that is, in my bedroom—left Mr. Wilcox and my wife in the front room, and before he went back into the back room I remember distinctly that I put both hands on his shoulders this way (indicating) and I looked into his eyes right straight, and I said, 'Well, you belong to the straight-nosed Osbornes, and not to the snub-nosed Osbornes, as I do,' because I noticed distinctly that he had such a fine nose. And we had some chat back and forth naturally, and I thanked him. I told him that I felt under the greatest possible obligations to him; that I thought it was a very honorable thing for a man to do. Well, he says, 'I am not married, and I paid this girl'—this is what he said to me in the back room—'I paid this girl every time I went with her.' And then, I said to him, 'Well, where did you go with her?' 'Well,' he said, 'I tell you, I went with her in various parts of New York,' but I remember a particular hotel on the East Side, over about Lexington avenue—I remember that he said that. Then I said, 'Well, look here.' He said to me, 'Is it any crime, this thing of going around with a girl in New York?' I said, 'Well, you are not married, and she is not married, and I don't know of it being a crime unless one of you are married.' He said, 'I don't think so, either.' Then I said, 'You tell me. He did tell me he had been out to New Jersey with her, and he said, 'If you will search near the station in Jersey, near the station, you will find some hotel that we were at.' 'Well,' I said, 'you don't mean to tell me you stayed with a girl in New Jersey, did you? How about the Mann Act?' I asked him. He was asking me, and I said, 'I want you to understand that you done this honorable thing by me and I would not get you into trouble for all the world.' 'Well,' he said, 'I had no sexual relations with her in Jersey.' I said, 'Are you sure of that?' He said, 'Yes, I am sure of it.' I said, 'If that is so, then the Mann Act cannot possibly have any application, either directly or indirectly to you.' And then I said to him, 'Well, I want you to go right down now and see the United States government; I want you to go right on down with me now and see Mr. Marshall;' and I said, 'This girl in my judgment has violated the laws of the United States, and she knows perfectly well that I cannot be the man, and no woman on earth could stay with a man two months and not know him; that is utterly impossible, and she knows it.' And I said, 'I want you to go right down with me to see Mr. Marshall;' and he said, 'No; that is utterly impossible; I cannot possibly do it.' He said, 'My employer has been good enough to let me come on here from Boston on some business of my own, and I have got to get back, or I will lose my job.' He told me, among other things, that he was a steamfitter by trade, and I thereupon took out a lead pencil and in the presence of— This was before I went into the back room. I am going back now to what happened in the presence of my wife and Mr. Wilcox. You will notice from the type of the writing it was written on no support practically, "22- West Newton street, near Huntington'—no, I think that is it. I can hardly read it. Q. Huntington avenue? A. 'Huntington avenue, Boston.' And I took also his business address on something. I have it written down in my office; those two addresses. He told me he was working for a man in Boston at the business address he gave me, and he said it was imperative for him to get back, and I did all I possibly could do to persuade him to come back; but he gave me his word of honor that he would meet me or be at the United States District Court, come to my office, go with me to Mr. Marshall's, at 4 o'clock the next afternoon, which would be Saturday, and with that the conference ended. Q. How long was he there? A. I think all this took about half an hour, I should say, sir. I do not think it was over that. Q. Was anything said, Mr. Osborne, in that conversation about letters this woman had written this man? A. Oh, he said— Yes, he did. He gave me this, and when I opened it, of course, I recognized at once

the handwriting and the paper as being of similar character to the one which was sent to me, as I remember it, on or about December 27th—after December 27th. And he said that he had other letters at home—no, I don't remember now whether he said they were in Boston or in his baggage. He told me that he had his baggage somewhere, and that he had either the letters there or in Boston; but he promised that he would get the letters and bring them down to Mr. Marshall, the United States District Attorney, the next day. That is my recollection substantially of all that occurred there.

"Mr. Wood: Now, I offer in evidence the other letter and the envelope delivered to Mr. Osborne at the time Exhibit R was delivered to him. (Marked Government's Exhibits Nos. 15 and 15–A.)

"Q. Mr. Osborne, do you remember anything else that was said in that conversation? A. I remember he spoke about his handwriting and I said you need not bother about that, you write much better than I do.

"Q. Is there anything else you can think of Mr. Osborne? A. No, I do not remember anything else except that he said he was born in New Hampshire."

Exhibits R and 15–A were as follows:

Defendant's Exhibit R.

"New York, October 24, 1914.

"Saturday Business.

"Dear Big Boy: Can't imagine how proud and happy I am to have a dear big boy like you call for me. Yes boy I sure do enjoy your company and hope it will continue so forever. Will it boy? Don't know how I miss you honey for I haven't been a bit happy since I last saw you. I want you to be true to me and trust me for I have given up every thought for the doctor and haven't seen him since I met you. I will do anything you want me to do for I love you and will do all in my power to make you happy.

"Hurt poor boy the other night but Honey I won't ever do it again (cross my heart). Sorry you weren't feeling well and I couldn't nurse you but never mind big boy. I will make up for it when I see you, will just love you oh so hard. Can't wait until the day is there so I could see my honey again. Love me and I will always be true to you.

"Your Sweetheart, Only yours, Rae."

Government Exhibit 15–A.

"Brooklyn, March 19, 1915.

"Mr. James W. Osborne—Dear Sir: I saw last night by the paper, when I returned home, about this Rae Tanzer trying to make trouble for you. She has the wrong man in you, and is only after money. She knows she never saw you in her life, but she will try and say she did. She is a sport. I have been in a number of hotels here in the city with her, and each time I had to pay her before I went to the room. And about the trip to another state, it is Jersey, and the place is Plainfield; we went one Sunday afternoon, and only stayed about two hours—a hotel right near the station. She is a big liar to say all the things about you like that in the paper. Those three letters she says she has I gave her and am sending you one of the letters she gave me. I see she still works at the same place. I do not live in the city now. I am working in Boston. I only came to Brooklyn last night on business and must get back to-day. But will come to see you some day the last of this coming week. So do not worry about it. I will clear everything. By the way, I am a steamfitter and am not used to writing much, so try and make it out.

"Yours truly, Oliver Osborne.

"Enclose please find her letter to me."

The foregoing testimony was obviously most damaging to the defendant, and, being the purest hearsay, should have been excluded upon a proper objection. Although the objection made was general, still it was sufficient, if the testimony was inherently inadmissible, or the objection could not have been obviated at the trial on any

ground. In Noonan v. Mining Co., 121 U. S. 393, at page 400, 7 Sup. Ct. 911, at page 914 (30 L. Ed. 1061), Mr. Justice Field said:

"2. The objection to the introduction of the articles of incorporation at the trial was that they were 'immaterial, irrelevant, and incompetent' evidence. The specific objection now urged, that they were not sufficiently authenticated to be admitted in evidence, and that the certificates were made by deputy officers, is one which the general objection does not include. Had it been taken at the trial and deemed tenable, it might have been obviated by other proof of the corporate existence of the plaintiff or by new certificates to the articles of incorporation. The rule is universal that, where an objection is so general as not to indicate the specific grounds upon which it is made, it is unavailing on appeal, unless it be of such a character that it could not have been obviated at the trial. The authorities on this point are all one way. Objections to the admission of evidence must be of such a specific character as to indicate distinctly the grounds upon which the party relies, so as to give the other side full opportunity to obviate them at the time, if under any circumstances that can be done. United States v. McMasters, 4 Wall. 680 [18 L. Ed. 311]; Burton v. Driggs, 20 Wall. 125 [22 L. Ed. 299]; Wood v. Weimar, 104 U. S. 786, 795 [26 L. Ed. 779]."

[3] The government seeks to justify the testimony on the ground that in the case in chief the defendant cross-examined James W. Osborne as follows:

"Q. Did you present to your wife a gentleman under the name of Oliver Osborne as the person that went with Miss Rae Tanzer to the Kensington—A. No; no.

"Q. The answer is no, you did not present such a person? A. Not as going to—what is the name—Kensington Hotel. I never heard of it at that time.

"Q. Did you present a person who posed as Oliver Osborne, as being the person who went with—

"Q. (continuing) —Miss Rae Tanzer to the Kensington Hotel? A. No; a man came to me, called Oliver Osborne; but I did not know at that time—I never heard of the Kensington Hotel.

"Q. And that was after you were sued? A. Yes, certainly. There was nothing in the suit about the Kensington Hotel.

"Q. Not a word? A. Not that I know of.

"Q. What became of that Oliver Osborne?

"Mr. Wood: I object to that.

"The Court: Sustained.

"Mr. Slade: Exception.

"Q. Did you present that person that designated himself as Oliver Osborne as the person that had relations with Rae Tanzer and for whom these letters were intended for?

"Mr. Wood: Don't answer. I object on the ground it is incompetent.

"The Court: Sustained.

"Mr. Slade: Exception.

"Q. You considered Oliver Osborne, the gentleman that came to see you, as a very important witness, did you not?

"Mr. Wood: I object.

"The Court: Objection sustained.

"Mr. Slade: Exception.

"Q. Do you know where this Oliver Osborne is?

"Mr. Wood: I object.

"The Court: Objection sustained.

"Mr. Slade: Exception.

"Q. Did you know the real name of the gentleman that posed as Oliver Osborne?

"Mr. Wood: I object.

"The Court: Objection sustained.

"Mr. Slade: Exception.

"Q. Do you know his present location?
"Mr. Wood: I object.
"The Court: Objection sustained.
"Mr. Slade: Exception.
"Q. Is it not a fact, Mr. Osborne, that you took that person designated as Oliver Osborne to your wife, and told him to say that he is the man with whom Rae Tanzer had relations? A. No.
"Q. Did you give to this Oliver Osborne a letter—one of the letters that you received? A. No.
"Q. Did you see a letter presented by this Oliver Osborne to your wife? A. He presented nothing to my wife."

The theory is that, the defendant having opened up the question of the conversation, the government was authorized to prove it. But the defendant did not open up the conversation, which was admitted over his objection and exception. The nearest he came to it was in asking James W. Osborne whether he had not previously to that conversation told Oliver Osborne to say that he was the guilty man in the conversation which subsequently took place between him, James W. Osborne, Mrs. Osborne, and Mr. Wilcox, and partly between Oliver and James W. Osborne, in the latter's private room. For this reason the case of People v. Buchanan, 145 N. Y. 1, 39 N. E. 846 on which the United States Attorney relies, does not apply. In it the witness was asked on cross-examination whether he had not suggested to the coroner something "about his inquiring about poison," and he answered, "No." On redirect the people were permitted to ask him to state the whole conversation which he had with the coroner. In other words, having on cross-examination been asked as to a conversation with the coroner, it was proper to ask him on redirect to state the whole of that conversation. Thus the situation will be seen to be a very different one. We think it was error to overrule the defendant's objection.

[4] At the trial it was brought out on the cross-examination of Rae Tanzer that the day after the hearing in the United States commissioner's office, as a result of which she was indicted, she admitted to a lawyer named Spielberg, and afterwards in a voluntary statement made in the United States Attorney's office which was taken down stenographically, that James W. Osborne was not Oliver Osborne. The government examined her at length with reference to this statement, but would not allow the defendant's counsel to look at it, would not offer it in evidence, or allow the defendant to do so. On redirect the defendant sought to bring out everything that the witness said when she made this statement in the United States Attorney's office. The record makes it perfectly clear that she wanted to explain why she said on the occasion of that statement that James W. Osborne was not the man who was with her at the Hotel Kensington. Whether he was or was not was a question of the most vital importance to the defendant. Then occurred the following:

"Q. You said in response to a question on cross-examination as to whether you were at the Sherman Square Hotel, and you said, 'Yes'? A. Yes.
"Q. And then you were asked as to whether you heard the telephone operator make certain statements, and you said, 'No, it was not true'? A. I did not hear it, but the starter told me that.

"Q. State to the court and jury all that was said on the subject.
"Mr. Wood: I object.
"The Court: Objection sustained.
"Mr. Slade: Exception.
"Q. Did you tell Mr. Wood the circumstances of that referred to in that letter? A. Yes; I did.
"Q. You told him all about it? A. Yes.
"Q. Now, tell his honor and the jury what you told Mr. Wood.
"Mr. Wood: I object.
"The Court: Objection sustained.
"Mr. Slade: It is my purpose to explain. I have no access to the notes, your honor.
"The Court: There is no reason why you should. The falsity is admitted.
"Mr. Slade: Yes, your honor; but the witness has stated—
"The Court: Falsity is falsity. That is an absolute. It is an absolute quantity. The witness is asked whether a certain statement which she has made is true. She says it is not. Now to cross-examine her would leave it there.
"Miss Tanzer, in your conversation with Mr. Wood, at the time this statement was made from which he read to you, did you tell him why you said that you thought that was not Mr. Oliver Osborne?
"Mr. Wood: I object.
"The Court: Objection sustained.
"Mr. Slade: Exception.
"Q. You testified that you tried to prevail upon your sisters to say that they made a mistake? A. Yes, I did.
"The Court: She has answered the question.
"Mr. Slade: I don't want to pursue this line, if your honor's ruling is that I cannot cross-examine this witness on the subject-matter that the learned District Attorney elicited upon cross, reading from a statement.
"The Court: The only matter that was raised by the District Attorney was this specific question, Did you say such a thing? and, Did you say such another thing?—the things themselves being in my judgment wholly immaterial; the only importance being that they were said by this witness. I don't see that you have a right to go into it.
"Mr. Slade: Am I right that, if the substance or subject-matter covered by the alleged statement contains a statement of fact, the witness should be permitted to explain, and state the circumstances under which it was made, so that the appropriate significance may be given to the fact itself? Now, my learned friend has taken out an extract of that statement and asked, Did you say so and so?
"The Court: It is a natural error, because you seem to forget about nine-tenths of the time that the defendant in this case is the man Safford.
"Mr. Slade: Yes, your honor; I appreciate it very much.
"The Court: Nobody appreciates it more keenly than I do.
"Q. Now, let me ask you, Miss Tanzer, now that you have replied to Mr. Wood's question that Mr. James W. Osborne is the man that you have referred to, is he the man that you have known as Oliver Osborne? A. Yes.
"Mr. Slade: That is all.
"(The witness steps down from the stand. Mr. Slade asks permission to have the witness resume the stand.)
"The Court: Now, we have heard quite enough. I think that the examination is closed. I decline to have her recalled. She has been fully examined. I think the matter is discretionary, and decline to have the young woman recalled.
"Mr. Slade: I submit that I have only asked the witness on cross-examination about four questions.
"The Court: You may call another witness, and if you have any further questions to ask Miss Tanzer, you may propound them in writing, and I will consider it over recess.
"Mr. Slade: I decline to do so, if your honor please.

"The Court: Very well, we will consider that she has been examined and dismissed. I decline to have her recalled.
"Mr. Slade: Your honor allows me an exception.
"The Court: Yes."

It was precisely because Safford, and not Rae Tanzer, was being tried, that Safford had a right to draw from her anything which would show that of her two irreconcilable accounts her statement in the United States Attorney's office was untrue and her testimony at the trial true. We think it was error to restrict him in this regard.

[5] We also think it was error to restrict the defendant's examination of Mr. Osborne's office diary to the single page for October 18, 1914. The following occurred in respect to this:

"Mr. Marshall: If your honor please, we offer the entry in the diary, and they are going over the entire book.
"The Court: Are you looking at the rest of that diary?
"The Witness: I have seen them.
"The Court: You hand the diary to the clerk.
"Mr. Slade: Your eyesight is very poor, Mr. Marshall.
"The Court: Hand the diary to the clerk. The diary will be kept open at the page at which it has been offered in evidence, and counsel may examine it at the clerk's desk.
"Mr. Slade: I take an exception to your honor's observations, if the court please.
"The Court: You will go on now.
"Mr. Slade: And I want to have the record complete with your honor's permission. We have a right—I have not looked at the diary, but we have a right, and I now claim the right, to examine that diary, for the purpose of cross-examining the witness in respect to entries.
"The Court: You have a right to examine the diary in so far as it has been offered in evidence.
"Mr. Slade: So that your honor limits me to the page?
"The Court: I do.
"Mr. Slade: Your honor will allow us the benefit of an exception.
"The Court: And it will furthermore be noted upon the record, if it is not noted upon the record, that the ruling is made upon the objection or application, both of the counsel for the government and of the witness on the stand, to the effect that cross-examining counsel was seen to turn over the pages of the diary other than the page which had been offered in evidence.
"Mr. Engel: If the court please, that is directed against me. I was handing the book over to Mr. Slade, and the leaf slipped. I was telling him something about—
"Mr. Slade: I want to show your honor I had not looked at it when Mr. Marshall jumped up.
"The Court: You will please go on.
"Mr. Slade: I except to the remark of counsel for the government, Mr. Wood, in saying the jury saw it all. That comment is improper.
"The Court: Yes. You may proceed."

We think the defendant was entitled to a general examination of the book, to test under the supervision of the court whether it really was a diary, and regularly kept, and by whom kept.

We cannot say to what extent the jury was influenced by the testimony as to the conversation which Oliver Osborne had with James W. Osborne and others, nor how their minds might have been affected in respect to the statement made by Rae Tanzer in the United States Attorney's office, if she had said that she made it, for example, in the hope of getting herself and her sisters and her counsel free of the

indictments found against them. The government insists that the other evidence in the case was so overwhelming against Safford's identification of James W. Osborne that these rulings were harmless. Without going further into the record, it is enough for us to say that the defendant had a right to be tried and convicted in accordance with the rules of law.

The judgment is reversed.

CARLAND v. HECKLER et al.

(Circuit Court of Appeals, Sixth Circuit. May 12, 1916.)

No. 2770.

1. PARTNERSHIP ⊂=64—CONTRACTS SIGNED WITH ASSUMED BUSINESS NAME—CONSTRUCTION OF STATUTE.

Pub. Acts Mich. 1907, No. 101, which forbids under penalty of fine and imprisonment the carrying on of any business under an assumed name, or any other than the real name of each individual owning or carrying on the business, unless a certificate is filed giving the name under which the business is done and the real name of each of the owners, does not render illegal and unenforceable a contract, signed "Lakeside Dredging Company, by" the individuals owning the business, and which expressly stated that it was entered into by such individuals, "copartners doing business under the firm name of Lakeside Dredging Company."

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 87–91; Dec. Dig. ⊂=64.]

2. BAILMENT ⊂=33—CONSTRUCTION—HIRE OF DREDGE.

A contract for the employment of a dredge in digging a canal at a stated sum per day provided that the hire should cease when the dredge reached the lake at the mouth of the canal after completion of the work, when it was being taken out and had nearly reached the lake, it grounded on a sand bar which had been formed in the mouth of the canal by a storm and was not released for nearly 30 days. *Held*, that it could not be said as matter of law that the cause of the delay was one which exonerated the employer from liability for the hire of the dredge until it reached the lake.

[Ed. Note.—For other cases, see Bailment, Cent. Dig. § 56; Dec. Dig. ⊂=33.]

3. BAILMENT ⊂=23—REDELIVERY OF PROPERTY—DELAY IN PERFORMANCE—DUTY TO MINIMIZE DAMAGES.

In such circumstances, although under the contract it was the duty of defendant, the hirer, to take the dredge out of the canal, it was also the duty of the owners, when it stranded, to render all reasonable assistance, and in an action to recover the hire during the time of the delay it was error to charge that they did their full duty if they rendered all the assistance that defendant asked of them.

[Ed. Note.—For other cases, see Bailment, Cent. Dig. §§ 107–116; Dec. Dig. ⊂=23.]

In Error to the District Court of the United States for the Eastern District of Michigan; Arthur J. Tuttle, Judge.

Action at law by Thomas F. Heckler and John Bechill, copartners under the firm name of Lakeside Dredging Company, against John C. Carland. Judgment for plaintiffs, and defendant brings error. Reversed.

P. H. Phillips, of Port Huron, Mich., for plaintiff in error.
Joseph Walsh, of Port Huron, Mich., for defendants in error.

Before KNAPPEN and DENISON, Circuit Judges, and EVANS, District Judge.

KNAPPEN, Circuit Judge. The plaintiffs (defendants in error here) were copartners; they contracted in writing with defendant, who was engaged in constructing a canal for the city of Port Huron, Mich., to furnish a steam dredge for digging a channel from Lake Huron to the partially completed canal. Plaintiffs were to man and provision the dredge and furnish all supplies, including coal, and to receive as pay $100 per day until the work should be completed, during a minimum of 18 days and a maximum of 8 calendar weeks. The work was to be completed "when the bottom of canal is down to engineer's grade." Plaintiffs were to furnish tugs for delivering the dredge at the canal, and, unless the work was completed in less than 18 days, for towing it away. It was agreed that defendant should pay plaintiffs "for all the time that their said dredge is in condition to proceed with the work" (Sundays excepted), notwithstanding the work "be delayed and said dredge not in operation on account of any occurrence in the carrying on of its work" by defendant, but not during delay due to the dredge being out of condition, or not fully manned or provisioned, or unable to do its work. There was express provision that, except as otherwise provided, defendant's liability "on account of said employment of said dredge shall cease after termination of contract at the time the said dredge reaches the mouth of said canal at Lake Huron."

The dredge was actually employed in construction work more than 7 weeks. It was then started for the lake (about half a mile distant), proceeding stern foremost. When near the lake it ran upon a bar caused by a heavy blow, which had washed in sand and gravel from the lake. As the crane and dipper were on the forward end of the dredge they were not available unless the dredge were turned about. Various attempts were made to get the dredge afloat, including pumping of the sand by steam, the use of a steam scraper, hauling by a tug from the stern, jetting the sand by hose and water pressure and dredging by an outside company. Finally the dredge was floated by means of dams forward and astern of the dredge, and the latter then turned about by cutting away the bank on each side of the canal. About 30 days were thus consumed in reaching the lake after the construction work was finished. Had there been no obstruction 2 or 3 days would have sufficed. The controversy below and here is limited to the rental charge of $100 per day during this period consumed in getting out of the canal, all rentals while the dredge was in use having been paid. Plaintiffs recovered verdict and judgment for about $3,000.

[1] 1. Defendant urges that this suit cannot be maintained because the contract sued on was void under Act 101 of the Public Acts of Michigan of 1907, which forbids the carrying on or transacting of any business in the state under any assumed name or any other than

the real name of each individual owning or carrying on the business, unless a certificate giving the name under which the business is or is to be conducted, together with the real name, residence and post office address of each of the owners of the business is filed in the office of the clerk of the county in which the business is or is to be conducted or transacted. Violation of the act is declared a misdemeanor and punishable by fine and imprisonment. This statute was considered by the Supreme Court of Michigan in Cashin v. Pliter, 168 Mich. 386, 388, 134 N. W. 482, 483, Ann. Cas. 1913C, 697. In that case the plaintiffs, who were doing business under a fictitious name, brought suit upon a written contract executed by them in that fictitious name. It was held that any contract "so made under an assumed name was illegal and not enforceable." As said at 168 Mich. 389, 134 N. W. 484 (Ann. Cas. 1913C, 697):

"The labor and materials were furnished under an illegal express contract, by virtue of which there can be no recovery."

Whether or not we are compelled to follow the decision in Cashin v. Pliter, we are entirely content to do so; for we think it correctly interprets the statute so far as it applies to the situation there presented.

In the instant case, however, while the record should, we think, be regarded as showing that plaintiffs maintained an office in Michigan for the transaction of business in the name of the Lakeside Dredging Company, which was, of course, a fictitious name, yet the contract, although signed by "The Lakeside Dredging Company by" the individual members, expressly stated that it was entered into "by and between Thomas F. Heckler and John Bechill, copartners, doing business in the firm name of Lakeside Dredging Company as parties of the first part," etc.

The pivotal question thus is whether, in the absence of express statutory declaration to that effect, we should ascribe to the Legislature an intention to forbid recovery by any copartnership under any contract it has made in compliance with law, where not only *actual information* of the names of the copartners is given, but where the contract is made *by such copartners* in their full and true names, merely because the partnership was at the time engaged in business under an assumed name, and had not given *constructive notice* to the public of the names of members of the firm. Cashin v. Pliter does not answer this question.

If the statute expressly declared illegal or unenforceable all contracts made by a copartnership which does business under an assumed name in the absence of the filing of the statutory certificate, it would be our plain duty to give it such effect. But it does not so declare; it does, however, make the transaction of business under such assumed name a misdemeanor. But this latter fact alone does not necessarily make all contracts by such copartnership unenforceable. Cashin v. Pliter, supra; Harris v. Runnels, 12 How. 86, 13 L. Ed. 901; Swisher v. Dunn, 89 Kan. 412, 131 Pac. 571, 45 L. R. A. (N. S.) 810. The question is one of legislative intent; and although, in the absence of anything in the statute having a contrary tendency, an intent to render

unenforceable contracts made *under such assumed name* would be presumed; yet the language of the statute, the subject-matter of it, the evil it seeks to prevent, and the purpose sought to be accomplished in its enactment, will all be taken into account in determining whether nonenforceability is intended to go farther. Wald's Pollock on Contracts, pp. 398–402; In re Reidy's Estate, 164 Mich. 167, 172, 129 N. W. 196.

The purpose of the statute, as stated by the Michigan Supreme Court, is "to protect the public against imposition and fraud, prohibiting persons from concealing their identity by doing business under an assumed name, making it unlawful to use other than their real names in transacting business without a public record of who they are, available for use in courts, and to punish those who violate the prohibition." Cashin v. Pliter, at page 389 of 168 Mich., at page 483 of 134 N. W. (Ann. Cas. 1913C, 697).

The instant case is not within the mischief which the statute is designed to prevent, for here there was no concealment, but, on the contrary, express disclosure of the identity of the copartners; and their real names were in fact used in the transaction involved.

The rule of invalidity usually applied under statutes of this general nature is that a "contract made in *violation of a statute is void,* and that when a plaintiff can not establish his cause of action *without relying upon an illegal contract,* he cannot recover." Miller v. Ammon, 145 U. S. 421, 426, 12 Sup. Ct. 884, 886 (36 L. Ed. 759). See, also, the principle stated in Cashin v. Pliter, supra, at page 389 (foot) of 168 Mich., 134 N. W. 482, Ann. Cas. 1913C, 697; Brewing Co. v. Wall, 98 Mich. 158, 57 N. W. 99. The later decisions of the Supreme Court of Michigan have not enlarged the strictness of construction applied in Cashin v. Pliter, but have, if anything, relaxed it.[1] Gay v. Seibold, 97 N. Y. 472, 49 Am. Rep. 533, is a case in point. That case involved a statute forbidding the transacting of business in the name of a partner not interested in the firm, or the designation "& Company" unless representing an actual partner or partners. The statute was a penal one. It was held that, although one may be doing business generally in violation of a statute, "a violation thereof may not be predicated on any transaction in which the false designation is not used." As there said: "An indictment under the statute cannot be based upon such a transaction." Similar holdings are found in O'Toole v. Garvin, 1 Hun, 92, and Donlon v. English, 89 Hun, 67, 35 N. Y. Supp. 82.

It results that we do not feel justified in so extending the construction put upon the statute in Cashin v. Pliter, as to include this case.

[2] 2. Defendant requested peremptory instructions in its favor, in substance, that no damages for delay in getting the dredge out of the

[1] See Axe v. Tolbert, 179 Mich. 556, 146 N. W. 418, where the name of "Wm. Axe & Son" was held not fictitious or assumed; Cross v. Leonard, 181 Mich. 24, 147 N. W. 540, where the name "Cross Brothers" was held not fictitious; also Zemon v. Trim, 181 Mich. 130, 147 N. W. 540, where a similar holding was made in the case of "David S. Zemon & Co.," the name of one partner being represented only by the word "Co." See also Sauer v. Construction Co., 179 Mich. 618, 146 N. W. 422.

canal and into the lake could be recovered because such damages were not within the reasonable contemplation of the parties in making the contract. The argument is that it could not reasonably have been contemplated that more than a day or two would be consumed in getting the dredge back to the mouth of the canal, and that a storm so violent as to obstruct the canal and cause a delay of about 30 days could not reasonably have been expected.

Doubtless the parties did not expect to meet the serious obstructions actually encountered; but unexpected difficulties are not enough to excuse nonperformance of a contract, and even if the evidence tended to show (which we do not hold) that the storm which caused the sand bar was unprecedented, or even more violent than likely to occur at that season of the year, it certainly did not conclusively so establish, and so could not form the basis of peremptory instructions.

[3] 3. Defendant also requested instructions, in substance, that it was plaintiff's duty, "at the expiration of the term of employment," to take the dredge out of the canal, that defendant was under no obligation to do so, and that plaintiffs cannot recover for default or neglect on their part or on account of the delays occasioned by their own neglect.

The jury was instructed, however, that it was defendant's duty to get the dredge out of the canal and to furnish such tools as were necessary therefor; that plaintiffs could not recover for delay due to their performance of their own work; but that, while it was their duty to give defendant such assistance as he asked for, and to use their own men and the dredge to assist in operations requested by defendant within plaintiff's line of work, in removing the obstacle and getting out of the canal, yet, if plaintiffs did all that they were asked to do, they would be entitled to recover the full amount claimed.

We think the court properly charged that it was defendant's duty to deliver the dredge at the mouth of the canal; but one injured by the breach of a contract is required to do everything reasonably within his power to minimize his damages; [2] and while the action here is not strictly to recover damages for delay in returning the dredge to the agreed place, the stipulated payment of $100 per day during the period in question is not, under the peculiar circumstances of the case, so different in principle from damages for delay in returning as to make the rule referred to wholly inapplicable. The work for which the dredge had been hired was finished and defendant's beneficial use of the dredge ended; his only remaining duty was to pay for the time consumed in returning it to the agreed place. During such return, not only were plaintiffs actually in charge of the dredge through their own crew, but plaintiff Bechill (whom we shall hereafter call plaintiff) was personally upon it. Although we think defendant properly chargeable with the expenses of employing the outside assistance needed, it was, we think, plaintiff's duty to co-operate with defendant in de-

[2] Warren v. Stoddart, 105 U. S. 224, 26 L. Ed. 1117; Lawrence v. Porter (C. C. A. 6th Cir.) 63 Fed. 62, 11 C. C. A. 27, 26 L. R. A. 167; Campfield v. Sauer (C. C. A. 6th Cir.) 189 Fed. 576, 111 C. C. A. 14, 38 L. R. A. (N. S.) 837; Canton-Hughes Pump Co. v. Llera (C. C. A. 6th Cir.) 205 Fed. 209, 123 C. C. A. 397.

vising, suggesting and carrying out measures for freeing the dredge when obstructions were met, unless relieved therefrom by defendant's express and voluntary assumption of sole authority over the operation; we think such assumption does not conclusively appear as matter of law. The court erred, in our opinion, in instructing the jury absolutely that plaintiffs discharged their duty if they did all that defendant asked of them.

We think the instruction may have been prejudicial; for the record, in our opinion, raised a question of fact whether plaintiffs did do everything they reasonably could have done to relieve the situation. True, it was conceded that plaintiffs did everything they were expressly asked to do; but there was also testimony that they "made no effort or attempt on their own account to get out of there." There was also testimony tending to show that in the early part of the return movement plaintiff caused a delay of perhaps a day by a refusal to allow the dredge to proceed under claim that it would collide with a water pipe in the canal bed, although it was finally found that there was substantial clearance way. It was also conceded by plaintiff that the method of releasing the dredge by building dams and floating her, if adopted when the bar was first encountered, would have required but three or four days to free the dredge. This would have saved more than three weeks time.

True, the jury might have concluded that plaintiff's fear of colliding with the water pipe was well-founded, and that plaintiffs were not remiss in failing, early in the operation, to hit upon the expedient (actually suggested at the last by defendant's manager), of floating the dredge by the use of dams. But we think that, having in view plaintiff's experience and his actual charge of the dredge and its movement, and the permissible inference from his testimony that he refrained from criticising methods he did not approve because defendant's manager "was running the job and trying to get the sand bar out," there was room for a conclusion that he did not do all he reasonably could to relieve the situation, had he recognized an active and affirmative duty in that direction; and although the court properly left it for the jury to say whether plaintiffs were justified in refusing to let the wrecker haul the dredge off the bar through fear of injury to it, we think the jury should not have been told that that matter was (as the court thought), "the only fault alleged and concerning which there is an issue," and that plaintiffs' duty should not have been expressly limited as it was by the charge in the respect before referred to.

For these errors in the charge referred to, the judgment must be reversed, and a new trial awarded.

STAGER v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. May 9, 1916.)

No. 111.

1. CONSPIRACY ⟸33—PROSECUTION—ESSENTIALS OF OFFENSE.
In a prosecution under Criminal Code (Act March 4, 1909, c. 321) § 37, 35 Stat. 1096 (Comp. St. 1913, § 10201), denouncing the offense of conspiring to defraud the United States in any particular, it is unnecessary, to warrant conviction of an examiner of merchandise at the appraiser's stores of conspiring to defraud the government, to show that the government was actually defrauded.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. § 60; Dec. Dig. ⟸33.]

2. CONSPIRACY ⟸43(10)—PROSECUTION—INDICTMENT—SUFFICIENCY.
In a prosecution under Criminal Code, § 37, for conspiring to defraud the government, indictment *held* sufficient.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 86, 97; Dec. Dig. ⟸43(10).]

3. CRIMINAL LAW ⟸150—LIMITATION—CONSPIRACY—OVERT ACTS.
Where, since the date named in an indictment charging conspiracy to defraud the government, overt acts showing a continuance of the conspiracy were committed within the period of limitations, the running of the statute is tolled.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 274, 275; Dec. Dig. ⟸150.]

4. CRIMINAL LAW ⟸427(5)—EVIDENCE—ACTS OF CONSPIRATORS.
In a prosecution for conspiring to defraud the government, where the evidence did not establish the conspiracy, letters written by accused's alleged co-conspirator, tending to show his guilt and participation in the conspiracy, are inadmissible, being hearsay.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1017; Dec. Dig. ⟸427(5).]

5. CONSPIRACY ⟸47—PROSECUTION—EVIDENCE—ADMISSIBILITY.
In a prosecution against an examiner at the appraiser's stores for conspiring to defraud the government, evidence *held* insufficient to support conviction.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 105–107; Dec. Dig. ⟸47.]

In Error to the District Court of the United States for the Southern District of New York.

Charles L. Stager was convicted under Criminal Code, § 37, of conspiring to defraud the United States, and brings error. Reversed and remanded.

Gerry & Wakefield, of New York City (Henry A. Wise and Carl E. Whitney, both of New York City, of counsel), for plaintiff in error.

H. Snowden Marshall, U. S. Atty., of New York City (Frank E. Carstarphen, Asst. U. S. Atty., of New York City, of counsel), for the United States.

Before COXE and WARD, Circuit Judges, and AUGUSTUS N. HAND, District Judge.

AUGUSTUS N. HAND, District Judge. The defendant, Charles I. Stager, an examiner of merchandise at the appraiser's stores at New York, was indicted under section 37 of the United States Criminal Code for conspiring with George Silva and Henry Blumfeld Sciama to defraud the United States. The indictment alleged that:

"The said Silva and the said Sciama agreed with the said Stager that the said Stager should obtain secret and confidential information given by other importers of merchandise in connection with the importation of merchandise at the custom house at the port of New York, and should inform the said Silva and the said Sciama of the said confidential and secret matters and information concerning the said other importers of merchandise; and the said defendants then and there conspired and agreed together that the United States should be deprived and defrauded of the said confidential information which it had obtained from the said importers other than the said Silva and the said Sciama and that the said Silva and the said Sciama should obtain the said secret and confidential information concerning other importers."

The indictment further alleged that the Treasury Department had promulgated rules that:

"* * * Information as to valuations placed by exporters and importers upon merchandise imported into the United States shall be secret and confidential, and shall not be disclosed by officers and employés and other persons connected with the said Treasury Department, and that subordinate officers of customs shall not be permitted to give information to importers concerning the valuations placed upon merchandise imported by other importers."

The defendant, Charles I. Stager, on motion of the government for a severance, was tried alone and convicted.

[1] It is well settled that the government need not show pecuniary loss in order to establish a conspiracy to defraud. The Supreme Court held in Hass v. Henkel, 216 U. S. 462, 30 Sup. Ct. 249, 54 L. Ed. 569, 17 Ann. Cas. 1112, that the statute was broad enough to include any conspiracy for the purpose of impairing, obstructing or defeating the lawful function of any department of government, and that a conspiracy to obtain crop reports from a statistician of the Department of Agriculture in advance of the time allowed by the regulations of the Secretary of Agriculture, fell within the prohibition of the act.

[2, 3] Question has been made as to the technical sufficiency of the indictment and as to whether the statute of limitations is a bar to the action. In our opinion the indictment is sufficient, and while the statute of limitations would be a bar if nothing had been done since the date of the original conspiracy alleged to have been formed December 29, 1911, the overt acts set forth in the indictment and proved would show a continuance of the conspiracy sufficient to take the case out of the statute of limitations. Wilson v. United States, 190 Fed. 427, 111 C. C. A. 231. Without regard to these considerations, however, we think the judgment must be reversed, because the evidence offered against Stager so far failed to establish the existence of any conspiracy as to leave no question for the jury and material errors were committed at the trial.

[4, 5] Charles I. Stager was shown to have been an appraiser of feathers at the appraiser's stores, and to have appraised various goods entered at the custom house in New York, in September, 1912. It also appeared that the public were not admitted to the floor where the

appraising was done except under special permits in cases where the applicants had business requiring their presence. Besides Stager and his clerk, there were numerous employés who were upon this floor, and after the appraisals were completed, the goods were returned to the custom house where the invoices and appraisals might become known to still other persons.

The invoice valuations and the appraisals by Stager of a number of invoices in September, 1912, were set forth in a letter dated September 27, 1912, written by George Silva to Henry Blumfeld Sciama. The most that can be said to have been shown by all this is that Silva had detailed information as to the invoices appraised by Stager, and the appraisals of the latter, when information as to such matters was not readily obtainable from others than Stager and his clerk, or presumptively known by many others. Numerous people in the department might have secured access to the invoices and appraisals, but undoubtedly Stager and his clerk were the only ones in the appraiser's stores whose duty it was to know about them. The proved common knowledge of the invoices and appraisals by Stager and Silva is the only important evidence tending to show a conspiracy to divulge confidential information contrary to the regulations of the Treasury Department. The government further showed by the witness Martin that Stager condemned certain quills imported by Martin as prohibited because they were "either eagle or condor," and said to Martin, who asked him how he could fill his contract if the imported quills were condemned, that there were several firms who might fill the order, and mentioned Sciama & Co. in that connection. Another importer of feathers named Kulies testified that Stager told him in 1912 that he was bringing in his goods too cheap "by the comparison of Sciama & Co."

We cannot see that mere comparison in a conversation between the invoices of Kulies and the invoices of Sciama & Co., or the suggestion that certain feathers could be bought of Sciama & Co., would either tend to establish a conspiracy unlawfully to obtain for Sciama & Co. confidential information, or to show the continuance of a conspiracy, the formation of which had already been established.

The government proved, however, that after a subpœna duces tecum was served on George Silva to appear before the grand jury in December, 1914, a detective shadowed Stager to Silva's place of business the next day. The subpœna resulted in the surrender of the letter book of Silva containing copies of letters from Silva to Sciama, one of which contained a list of appraisals by Stager. Stager says he merely happened to go to Silva's place to secure information about the feather market; but he admits that Silva talked with him about the service of the subpœna, though not about the contents, and was agitated, and he did not record this visit in a book, as was the custom when he visited importers to secure information about the market. Stager's call at this time certainly arouses suspicion.

The case comes down to this: Was there sufficient evidence of the formation of a conspiracy for submission to a jury by reason of the fact that Stager and Silva had common information as to the

invoices and appraisals which passed through Stager's hands, and by reason of the fact that Stager went to the office of Silva the day after the service of the subpœna and the delivery to the government, as a consequence, of the incriminating letter book? We do not think these circumstances were alone sufficient to establish a conspiracy.

The government, however, attempted to strengthen its case by the introduction of certain letters both prior and subsequent to the one of September 27, 1912, written by Silva to Sciama. These letters in general contained statements that information had been obtained by Silva from Stager, and thereby conveyed such information to Sciama. When a conspiracy is once established acts and admissions of any one of the conspirators in pursuance of the conspiracy, and while it continues, are admissible against the others, upon the theory that the conspirators are agents for one another in the common enterprise. Connecticut Mutual Life Insurance Co. v. Hillmon, 188 U. S. at page 218, 23 Sup. Ct. 294, 47 L. Ed. 446. But the preliminary question whether sufficient evidence of a conspiracy has been adduced must always be answered by the court in the affirmative or the general rule of evidence excluding hearsay will render an admission of one of the conspirators inadmissible against the others. Inasmuch as we do not think the existence of a conspiracy was established, these letters were wholly incompetent and inadmissible as against Stager. But even if there had been sufficient evidence of a conspiracy, we find nothing tending to establish that any conspiracy was entered into, as alleged in the indictment, on the 29th day of December, 1911. There does not seem to be a particle of competent evidence of common knowledge on the part of Charles I. Stager and his co-conspirators, Silva and Sciama, as to the invoices and appraisals of the goods of other importers prior to September, 1912, when a copy of the list of appraisals made by Stager and sent by Silva to Sciama appears in the letter book of Silva. This common knowledge existing at a time when invoices and appraisals were guarded from publicity is the only thing in the record which could tend to show the existence of a conspiracy at any time. The only proof offered to establish a conspiracy prior to September, 1912, therefore, consisted of the letters of Silva to Sciama, which were clearly inadmissible as no competent proof to show the existence of a conspiracy during the time when these letters were written appears to have been offered. The letter of Decembr 29, 1911, addressed by Silva to Sciama was particularly prejudicial to the defendant Stager, and the admission of it would alone be sufficient to require the reversal of the judgment. This letter contained the following statement:

"Of course the $200 to Stager are well placed, and we shall have to give him more at the end of the year, if he continues to keep us informed properly."

We can find no warrant for the admission of this letter which was written at a time covered by no other or prior evidence showing the formation of a conspiracy than the letter itself. If such a letter is competent, a conspiracy could be proved by the mere letter of one man that another was implicated. The very object of the rule against hearsay was to prevent a jury from being influenced by statements of

persons who could not be subjected to cross-examination. If the letters were not in the case, we venture to say no one would think the mere possession by Silva of information which Stager had primarily within his knowledge would be sufficient to establish that Stager had given this confidential information to his codefendant.

The fact is, the incompetent letters were the basis of the judgment of conviction, which for the foregoing reasons must be reversed.

SECURITY TRUST & SAV. BANK v. WM. R. STAATS CO. et al.

(Circuit Court of Appeals, Ninth Circuit. May 8, 1916. On Motion for Rehearing, June 2, 1916.)

No. 2691.

BANKRUPTCY ⟸166(4)—VOIDABLE PREFERENCE—EXTENSION OF CREDIT ON CASH SALE.

Bankrupt, which was a brokerage corporation, within four months prior to the bankruptcy, bought from defendant, another brokerage company, certain shares of stock, the certificates were delivered, and it gave its check for the price. The check was refused payment, but at bankrupt's request defendant retained and twice more presented it, after which, and four days after the sale, defendant accepted bankrupt's note, secured by mortgage, for the purchase money. It made no effort to regain possession of the stock, which in the meantime was hypothecated by the bankrupt. *Held*, that whatever right of rescission defendant may have had was lost, and it became a general creditor, when it agreed to wait and to present the check a second and third time, and accepted security for the debt, and that, bankrupt being at the time insolvent, and defendant having reasonable ground to believe such fact, the mortgage constituted a preference, voidable at suit of the bankrupt's trustee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 250, 251, 256; Dec. Dig. ⟸166(4).]

Appeal from the District Court of the United States for the Southern District of California; Oscar A. Trippet, Judge.

Suit in equity by the Security Trust & Savings Bank, trustee in bankruptcy of the Fielding J. Stilson Company, against the William R. Staats Company and the Title Insurance & Trust Company. Decree for defendants, and complainant appeals. Reversed.

This is a suit in equity between the Security Trust & Savings Bank, a corporation, trustee in bankruptcy of the estate of Fielding J. Stilson Company, a bankrupt corporation, and William R. Staats Company and Title Insurance & Trust Company, corporations. The complaint alleges: That upon July 2, 1912, petition in involuntary bankruptcy was filed against the Stilson Company, and on October 24, 1912, the Stilson Company was adjudged a bankrupt; that on March 12, 1912, the Staats Company was a general unsecured creditor of the Stilson Company for $3,870; that the Stilson Company was then insolvent, and the Staats Company knew, and had reasonable cause to believe, that the Stilson Company was insolvent; that on March 19, 1912, the Stilson Company made and delivered to the Title Insurance & Trust Company a deed of trust for certain realty in Los Angeles, which was recorded on March 20, 1912, and was received as security for the indebtedness of $3,870 due by the Stilson Company to the Staats Company; and it is alleged that the effect of the conveyance was to enable the Staats Company to receive a greater

percentage of its indebtedness than any other creditors of the same class, and that the conveyance was made by the Stilson Company to give the Staats Company a preference in violation of the bankrupt statutes. The trustee prays that the conveyance be vacated and declared void, and that it be decreed that neither the Staats Company nor the Title Insurance Company has any right to the property described in the conveyance.

The Staats Company and the Title Insurance & Trust Company, by answer, admitted the execution and delivery of the conveyance, but denied that it operated as a preference, and set up that the Staats Company was a creditor of the Stilson Company and that the deed of trust was made under these circumstances: That on the 19th of March, 1912, and for months before then, the Stilson Company and the Staats Company were stockbrokers in Los Angeles; that on March 15, 1912, the Stilson Company asked the Staats Company to sell it for cash certain shares in the Amalgamated Oil Company at $64.50 per share, and that the Staats Company sold to the Stilson Company 60 shares at $64.50, and delivered the certificates of stock to the Stilson Company with an understanding and agreement between the Stilson Company and the Staats Company that the sale was made for cash; that the Stilson Company then delivered to the Staats Company its check on a bank in Los Angeles in payment for the stock, and that in due course the Staats Company presented the check, but was notified that the Stilson Company had no funds wherewith to pay the check, and that it had not had funds wherewith to pay the check when the same was drawn, and that payment was refused; that the Staats Company notified the Stilson Company of the refusal of the bank to pay the check, but that the Stilson Company assured the Staats Company that the Stilson Company was sound, but that certain funds which it had expected to receive had been slightly delayed in receipt, and that, for that reason, there were not funds on deposit sufficient to pay the check; that the Stilson Company then agreed that, if the Staats Company would not exercise its right to rescind the sale, the Stilson Company would execute to the Staats Company its note for $3,870, and to secure the note would make a deed of trust on the property described in the deed of trust heretofore referred to; that in pursuance of such agreement the Staats Company refrained from exercising its right to rescind the sale, and accepted from the Stilson Company its note for $3,870, and the deed of trust referred to. Good faith on the part of the Staats Company is pleaded, and it is averred that a present fair consideration passed from the Staats Company to the Stilson Company for the deed of trust.

Over the objections of the defendants below (the Staats Company and the Title Insurance & Trust Company) the matter was referred to a special master to hear the issues raised by the complaint and the answer and to report the same to the District Court, together with findings of fact and conclusions of law. Thereafter the special master made his findings to the effect that on March 19, 1912, the Stilson Company was insolvent; that the transfer made by the Stilson Company to the Title Insurance & Trust Company was made and received as security for an indebtedness of $3,870 then due by the Stilson Company to the Staats Company, and that the effect of the transfer was to enable the Staats Company to obtain a greater percentage of its claim against the bankrupt than other creditors of the bankrupt of the same class; and that the Staats Company, when it received the transfer, had reasonable cause to believe that it was intended by the giving of the transfer to give a preference, and that the transfer was voidable at the instance of the trustee. The Staats Company and the Title Insurance & Trust Company, defendants below, filed exceptions to the findings and report of the special master. The District Court, after overruling several exceptions and sustaining others, dismissed the complaint. From the judgment of dismissal, the Security Trust & Savings Bank, as trustee of the Stilson Company, bankrupt, appeals.

W. T. Craig, of Los Angeles, Cal., for appellant.

O'Melveny, Stevens & Millikin and Walter K. Tuller, all of Los Angeles, Cal., for appellees.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge (after stating the facts as above). The appellant contends that the court erred in sustaining the exceptions of the defendants: To the finding of the special master that the deed of trust operated to enable the Staats Company to obtain a preference; to the finding that the deed of trust was executed to secure an antecedent debt, and that the transaction between the Stilson Company, bankrupt, and the Staats Company, was not a single transaction; to the finding that the 60 shares of stock had been hypothecated by the bankrupt prior to the execution of the trust deed; and to the finding that the Staats Company, at the time of the execution of the deed of trust, had reasonable cause to believe that a preference was intended.

The history of the transaction involved, as gathered from the evidence, is in accord with the findings of the special master, and may be briefly stated as follows: The Stilson Company was adjudged a bankrupt on October 24, 1912, upon an involuntary petition filed on July 2, 1912. The particular act which was made the basis of the adjudication in bankruptcy was that about March 14, 1912, while the Stilson Company was insolvent, it conveyed certain of its real property in Los Angeles to the William R. Staats Company with intent to hinder and delay the creditors of the Stilson Company, and with intent to prefer the Staats Company over other creditors of the bankrupt. In due course of proceedings in the bankruptcy court, it was there found that on March 15, 1912, the Stilson Company was indebted in the sum of more than $250,000, and that it had at that time assets of no greater value than $215,000, and that on the 19th of March, when insolvent, the Stilson Company had conveyed the realty heretofore referred to to the Staats Company, then a creditor of the Stilson Company, with intent to prefer the Staats Company over its other creditors, and that the effect of the transfer was to enable the Staats Company to receive payment of a greater percentage of its debt than any other unsecured creditor of the bankrupt.

In the present suit it was found by the special master, and the evidence well sustains the finding, that on March 15, 1912, the Stilson Company, in due course of business, bought from the Staats Company 200 shares of Amalgamated Oil Company stock at $64.50 per share. The Staats Company delivered certificates representing 60 shares, and gave a broker's duebill for 140 shares for subsequent delivery. On that day, March 15th, the bankrupt, to pay for the shares, gave its check for $12,900 to the Staats Company, payable at the Citizens' National Bank of Los Angeles, but on presentation of the check to the bank it was rejected for want of funds and was returned. On March 16th, Mr. Jardine, vice president of the Staats Company, had a talk with Mr. F. J. Stilson, president of the Stilson Company, concerning the rejected check, and was told by Stilson that the check would be made good, and Stilson asked that it be put through the bank again. On Monday, March 18th, the check was again presented at the bank, but rejected, and thereafter, again, on the 18th of March, Stilson, of the Stilson Company, asked an officer of the Staats Company to put it through the bank once more; but again it was rejected by the bank for want of funds to the credit of the

Stilson Company. Thereupon, at a conference between Mr. Jardine, of the Staats Company, and Mr. Stilson, of the Stilson Company, Stilson said he expected payment of $10,000 upon some real estate and that he would first take care of the "item" with the Staats Company; but on the 19th of March Stilson advised the Staats Company that he could not meet the payment, as the expected funds did not materialize, but that the Stilson Company had some realty in Los Angeles and would give the Stilson Company's equities as security. An employé of the Staats Company then went with Stilson to examine the real property offered as security, with the result that the real estate was accepted as security, and a trust deed was given by the Stilson Company on the afternoon of the 19th to the Title Insurance & Trust Company for the benefit of the Staats Company to secure a promissory note due one day after date in the sum of $3,870, the price of the 60 shares of stock of the Amalgamated Oil Company which had been delivered by the Staats Company to the Stilson Company. On March 20th, at 9 o'clock, this deed of trust was put on record, and on that same morning the Stilson Company suspended, and thereafter did no business.

The evidence also sustains the finding to the effect that the duebill for the 140 shares which had been given by the Staats Company to the Stilson Company, and the 60 shares also, had been hypothecated by the Stilson Company, and there is no evidence to show that, when the Staats Company agreed to give the Stilson Company time to obtain the money wherewith to meet its obligations, there was any suggestion of holding onto the stock which the Staats Company had sold to the Stilson Company. The Staats Company, with full knowledge of the rejection of the check, and without any then apparent thought of retaining a lien on the shares, expressly agreed with the Stilson Company to wait and again to put the check through the bank, and did so twice after it had first been rejected.

We agree with the special master in holding that, when the Staats Company accepted the mortgage, it was in lieu of cash, and that the transaction became one where the debtor, to secure an existing antecedent debt due by it to the creditor, gave security, and the creditor, confirming the sale, accepted the security. We do not think that the transaction can be looked upon as a new and present advancement to the Stilson Company; it was a sale and delivery of the 60 shares of stock, and they became part of the general assets of the Stilson Company. The evidence shows that the effect of the enforcement of the mortgage given by the Stilson Company when insolvent would be to give to the defendant the Staats Company a greater percentage of its claim against the bankrupt than other creditors of the same class, and under the facts the bankrupt must be held to have given a preference by the giving of such security to the Staats Company.

Our further view is that the evidence sustains the finding of the special master to the effect that, when the Staats Company received the trust deed from the Stilson Company, it had reasonable cause to believe that it was intended to give a preference. There is ample evidence to show that the Staats Company must have known of the

financial stress of the Stilson Company. Its officers knew when the mortgage was given that the Stilson Company then had checks outstanding, but rejected, and that the intent of the Stilson Company was to secure the Staats Company for the price of the 60 shares; it being in evidence that the Staats Company only wanted security for the 60 shares and did not recognize the duebill for 140 shares. We must affirm the view of the special master in his conclusions that all the circumstances surrounding the transaction must have caused the Staats Company to believe that the Stilson Company was insolvent and that the effect of the mortgage would be to prefer the Staats Company; and we hold that the master was correct in finding that it was intended that the transaction should operate as a preference. Sundheim v. Ridge Avenue Bank (D. C.) 138 Fed. 951; In re Dorr, 196 Fed. 292, 116 C. C. A. 112; Hotchkiss v. National City Bank, 201 Fed. 664, 120 C. C. A. 92; Id., 231 U. S. 50, 34 Sup. Ct. 20, 58 L. Ed. 115.

Finally, we believe that the Staats Company became a general creditor of the bankrupt, and that the transaction was broken in its continuity when the Staats Company agreed to wait for its money and to send the check through the bank the second and third time, and when it agreed to wait to see whether the bankrupt would obtain money which its agents said was expected from the sale of certain other property, no effort having been made by the Staats Company to prevent the shares of stock which had been sold and delivered to the Stilson Company from passing out of the hands of the Stilson Company. That part of the argument made by the appellee in support of the action of the District Court wherein the point is made that the giving of the check by the Stilson Company was a representation that that corporation had sufficient funds to meet the check, and that, such representation not being true, a fraud was perpetrated on the Staats Company, and that title remained in the Staats Company, and did not pass until the note and deed of trust were accepted, has received our careful consideration. But whatever right of rescission existed because of misrepresentation by the Stilson Company in giving the check was abandoned by the position taken when security was accepted for the purchase money. Joslin v. Cowee, 52 N. Y. 90; Amer v. Hightower, 70 Cal. 440, 11 Pac. 697; Wendling Lumber Company v. Glenwood Lumber Company, 153 Cal. 411, 95 Pac. 1029.

The order of the District Court, sustaining the exceptions to the report of the special master and dismissing the bill, is reversed, and the cause is remanded, with directions to overrule the exceptions to the report of the master and to enter a judgment in favor of the complainant.

On Motion for Rehearing.

PER CURIAM. We have given attentive examination to the appellees' motion and brief for rehearing. Stress is laid by the appellees upon the recent decision of the Supreme Court in Bailey, Trustee, v. Baker Ice Machine Company, 239 U. S. 268, 36 Sup. Ct. 50, 60 L. Ed. 275. But the facts of that case are very different from those here involved. The statement by Justice Van Devanter shows that

by a contract in writing it was there stipulated that the title to the machine installed should be and remain in the Baker Company until full payment of the purchase price; that the machine should be kept insured for the benefit of the Baker Company; that if default was made in the payment of the purchase price the Baker Company should have the right to resume possession and take the machine away; and that the Baker Company should have a right to file a mechanic's lien for materials and labor furnished under the contract. The court held that the title to the property was retained in the vendor and that the contract had been rightly held to be one of conditional sale. Much closer to the present case are National City Bank v. Hotchkiss, 231 U. S. 50, 34 Sup. Ct. 20, 58 L. Ed. 715, and Mechanics' Bank v. Ernst, 231 U. S. 60, 34 Sup. Ct. 22, 58 L. Ed. 121, where the opinions and decisions appear to us to be in direct accord with our decision herein.

Motion for rehearing is denied.

In re PIERSON et al.

In re VAN THYN et al.

(Circuit Court of Appeals, Second Circuit. May 9, 1916.)

Nos. 107–109, 114.

1. BANKRUPTCY ⊂⊃440—PROCEEDINGS—REVIEW.

A petition to revise is the proper means of procuring review of an order of the District Court in an omnibus proceeding by creditors to reclaim property in the hands of the trustee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 915; Dec. Dig. ⊂⊃440.]

2. BANKRUPTCY ⊂⊃140(3)—BROKERS—RIGHTS OF CUSTOMERS.

Though it was the habit of bankrupt stockbrokers always to have enough stock on hand or hypothecated to cover all their customers who were long, customers who were long on the day of the failure cannot claim specific stocks on hand, on the presumption that such stock was intended to cover their transactions, where there was not sufficient stock in the brokers' box or hypothecated to cover all the long customers, though some did not assert any right to the specific stock.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 225; Dec. Dig. ⊂⊃140(3).]

3. BROKERS ⊂⊃29—RIGHTS OF BROKERS.

Where bankrupt stockbrokers, commissioned to purchase stock for a customer, never made the purchase, they are guilty of a conversion of the customer's money, and are liable for the full sum paid for the stock, instead of the value of the stock on the last day the Stock Exchange was open before the failure.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 22; Dec. Dig. ⊂⊃29.]

Appeals from and Petitions to Revise Order of the District Court of the United States for the Southern District of New York.

In the matter of the bankruptcy of J. Fred Pierson, Jr., and Clar-

ence E. Fell, individually and as copartners doing business as J. F. Pierson, Jr., & Co. Hela Van Thyn and others appeal from and petition to revise an order (225 Fed. 889) determining the rights of various claimants in an omnibus proceeding to reclaim property in the hands of a receiver. Order modified as to one claimant, and affirmed.

Goldman, Heide & Unger, of New York City, for petitioners Van Thyn and others.

James Gillin, of New York City, for petitioner Gott.

Bayard L. Peck, of New York City, for petitioner Quinn.

Stanchfield & Levy, of New York City (W. M. Parke, of New York City, of counsel), for receiver.

Before WARD and ROGERS, Circuit Judges, and MAYER, District Judge.

WARD, Circuit Judge. [1] The parties thinking themselves aggrieved have, out of abundant caution, taken both an appeal and a petition to revise. The proper remedy is the petition to revise. In re Rose Shoe Manufacturing Co., 168 Fed. 39, 93 C. C. A. 461.

July 30, 1914, the New York Stock Exchange closed and did not reopen until December 12th. December 8, 1914, a petition in bankruptcy was filed against J. F. Pierson, Jr., & Co., stockbrokers, and a receiver appointed. The firm had borrowed of the banks upon securities belonging to the customers properly hypothecated, some of which, or their proceeds, were turned over to the receiver upon the liquidation of the loans. February 4, 1915, an omnibus proceeding was begun before a special master to determine the rights of various claimants thereto, and this is a petition to revise an order of the District Court by four of the claimants.

Claim of Van Thyn to 100 Shares of Central Leather Stock.

May 18, 1914, the bankrupts bought for this customer 100 shares of Central Leather. On the day of the failure, December 8, 1914, there was a debit balance in his account of $1,256.43. On that day there were hypothecated with the banks 335 shares of the same stock, which covered all purchases for customers who were long of it. When the loans were closed out, the banks returned 235 shares to the receiver. Van Thyn, the only long customer making a specific claim for stock, tendered his debit balance and demanded 100 shares.

Claim of Levy for 20 Shares of Southern Pacific Stock.

September 5, 1913, the bankrupts bought for this customer 20 shares of Southern Pacific stock. On the day of the failure they were long 200 shares hypothecated for loans and had one share on hand. When the loans were closed out, 60 shares and some cash were returned to the receiver. On the day of the failure Levy's account, after crediting him with the value of his collaterals, showed a credit balance of $1,487.94, which he tendered to the receiver and demanded 20 shares of Southern Pacific stock, no other specific claim being made.

Claim of Quinn to 20 Shares of Westinghouse and 10 Shares of United States Steel Stock.

August 24, 1914, this customer delivered 20 shares of Westinghouse stock to the bankrupts as collateral for his marginal account. On the day of the failure the bankrupts were long 150 shares. When the loans were closed out, 50 shares were turned over to the receiver. Quinn, the only claimant for stock specifically, demanded 20 shares. July 30, 1914, he delivered to the bankrupts 10 shares of United States Steel as collateral. On the day of the failure they were long 921 shares. After the loans had been closed out there were delivered to the receiver 46 shares, against which Quinn's claim for 10 shares is the only specific claim. Upon the settlement of his account there was a balance to his credit of $265.

Claim of Gott to 20 Shares Sloss-Sheffield and 20 Shares National Enameling Company Stock.

October 6, 1910, the bankrupts purchased for this customer 20 shares of Sloss-Sheffield stock, for which he paid in full October 12th, leaving the same with them. October 14, 1912, the bankrupts purchased for him 20 shares of National Enameling Company stock. On the day of the failure Gott's account showed a debit balance of $608.71. Upon the liquidation of the loans this particular certificate for 20 shares of National Enameling Company stock was delivered to the receiver, together with 20 shares of Sloss-Sheffield, out of 40 shares which had been sold short.

Another customer, named Cochran, was also short 20 shares of Sloss, but made no specific claim. The value of Sloss stock July 30, 1914, when the Exchange closed, was $390.

The special master dismissed all the specific claims against the surplus stock on the ground that the claimants had identified no specific stock, and that no, or not sufficient, stock of the kind claimed was actually "in the box" at the time of the failure to cover them. He understood this to be the effect of our ruling in Re Hollins, 219 Fed. 544, 135 C. C. A. 312, as to the meaning of the decision of the Supreme Court in Gorman v. Littlefield, 229 U. S. 19, 33 Sup. Ct. 690, 57 L. Ed. 1047. In the case of Gott he awarded to him the 20 shares of Enameling Company stock which had been identified, upon payment of his debit balance, less the value of the 20 shares of Sloss on the day the Stock Exchange closed, viz., $390.

Judge Learned Hand confirmed the report of the special master.

[2] It was proved that the habit of the bankrupts was always to have enough stock on hand, or hypothecated, or short, to cover all their customers who were long; but there is no evidence of how often they were in and out of the particular stocks in question, and whether at all time since the date of purchase all long customers were so covered.

We do not think the rule in Gorman v. Littlefield should be restricted to stock actually in the box on the day of the failure. The reason for the rule would be exactly as cogent if the stock were in some one

else's box on that day, or if after that day stock or proceeds of stock hypothecated should be returned to the receiver. The rationale of the decision is that if the receiver has enough, or more than enough, of the particular stock to cover all customers who were long on the day of the failure, then the presumption that he intended to keep their stock on hand is a sufficient identification of the stock, or of so much of it as is needed, as theirs. If, however, the stock on hand, though sufficient to cover all actual claims, is not sufficient to cover all the long customers, no such presumption arises.

The fact that some of the long customers make no specific claim for stock in the surplus cannot enlarge the rights of one who does. In none of the claims now under consideration was there enough stock on hand to cover all the customers who were long; therefore the order of the District Court was right.

[3] The Gott claim presents an additional question, viz., whether he should be credited with $1,092.50, which he paid for the Sloss stock October 13, 1910, or with $390, which was its value July 30, 1914, the day the Stock Exchange closed. If the bankrupts never bought the stock at all, they were then and there guilty of converting his money, and were liable to him for the full sum paid, with interest. There is no evidence that the bankrupts did buy the stock. Judge Hand, in his memorandum refusing Gott's motion for a reargument, does say that on the day of the purchase the bankrupt sold the same amount of stock for another customer, which would be a valid execution of his order. But we find nothing in the record to sustain this statement. Therefore the order must be modified, to credit Gott with $1,092.50, with interest from October 13, 1910, to the day of the failure, after deducting the amount of his debit balance, $608.71.

As so modified, the order is affirmed.

In re BARKER PIANO CO.

(Circuit Court of Appeals, Second Circuit. May 9, 1916.)

No. 258.

1. BANKRUPTCY ⟸36—POWER TO VACATE ORDERS.

As there are no terms in bankruptcy, and no provision in the statute limiting the time within which an order of a referee may be reviewed or an order of the District Court reheard, an order of the court may be revoked months after it is made.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 36; Dec. Dig. ⟸36.]

2. BANKRUPTCY ⟸305—COLLECTION OF ASSETS—ORDERS.

A bankrupt, which had sold goods on installments, assigned the installment contracts before bankruptcy. Thereafter the assignees and the trustee both asserted the right to collect the installments, and under orders of the referee and the District Court the trustee made collections. The assignees warned the purchasers not to make payments to the trustee. *Held* that, as such payments would not, if the purchasers were liable to the assignees, bar recovery by them, the District Court should ont order the trustee to deliver over moneys collected to the assignees for

the purpose of placing the parties in statu quo, for it should either determine the rights of the assignees, or have the trustee resort to a plenary suit in some court of competent jurisdiction for that purpose.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 466-468; Dec. Dig. ⟸305.]

Petition for Revision of Order of the District Court of the United States for the District of Connecticut, in Bankruptcy.

In the matter of the bankruptcy of the Barker Piano Company. Petition by Stewart N. Dunning, as trustee, to revise an order of the District Court directing payment of moneys to the Commercial Securities Company and another. Order reversed.

J. T. Robinson, of Hartford, Conn., for petitioner.

H. A. Heiser, of New York City, for respondent.

Before WARD and ROGERS, Circuit Judges, and VEEDER, District Judge.

WARD, Circuit Judge. The Barker Piano Company was a corporation of Connecticut engaged in the business of selling pianos. It sold many of them under contracts of conditional sale. These contracts with the vendees it assigned to various persons and corporations in consideration of money received, and the controversy between the trustee and the persons who hold the contracts is whether those assignments were absolute, or merely as security for repayment of money loaned, and, if so, whether the loan was usurious. The transcript of record does not contain any copy of the conditional contracts of sale of the pianos, or of the contracts between the bankrupt and the persons to whom it assigned the contracts, nor was testimony taken during any stage of the proceedings.

The record shows that the bankruptcy was adjudicated in July, 1914, that the particular controversies in question began July 30, 1914, and the final order in the District Court was not entered until January 26, 1916, a delay very inconsistent with the rapid administration which the Bankruptcy Act was intended to accomplish.

July 30, 1914, the trustee filed a petition for leave to collect all balances due by the vendees under these assigned contracts of sale, amounting to some $44,000, pending the determination of the rights of the holders thereof and of the trustee respectively. On the same day the referee made a temporary order to that effect.

August 27, 1914, the Commercial Securities Company, a corporation of the state of Illinois, and J. H. Shale, trustee, being holders of some of the assigned contracts aforesaid, each filed with the referee objections to the said petition and to the order of July 30th on the ground that the referee had no jurisdiction to make any order interfering in any way with their rights under the said assigned contracts.

September 21st the referee, without hearing any testimony, found that the contracts were assigned to the holders as collateral security for repayment of borrowed money and made his temporary order of July 30th permanent. September 28th the Commercial Securities Company and Shale, trustee, filed petitions to review the order of the referee.

December 24th the District Judge reversed the order on the ground that the referee had no jurisdiction in the premises, and directed the trustee to turn over to the holders of the assigned contracts all moneys collected by him since July 30, 1914, when the temporary order was made. December 30th the trustee asked for a rehearing of the petition of review.

January 9, 1915, the trustee filed in the bankruptcy proceeding a document, which he called a caveat, certifying that he had begun an action in the superior court for Hartford county, in which he, as trustee, had summoned, among others, the Commercial Securities Company and Shale, trustee, in an action to determine title to payments made or that might become due, to him upon the said assigned contracts.

February 19th the court amended the order of December 24, 1914, by striking out the direction that the trustee turn over to the holders of the assigned contracts the moneys collected by him since July 30, 1914, and instead thereof directed him to prosecute the action begun in the state court or some other plenary suit for adjudicating the rights of the various claimants. This order was subsequently revoked in open court.

June 16th the Commercial Securities Company and Shale, trustee, petitioned for an order directing the trustee to pay over to them the moneys collected by him on the assigned contracts under and in pursuance of the order of the referee of September 21, 1914. July 1st the trustee filed an answer praying that the petition be denied or in the alternative that the Securities Company and Shale, trustee, be ordered to surrender the contracts of sale to him.

[1] It is objected that it was too late to do this. As there are no terms in bankruptcy, and no provision in the statute limiting the time within which an order of the referee may be reviewed or an order of the District Court reheard, and we are referred to no rule of court, this proceeding cannot be regarded as too late. In re Ives, 113 Fed. 911, 51 C. C. A. 541.

Upon this petition and answer the court filed an opinion, in which it held that the trustee had collected and was collecting moneys under the assigned contracts by virtue of a void order of the referee, which was an unlawful disturbance of the property of the holders for which reason the original order of December 24th was right. January 18, 1916, the trustee applied for a rehearing, which was refused.

[2] January 26th an order was entered reversing the referee's order of September 21, 1914, and directing the trustee to turn over the moneys collected by him to the Securities Company and Shale, trustee, and restraining him from interfering with the contracts assigned to them or making collections thereunder. The petition to revise applies to this order.

The holders of the assigned contracts and the trustee had each notified the vendees of the pianos to pay them respectively. We are of opinion that the referee's order authorizing the trustee to collect was wholly unnecessary, it being his duty to bring in everything he believed to be assets of the estate. He was collecting from the vendees of the pianos and not from the Security Company or Shale, trustee. Their

rights could not be prejudiced by his so doing. It is true that they were apparently entitled to collect, whether the contracts they held were sales or only security for money loaned. Still if the vendees paid the trustee wrongfully, they would have to pay again, or, if the holders chose, they could reclaim in the bankruptcy proceedings the moneys collected. But moneys actually collected by the trustee and in the possession of the bankruptcy court were subject to its summary jurisdiction. The learned judge, apparently with a view to restoring the status quo before the referee's orders of July 30 and September 21, 1914, ordered the trustee to pay over the moneys collected by him since those dates to the holders of the assigned contracts. The status could be restored in only one way, and that was by paying the moneys over to the vendees of the pianos from whom they had been collected. The court should either have passed upon the title to the moneys in its possession, giving the trustee and the holders of the contracts an opportunity to offer proofs, or else should have permitted the whole question of the rights of the parties to be determined in a plenary suit in some court of competent jurisdiction.

The order is reversed.

ROBB v. UNITED STATES.

(Circuit Court of Appeals, Third Circuit. May 17, 1916.)

No. 2102.

CLERKS OF COURTS ⟸61—FEES—NATURALIZATION.

Naturalization Act June 29, 1906, c. 3592, § 13, 34 Stat. 600 (Comp. St. 1913, § 4372), fixing the fees for naturalization, provides that clerks of courts exercising jurisdiction in such proceedings shall be permitted to retain one-half of the fees in any fiscal year up to the sum of $3,000, and that all fees in excess of such amount shall be accounted for and paid over to the Bureau of Naturalization. Rev. St. § 2687 (Comp. St. 1913, § 5394), declares that collectors of customs and all other federal officers serving for a less period than a year shall not be paid for the entire year, but shall be allowed in no case a greater than a pro rata of the maximum compensation for the time only which they actually serve. The clerk of the Circuit Court during the period from July 1, 1911, to December 31, 1911, when the office was abolished, received over $4,000 as fees in naturalization cases. *Held* that, as the Naturalization Act did not repeal the section 2687, the clerk could not, for the half-year period, retain more than $1,500 of such fees.

[Ed. Note.—For other cases, see Clerks of Courts, Dec. Dig. ⟸61.]

In Error to the District Court of the United States, for the Eastern District of Pennsylvania.

Action by the United States against Mabel H. Robb, executrix of the last will and testament of Henry B. Robb, deceased. There was a judgment for plaintiff, and defendant brings error. Affirmed.

Theodore W. Reath, Sharswood Brinton, and F. Markoe Rivinus, all of Philadelphia, Pa., for plaintiff in error.

Francis Fisher Kane, U. S. Dist. Atty., of Philadelphia, Pa., for the United States.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

PER CURIAM. This case involved one of those accounting disputes which arose between the government and clerks of the Circuit Court when that court was abolished. The facts of the case are fully set forth in the opinion of the court below, which is set forth in the margin.[1]

[1] 1. That Henry B. Robb held the office of clerk of the United States Circuit Court for the Eastern District of Pennsylvania during the year 1911, and that on December 31, 1911, the office of such clerk ceased to exist by operation of law; the said Circuit Court having been abolished by the act of Congress of March 3, 1911.

2. During the six months beginning July 1, 1911, and ending December 31, 1911, certain moneys, amounting to $4,151, came into the hands of the said Henry B. Robb, as clerk aforesaid, as fees collected by him in naturalization cases, as appears by copies of his quarterly reports submitted to the Department of Commerce and Labor, appended to the stipulation filed in this case. This sum of $4,151 was made up as follows: $2,697 came into his hands during the quarter ending September 30, 1911, and $1,454 came into his hands during the quarter ending December 31, 1911.

3. At the end of the first quarter, to wit, on October 1, 1911, the said Henry B. Robb retained as his compensation for such quarter $1,348.50, that being one-half of the moneys that had so come into his hands, and at the termination of the quarter ending December 31, 1911, he retained as his commission $727, that being one-half of the moneys that had so come into his hands during the said quarter. In each case the said Henry B. Robb claimed that he was entitled under the law to retain the said sums of money.

4. The said Henry B. Robb transmitted to the Chief of the Division of Naturalization of the Department of Commerce and Labor on the dates mentioned the sums of $1,348.50 and $727, respectively, the remaining halves of the amounts of money that had so come into his hands.

5. The said Henry B. Robb is dead, and letters testamentary under his will have been granted to Mabel H. Robb, who is at present his executrix.

6. The plaintiff claims that the said Henry B. Robb was entitled to retain as his compensation for the two quarters mentioned only one-half of $3,000. He retained $2,075.50, and the plaintiff claims that there is now due from his estate the sum of $575.50, with interest thereon from December 31, 1911. Demands were duly made by the plaintiff upon the said Henry B. Robb during his lifetime for a recovery of this sum, and such demands have been subsequently made upon his executrix since his death, but payment has not been made to the plaintiff in the said sum of $575.50, or any part thereof.

The plaintiff requests the court to find also the following conclusion of fact, namely:

7. The Department of Commerce and Labor, as also the Department of Labor since its creation, have invariably required the prorating of the $3,000 maximum of naturalization fees which the clerk of a court may retain in any fiscal year, where the duties imposed by the act of June 29, 1906, have extended over only a portion of the fiscal year. The custom and practice of the department has been uniform, long-continued, and contemporaneous with the administration of the said naturalization law by the federal government.

The finding requested is declined, because the court is of opinion that the evidence does not show an established practice of the Departments in existence for sufficient length of time before the present suit was brought to have any bearing upon the issue in this case.

Conclusions of Law.

1. It was the purpose of Congress under section 13 of the Naturalization Act of 1906 to provide annual compensation to the clerk of the court for his services in naturalization cases at a maximum of $3,000 for each fiscal year.

2. The provisions of section 2687 Revised Statutes (Comp. St. 1913, § 5394)

As we agree with the conclusion reached by Judge Thompson, we restrict ourselves to affirming the case on his opinion, noting the fact, also, that the same conclusion was reached in Darling v. United States, Case No. 32514, Court of Claims.

FISHER HYDRAULIC STONE & MACHINERY CO. v. WARNER.

(Circuit Court of Appeals, Second Circuit. May 9, 1916.)

No. 249.

1. EVIDENCE ⟸18—JUDICIAL NOTICE—MARKET VALUE.
Courts may take judicial notice of the fact that expensive machinery and fittings not yet installed, made up of many parts and manufactured to be placed in a particular plant, do not have a stable value, particularly when covered by patents.
[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 22; Dec. Dig. ⟸18.]

2. PATENTS ⟸216—SALES—BREACH OF CONTRACT—REMEDIES OF SELLER.
Where plaintiff contracted to sell defendant expensive machinery, manufactured to be operated in a particular plant, defendant being given a license to operate the machinery under a patent held by plaintiff, and title being retained until payment, plaintiff may, defendant having refused to accept delivery, recover the purchase price of the machinery, it being of a special sort and having no general market value, without proof of the difference between the market price and the contract price, and such remedy cannot be denied because it is analogous to the equitable remedy of specific performance.
[Ed. Note.—For other cases, see Patents, Cent. Dig. § 329; Dec. Dig. ⟸216.]

3. APPEAL AND ERROR ⟸395—WRIT OF ERROR—BOND—DISMISSAL.
Though plaintiff in error has been guilty of laches in failing to file a bill of exception, citation, and bond, yet, where defendant signed an ordinary stipulation as to the record, the writ of error will not be dismissed, defendant having failed to promptly move for dismissal, but plaintiff in error will be allowed to file a bond thereafter, under penalty of dismissal in case of failure.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2065, 2066, 2086; Dec. Dig. ⟸395.]

In Error to the District Court of the United States for the Northern District of New York.

Action by the Fisher Hydraulic Stone & Machinery Company against Henry P. Warner. There was a judgment for plaintiff for nominal damages (188 Fed. 465), and plaintiff brings error. Reversed and

applied to clerks of the Circuit Courts, and that section was not repealed as to such clerks by the act of June 29, 1906 (34 Stat. 600).

3. Henry B. Robb, deceased, being clerk of the Circuit Court of the United States for the Eastern District of Pennsylvania from July 1, 1911, to December 31, 1911, having received in naturalization fees during the said period the sum of $4,151, in retaining the sum of $2,075.50, retained the sum of $575.50 in excess of the maximum of $1,500 for that half year to which he was entitled under the act of June 29, 1906 (34 Stat. 600), and section 2687 of the Revised Statutes.

4. The plaintiff is entitled to judgment in the sum of $575.50, with interest thereon from December 31, 1911.

remanded, on condition that plaintiff in error file an appeal bond; otherwise, writ dismissed.

Costello, Burden, Cooney & Walters, of Syracuse, N. Y., for plaintiff in error.

King, Waters & Page, of Syracuse, N. Y., for defendant in error.

Before COXE and WARD, Circuit Judges, and AUGUSTUS N. HAND, District Judge.

AUGUSTUS N. HAND, District Judge. The plaintiff contracted in writing to sell to the defendant certain machinery and fittings known as a concrete mixer. The agreement provided that the apparatus was to be sold f. o. b. cars Mt. Gilead, Ohio, was to be installed under the supervision of a representative of the plaintiff without charge for superintendence, and to be ordered by the defendant on or before October 1, 1906. The defendant was to pay $5,130 altogether, $500 upon the execution of the contract, 50 per cent. of the balance on receipt of the bill of lading, and to have the privilege of examining the articles shipped and determining that everything contracted for had been delivered in Syracuse. The remainder of the purchase price was to be paid 90 days after the articles were received in Syracuse. The contract further provided that title should remain in the plaintiff until the entire purchase money was paid, and that thereupon the defendant should have within a limited territory certain exclusive patent rights belonging to the plaintiff and relating to machinery of the kind sold.

The initial $500 was paid at the time of the signing of the contract. The plaintiff had the machinery manufactured and brought to Mt. Gilead, and in due time requested the defendant to order shipment. This the latter failed, and in effect refused, to do. Thereupon the plaintiff brought this action to recover the balance of the purchase price.

[1, 2] No testimony was offered as to the market value of the machinery which the plaintiff is still holding in storage for the account of the defendant. The District Judge found that the defendant had broken his contract, but that the measure of damages was the difference between the contract price and market price, and, as no evidence of the market price was offered, awarded judgment for the plaintiff for nominal damages. His opinion is reported in 188 Fed. 465.

The old rule of damages laid down in the English case of Barrow v. Arnaud, 8 Q. B. 604, was that, if a purchaser refused to take goods according to his contract, the only damages which could be recovered where *title had not passed* was a sum equivalent to the difference between the contract price and the market price of the goods for the reason that "the seller can take his goods into the market and obtain his price for them." The courts for years had refused to allow the seller to recover the purchase price because such a remedy treated the failure of a vendee to accept goods as equivalent to a sale and delivery by the vendor, and thus, in effect, granted specific performance in aid of the vendor when law courts were supposed to be clothed with no such power in respect to ordinary contracts for the sale of merchandise. The whole question is a puzzling one, and the decisions in the Ameri-

can courts are in conflict. The difficulty is increased by the fact that there was no testimony offered at the trial to show that the machinery had no established market value. The trial court found that the "machinery when made undoubtedly had a certain kind of market value, but limited and restricted, and not the ordinary market value of articles of commerce." It would seem that this court can take judicial notice of the fact that expensive machinery and fittings not yet installed, made up of many parts, and manufactured to be placed in a plant, do not have a stable market value, particularly when apparently covered by patents.

Although no particular testimony was adduced in support of the finding of the District Court as to market value, yet we think it was justified by the facts in the case and by common knowledge, and shall assume, where there has been no appeal by the defendant from the judgment, that the finding was correct and means that the goods had no established or ready market value. This is a case, therefore, where the seller has prepared goods of a special kind, and not one where he could "take his goods into the market and obtain his price for them," as the court said in Barrow v. Arnaud, supra.

The earliest case perhaps where a vendor recovered the purchase money against a vendee who refused to accept the article sold was Bement v. Smith, 15 Wend. (N. Y.) 493. There the defendant had orally agreed to purchase a sulky to be manufactured by the plaintiff for him which the defendant arbitrarily refused to accept. The discussion was principally as to the statute of frauds and the court awarded the vendor the purchase price. While the cases of contracts to manufacture an article have always been treated in the law of sales as sui generis, they seem to have been the source of the New York doctrine, which now goes the whole length of allowing any seller to recover the purchase price when the buyer refuses to accept the goods and the seller has held them for the vendee's account, irrespective of whether title has passed or not. Dustan v. McAndrew, 44 N. Y. 72; Ackerman v. Rubens, 167 N. Y. 405, 60 N. E. 750, 53 L. R. A. 867, 82 Am. St. Rep. 728; Gourd v. Healy, 206 N. Y. 423, 99 N. E. 1099.

We do not need to go as far as this, and prefer to limit our decision to cases where the goods are of a special kind, having no ordinary market value. Such a conclusion has been reached as to articles having no established market value in Bement v. Smith, 15 Wend. (N. Y.) 493; Black River Lumber Co. v. Warner, 93 Mo. 374, 6 S. W. 210; Shawhan v. Van Nest, 25 Ohio St. 490, 18 Am. Rep. 313; Ballentine v. Robinson, 46 Pa. 177; Smith v. Wheeler, 7 Or. 49, 33 Am. Rep. 698; Gordon v. Norris, 49 N. H. 376; Kinkead v. Lynch (C. C.) 132 Fed. 692; Ideal Cash Register Co. v. Zunino, 39 Misc. Rep. 312, 79 N. Y. Supp. 504; Van Brocklen v. Smeallie, 140 N. Y. 70, 35 N. E. 415; National Cash Register Co. v. Dehn, 139 Mich. 406, 102 N. W. 965. That this in effect grants specific performance may not be consonant with certain legal theories as to the law of personal property, but it is warranted by good authority and eminently just. A very interesting discussion of the law applicable to this subject by

Professor Williston appeared in volume 20 of the Harvard Law Review, at page 363. The Roman law seems to have allowed the recovery of the purchase price when the purchaser refused to accept, and such, we understand, is the law in France and Germany.

The argument that a recovery of the purchase price should not be permitted because it in effect enforces specific performance in a court of law is not as complete an objection as might be supposed. If A. barters a horse to B. in exchange for a cow, and B. makes a fraudulent representation as to the age and condition of the cow, title will pass to both animals, yet A. may rescind and in an action at law of replevin may recover the horse upon a tender of the cow. Thus a court of law may compel B. to return the horse and take back title to the cow. Undoubtedly the original remedy was in equity for fraud, but has long since been effectually obtained at law. Likewise, when a conditional sale has been made and possession given of a chattel, the vendor, though retaining title, can force the vendee, when the latter has defaulted in his payments, to take title, and can recover the purchase price as though title had passed. We do not, therefore, find an insuperable difficulty in the incidental fact that recovery of the purchase price is equivalent to specific performance of the contract, and we hold that, under the peculiar facts of this case, the plaintiff was entitled to recover the balance of the purchase price, less the cost of supervising the erection of the machinery, as provided in the contract. The defendant, who has willfully repudiated his contract, is entitled to no particular consideration, and a remedy may properly be enforced analogous to that obtainable in a court of equity, where the goods have no established market value and where the vendor, therefore, would be given no adequate remedy if he were forced to retain them and seek to dispose of them in an uncertain market.

[3] A motion has been made to dismiss the appeal because of failure to file the bill of exceptions, citation, and bond as required by law. The ordinary stipulation as to the record upon which the same was filed in this court was signed by attorneys for defendant in error. Thereafter they entered no special appearance in this court when they moved to dismiss the appeal. While the plaintiff in error has been guilty of laches, the defendant in error did not move promptly, and led the plaintiff in error to print its bill of exceptions by serving amendments to it and stipulating as to the record long after the plaintiff in error was in default. Under the circumstances, we are not disposed to grant the motion to dismiss the appeal, and will deny the motion to dismiss, and direct the reversal of the judgment and a new trial, provided the plaintiff in error files the usual appeal bond within 15 days from the date of filing this opinion; otherwise, the motion to dismiss the appeal will be granted.

PIERCE v. COMBINED HEAT & SPRINKLER CO.

(District Court, D. Massachusetts. April 24, 1916.)

No. 538.

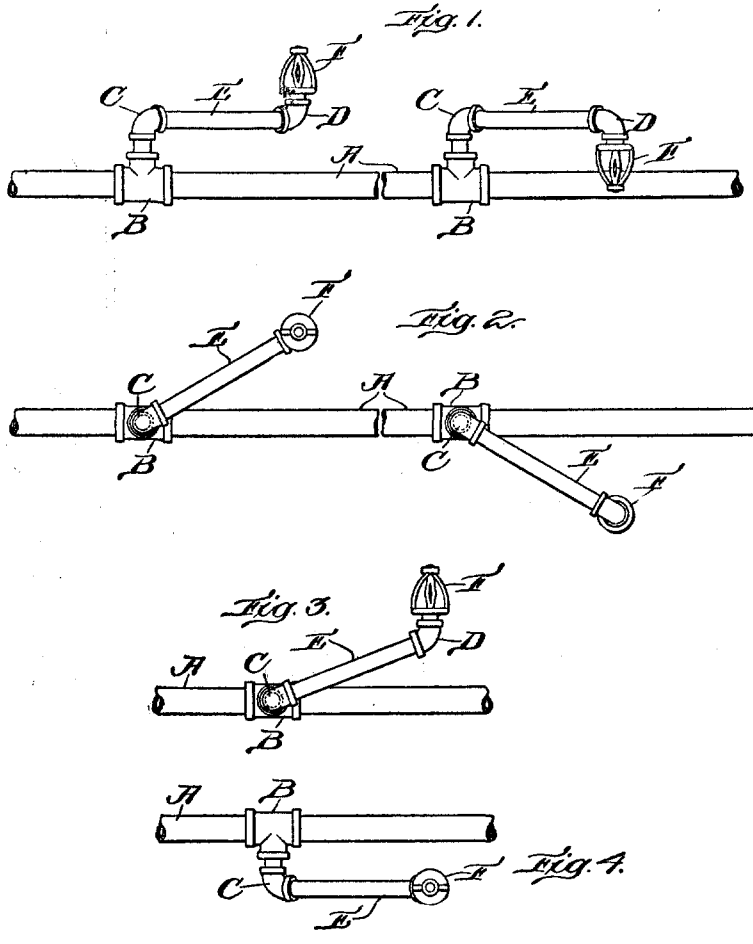
PATENTS ⟸328—VALIDITY AND INFRINGEMENT—COMBINED WATER HEATING AND SPRINKLER SYSTEM.

The Hammond patent, No. 1,058,968, for a combined water heating and sprinkler system, *held* valid, and entitled to a sufficiently broad construction, in view of the prior art, to show infringement by the apparatus of defendant.

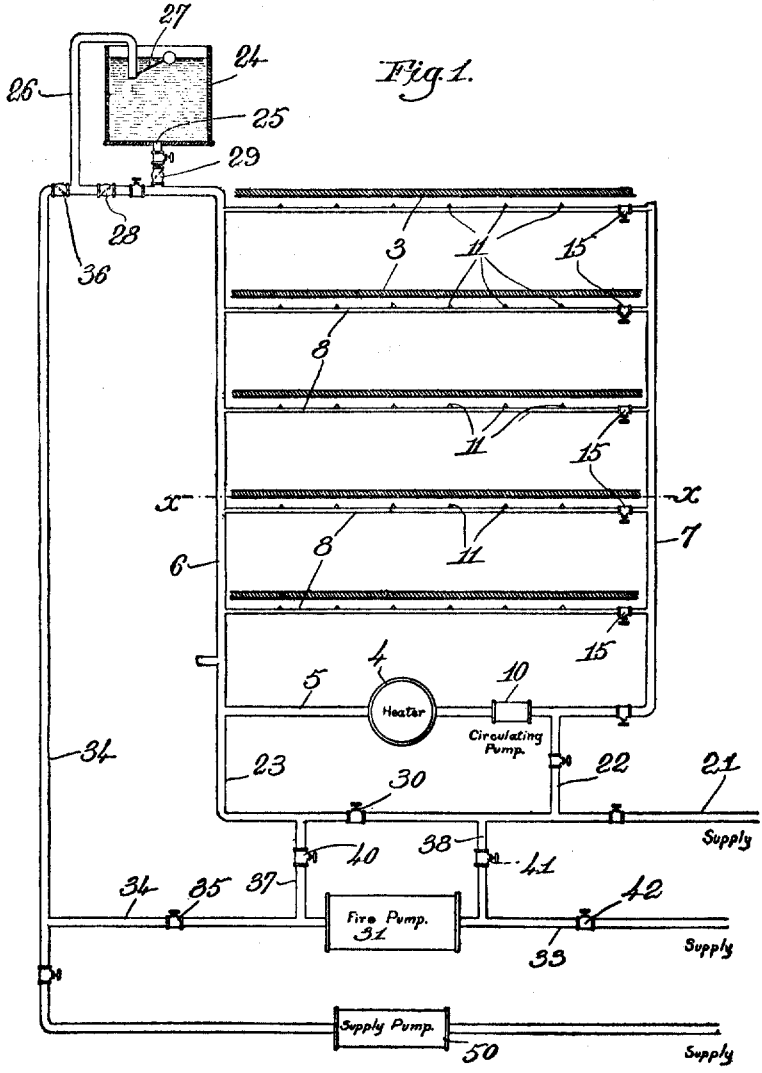
In Equity. Suit by Andrew G. Pierce, Jr., against the Combined Heat & Sprinkler Company. On final hearing. Decree for complainant.

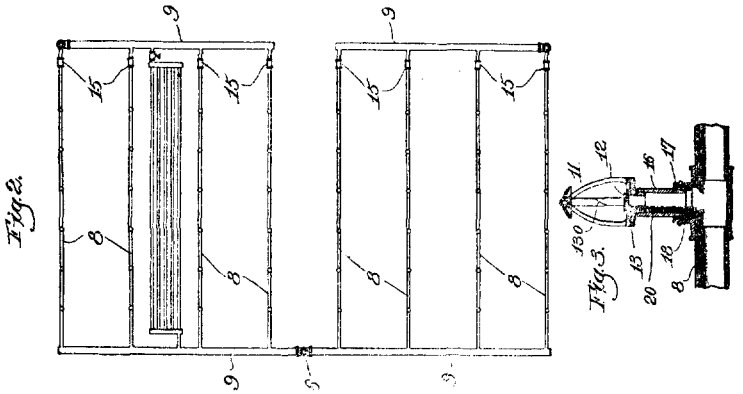
The following are the diagrams referred to in the opinion of the court:

W. B. Hammond Patent. No. 1,058,968.

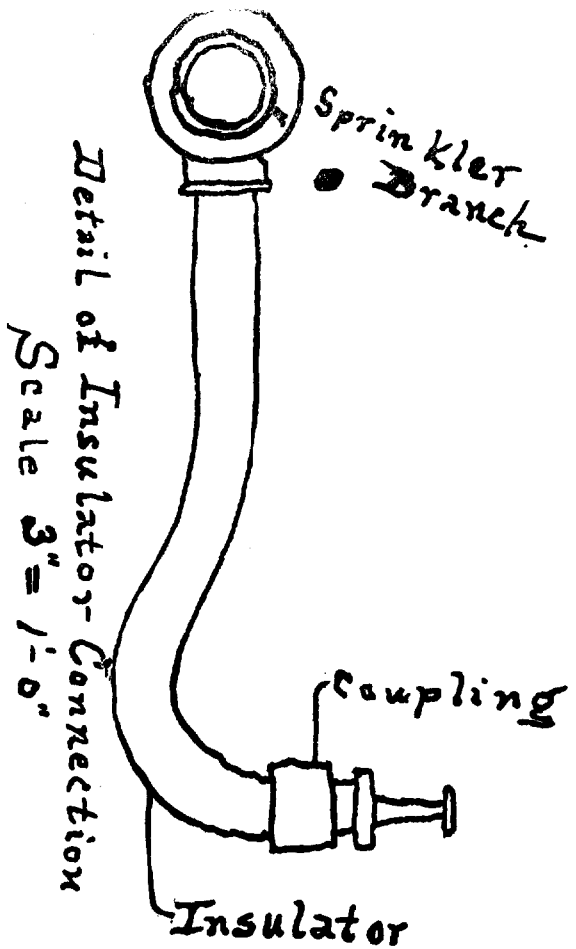


Nutter and Chatman Patent. No. 1,087,136.





Plaintiff's Exhibit 2.



Odin Roberts and Roberts, Roberts & Cushman, all of Boston, Mass., for plaintiff.

Fish, Richardson, Herrick & Neave and Harrison F. Lyman, all of Boston, Mass., for defendant.

DODGE, Circuit Judge. The plaintiff owns United States patent 1,058,968, issued April 15, 1913, to W. B. Hammond, for improvements in combined water heating and sprinkler systems. The defendant company has made and used apparatus shown, as is agreed, in a drawing identified as Plaintiff's Exhibit 2, which apparatus is claimed by the plaintiff to embody the improvements covered by claims 1 and 2 of the Hammond patent, and therefore to infringe those claims.

Whether or not infringement is proved is the only question in dispute. The defendant denies the validity of the patent in suit only in case it is to be construed broadly enough to cover the differences upon which it relies between its apparatus and that which the patent describes.

Hammond's specification begins with the statement that his invention relates to—

"combined water heating and sprinkler systems such as have recently been proposed and by means of which a single system of piping installed near the ceiling of apartments to be heated is availed of also to perform the duty of a fire-extinguishing system controlled in cases of emergency by the automatic operation of sprinkler heads."

He goes on to set forth that the sprinkler heads of such a fire-extinguishing system are required to release the water when their temperature has risen to about 160 degrees, while effective heating often requires water to be carried through the pipes of the system heated at its entrance as high as 212 or 220 degrees. Proximity of the sprinkler heads to the pipes containing water at such temperatures is apt to result in keeping the sprinkler heads at temperatures too near their releasing temperature. He then continues:

"I am aware that, previous to my invention herein described, it has been proposed to apply sprinkler heads to vertical offsets joined to a hot water circulating pipe, but I have observed by experiment and practice that in such constructions the temperature of the sprinkler heads always rises to and frequently beyond the releasing temperature whenever the water in the heater pipe is raised to a temperature effective for heating purposes."

It may conveniently be stated at this point that the "heating and sprinkler systems such as have recently been proposed," to which Hammond here referred, are covered by United States patent 1,078,136, issued February 17, 1914, to Nutter and Chatman, for combined heating and sprinkler system. Although this patent was issued several months later than Hammond's, it had been applied for May 26, 1906, some years before Hammond's application for his patent in suit, which was filed December 7, 1911.

Although "means to insulate the sprinkler heads from the heat of the circulating water" were described and claimed in this Nutter and Chatman patent, the only sprinkler heads described were each to be

screwed into a nipple, which was in turn to be screwed into a bushing of heat-insulating material carried by a T in the circulating pipe. Each such nipple carrying a sprinkler head was shown as rising vertically from the circulating pipe toward the ceiling and separating the sprinkler head carried, by a short interval only, from the circulating pipe or the T therein. According to the patent, air in an air chamber formed in the nipple was relied on to prevent direct contact between the hot water in the pipe and the sprinkler head valve. These were to be insulated sprinkler heads, only "if desired," in which case "some suitable form" of them was to be used. But it appears from the evidence in this case that no such heat-insulated sprinkler heads as described by Nutter and Chatman have ever been commercially used, and when experimentally used they have failed to work as intended.

On the Nutter and Chatman application interferences were declared in the Patent Office involving all its broader claims, and to these both Hammond and Pierce, the present plaintiff, were parties. The result upon all was in Nutter and Chatman's favor.

Returning now to Hammond's patent in suit, he proceeds therein, after what has been last quoted from it, to describe his invention as follows:

"I have discovered that if the sprinkler offsets in a hot-water circulating pipe are so constructed that the sprinkler head at the dead end of such an offset is at a horizontal distance measured along the pipe connection, whether this be straight or curved, from the junction with the circulation pipe which is decidedly in excess of its vertical displacement therefrom, communication of heat by circulation in the offset itself is practically cut off, and the heat-insulating effect of trapped gases in the offsets rendered effective to maintain the temperature at the sprinkler head at a safe point, though that of the circulating water in the circulation pipe be carried to the practical highest limit."

There are four claims in all, two only being involved in the present suit. Each of these covers the combination of certain elements in a "combined circulatory water heating and sprinkler system." The specified elements in claim 1 are:

(1) A pipe for the circulation of heating water.
(2) Upwardly branching offset pipes secured to the circulation pipe and in communication therewith, said offsets terminating in dead ends, the horizontal component of offset of said dead ends from the junction with the circulating pipe measured along the offset being materially greater than the vertical component.
(3) Sprinkler heads secured to said offsets at their dead ends.

Claim 2 differs from claim 1 only in its description of the element I have numbered (2). Instead of "upwardly branching offset pipes," etc., claim 2 reads "upwardly and laterally branching offset pipes," etc.

Sprinkler heads carried on offsets such as are described and claimed by Hammond have proved operative for the purpose intended and commercially successful. Extensive installations have been made containing them, under license from the plaintiff.

Hammond's offset pipes are secured to T's, used as couplings for the circulation or heater pipes at the desired points, and each com-

prises an elbow connecting it with the T, and a straight dead end section, at the end whereof the sprinkler head is secured in vertical position by another elbow. They are smaller in diameter than the heater pipes. Two forms are shown. In that shown by Figs. 1 and 2 of the patent the offset projects from the upper portion of the heater pipe, and the position of its "dead end section," lying horizontally above the heater pipe, permits drainage from it back into the heater pipe; but its extension in that plane is at an angle with the latter, so that most of it lies outside the region directly over the heater pipe, and the sprinkler head it carries is brought wholly outside that region. This is called in the patent the preferable construction. In the other form (Fig. 3) the offset projects at first sidewise from the heater pipe and then has its "dead end section" canted upward, so as to be for the most part above the level of the heater pipe. In both forms the sprinkler head, instead of being directly over the heater pipe, is brought far enough away from it horizontally to be out of any direct current of heated air arising therefrom. In the second form the entire offset as well as the sprinkler head is outside the region directly over the heater pipe.

The offsets used in the defendant's apparatus shown in Exhibit 2 project from the side, not the top, of the heater pipe. They consist, not of straight "dead end sections," with elbow connections at either end, like those of the patent, but of curved sections of pipe smaller in diameter than the heater pipe, which, after a short lateral projection from it, are bent so as to form a depression or loop in a vertical plane parallel with it, at first downwardly from its level and then upwardly so as to terminate at a point slightly above the level of its top. Upon this termination the sprinkler head is carried, for which a position is thus secured at a level above the heater pipe and also removed horizontally from region directly over it.

It is true of the defendant's offsets, as of those described in the patent, that their dead ends to which the sprinkler heads are secured are further removed horizontally than they are vertically from the point where the offset leaves the heater pipe; and it seems to me that the provisions of the claims regarding horizontal and vertical "components of offset," fairly construed in connection with the specification, must be taken as covering them, unless for reasons to the contrary not apparent from the patent itself. The defendant says that they are neither "upwardly branching" (claim 1), nor "upwardly and laterally branching" (claim 2). They are certainly "laterally branching," and the main reason suggested for not calling them "upwardly branching" is that they branch downwardly before they branch upwardly; but in view of the fact that they finally branch upwardly, in the sense that they reach a point above that at which they leave the heater pipe, this does not seem to me a sufficient reason. Further objections to the above view are below considered.

The defendant says that communication of heat by circulation in its offsets is cut off, not by any "heat-insulating effect of trapped gases in the offsets, rendered effective to maintain the temperature of the sprinkler head at a safe point" (see Hammond's statement, above

quoted, of what he has discovered), but by noncirculating water trapped in the loop depression formed in each offset between its junction with the heater pipe and its dead end on which the sprinkler head is carried. The defendant's offsets, therefore, operate, according to its contention, to keep the sprinkler heads from being heated to the temperature of the circulating water, upon a principle essentially different from that employed by Hammond for the same purpose. The plaintiff denies that there is any such difference in operation between the two forms of offset, and upon the questions thus raised the evidence is conflicting.

That air is "trapped" in the dead ends of the defendant's offsets, between the incoming water and the sprinkler head when the system is first filled, cannot be and is not denied. The air so trapped will occupy in the offset pipe below the sprinkler head a space varying in length according to the water pressure, and the amount of such pressure will depend, among other things, upon the vertical difference in level between the sprinkler head and the junction of its offset pipe with the heater pipe.

The defendant says that this air-filled space "doubtless soon is lost and the offset becomes filled with water up to the sprinkler head," and that, as a means of insulation, it neither is nor can be relied on, "for in practice it soon becomes nonexistent." But this does not seem to me sufficiently proved. An air-tight joint between the dead end and the sprinkler head would prevent any disappearance. If no such joint can be made absolutely air-tight, the rate of disappearance must, in any event, depend upon the tightness of the joint, the amount of air trapped, and the pressure maintained upon it. And this must be true, even upon the assumption that, as the defendant insists, no replenishment of the amount of air originally caught as above is possible in the offsets, because there can be no circulation in the water they hold in their loop depressions.

Opinion evidence only is relied on, from witnesses testifying for the defendant, to show that there is no such circulation. But this was to the effect, at most, that there would be no appreciable, or no material circulation, and therefore practically no replenishment of air. Since both forms of offset terminate in dead ends, it seems obvious that in neither can there be as much circulation of the water as in the heater pipes. Because of the fact that water passing into the defendant's offsets from the heater pipe, and losing therein some of its heat, cannot so readily return into the heater pipe as it can from the plaintiff's offsets, it seems very probable that water circulation in the defendant's offsets is less than in the plaintiff's. But I do not think the conclusion required or established by the evidence that circulation is necessarily nonexistent, or never appreciable in amount, in the water contained in the defendant's offsets; it being always part of the body of circulating water in the heater pipe, though held for the time being in a dead end and at a lower level. Unless circulation is completely stopped, it can hardly be said that replenishment of air trapped above the heater pipe level in the dead end has been wholly cut off.

Although, in a paragraph of his specification, subsequent to what has been above quoted from it, Hammond has described the manner in which his sprinkler head offsets were expected to work in operation, and in the description there given has expressly relied upon fresh supplies of water introduced from time to time into the circulating system, and intercepted at the dead ends of his offsets by his arrangement of the offset pipes, permitting them to drain completely into the heater pipe, for the purpose of replenishing the air trapped in their dead ends and thus preventing the water from filling them completely, the same description also makes it clear that air trapped at the dead ends is not his sole reliance for keeping the water temperature there below that in the heater pipe. He says:

"Moreover, the lateral disposition of the offsets with respect to the [heater pipes] presents an effective area of conductive metal in the offsets to the rising current of air coming from all portions of the apartment, so that, even if by temporary accidental exhaustion of the occluded gases these offsets were to be filled with water, the sprinkler head * * * will remain at a temperature safely below that at which sprinkler heads are usually set to release, for a time sufficient to allow restoration of trapped gas."

And as air trapped at the dead ends of the offsets is not the sole means used by Hammond to keep down the temperature of his sprinkler heads, but also water, whether completely or only in part filling the offset pipes, so in the defendant's offsets it is not water alone which protects the sprinkler heads. Air trapped beneath them is also used to obtain the same result. If it is true that more use is made of water than of trapped air in the defendant's offsets than in those of Hammond, or that the defendant's offsets can be relied on for that reason to protect the sprinkler heads for a longer time, I am still unable to accept the conclusion that their mode of operation differs in kind. The most that can be said is that the defendant so uses the same mode of operation as to secure a better result.

The defendant says that if its sprinkler heads were dropped to or below the level of the heater pipe they would not be "upwardly branching," and this may be conceded, if the meaning above given that term is the right one. The term would be certainly inapplicable to offsets having in them no upward curve whatever. Such changes in its offset pipes would result, according to the defendant, in their trapping less air, or none at all, but would neither change their mode of operation nor make them less efficient for their intended purpose. That their mode of operation had been substantially changed could not, in my opinion, be said, so long as trapped air continued to form any part of the insulating means relied on; but such offsets, so using trapped air, would escape the claims in suit only because the claims are limited to upwardly branching offsets. If, as I hold, the offsets before the court in this case are of that kind, they are within the claims, whatever might be said regarding them if differently arranged.

The defendant says that the offsets of the patent require a horizontally disposed section of pipe, which its offsets obviously have not; and this assertion makes it necessary for the defendant to say further that the modified or alternative form of offset shown in Figs. 3 and 4

of the patent, whose straight dead end section, offset from the side of the horizontal pipe, instead of its top, is canted upwardly to bring its dead end above the level of the heater pipe and has no horizontally disposed section whatever, cannot be regarded as covered by the patent or within the claims thereof.

I find nothing in the specification of the patent or the language of its claims which seems to me sufficient to support this contention. What the defendant principally relies on to support it is found in the Patent Office proceedings upon Hammond's application. The office having taken the position that in view of certain forms of offset found in the prior art, it could not regard Hammond's forms as more than mechanical changes not involving invention, this objection was overcome by arguments and affidavits submitted on Hammond's behalf in which it was pointed out that in none of the earlier patents cited was the water, by whose escape through the sprinkler heads fire was to be extinguished, to be heated water, circulating constantly through the pipes, and, except when permitted to escape through the sprinkler heads, availed of only for heating purposes, so that none of them had required offsets contrived for the purpose of protecting sprinkler heads at their ends against the heat of the circulating water.

Hammond appears to have succeeded in satisfying the examiners that his method of arranging the offsets with reference to the heater pipes overcame difficulties with which the earlier patentees referred to had been in no way concerned, with which there had been no attempt at all to deal, except by Nutter and Chatman in their then pending application, and which they had not succeeded in overcoming. In a communication submitted by him under date of February 3, 1913, he dwelt at considerable length upon the amount of air trapped in the horizontally disposed member of offsets such as shown in his Figs. 1 and 2, claiming, among other things, that, whatever the water pressure, this member would always contain a horizontal air column, whose presence would prevent circulation in the water also contained therein.

The defendant says that this amounted to the adoption by Hammond of a theory of operation depending altogether upon the presence of a horizontally disposed section of pipe in the offset; that it necessarily implied the abandonment by him of all forms containing no horizontally disposed member, like those shown in his Figs. 3 and 4, and therefore that "horizontal component of offset" in his claims cannot be taken in the "geometrical" sense above given it, but must be regarded as meaning only the horizontally disposed member of Figs. 1 and 2. If this is the proper construction, the defendant's further contention may well prevail that "upwardly branching" in the claims must be taken as applicable only to offsets which branch from the top of the heater pipe and thus permit drainage from them into it.

But consideration of the whole record upon Hammond's application leaves me unable to believe that his insistence upon the importance of the horizontal air column in what he thought the best embodiment of his invention can fairly be taken as an acceptance on his part of the above limitations. To urge upon the examiners' attention the ef-

fectiveness of horizontally trapped air for the purpose of obtaining his declared object was not necessarily to admit either that the air so trapped, or air in whatever form trapped, was the sole means relied on for that purpose. Hammond seems to me to have dwelt upon the horizontal air column as affording him the illustration best adapted to show the examiners that he had done more than put old forms of offsets supporting sprinkler heads to a new use without any change in function or mode of operation. This he might well do without disclaiming that reliance upon air trapped in other forms of offset, and also upon the water contained in all forms, which, as it seems to me, was sufficiently indicated from the first in his application and is indicated in his patent as issued.

It is said that the sprinkler head would be as well or better protected by making the vertical component of offset equal to or greater than the horizontal component, and that the respective proportions of the two which the patent requires are therefore without functional significance; but this objection I consider sufficiently met by the fact that both in the Nutter and Chatman patent and in Hammond's it is assumed that the heater pipes will be "near the ceiling," and thus render any but a short vertical component unavailable in systems of the kind which both patents contemplate. Whether or not the language about "components of offset" is best adapted to indicate the mode of operation, it seems to me sufficient to enable persons skilled in the art to embody Hammond's idea, and thus secure in his way the advantage he claims to have secured.

Hammond's claim to have solved a problem unsolved by Nutter and Chatman, or by any one before him, seems to me sustained by the evidence, and I am therefore unable to regard the construction of his claims above adopted as making them invalid in view of the prior art. They are therefore held valid, and infringed by the defendant's apparatus, and there may be a decree accordingly.

PACIFIC TIMBER CRUISING CO. v. CLARKE COUNTY, WASH.

(District Court, W. D. Washington, S. D. May 2, 1916.)

No. 1950.

1. COUNTIES ⇐47—COUNTY COMMISSIONERS—POWERS OF.

County commissioners, being administrative officers of the county, and given by Rem. & Bal. Code Wash. § 3890, the care of county property and management of county funds and business, should be allowed full scope in administrative power, even though it is not expressly granted.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 55; Dec. Dig. ⇐47.]

2. COUNTIES ⇐113(6)—COUNTY COMMISSIONERS—CONTRACTS OF.

A contract by county commissioners, agreeing to pay for the cruising and estimating of the timber on lands in the county, is valid and enforceable, in view of Rem. & Bal. Code Wash. § 3890, giving the commissioners care and management of county property, funds, and business, even though the information would be for the benefit of the county assessor, for under sections 9200-9207 the commissioners are required to

equalize assessments, and they are not bound to accept valuations made by the assessor.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 174, 180; Dec. Dig. ⊂⇒113(6).]

At Law. Action by the Pacific Timber Cruising Company, a corporation, against Clarke County, Wash., a municipal corporation. On demurrer to the complaint. Overruled.

Stevenson & Stapleton and L. A. McNary, all of Portland, Or., for plaintiff.

James O. Blair, L. M. Burnett, Miller & Wilkinson, and H. L. Parcel, all of Vancouver, Wash., for defendant.

NETERER, District Judge. The plaintiff has commenced an action against the defendant to recover for valuations of timber made under a written contract, in which it was provided that:

"* * * A careful cruise and estimate of the timber upon the lands in Clarke county shall be made, and render in writing reports embodying a topographic sketch showing the elevation of the land above the sea level, as taken by means of aneroid barometers, openings, clearings, burns, marshes, rivers, waterfalls, etc., and a general description of the land cruised, whether adapted to agriculture, grazing, or other purposes after the timber is removed, description of the character of the different varieties of timber, the average stump diameter, the average number of sixteen-foot logs per tree, the percentage of surface clear timber, description of logging conditions, including distance to outlets, railroads or driving streams, reporting damage by fire and probabilities of fire."

It is contended on the part of the defendant that the commissioners are powerless to enter into such a contract, and that they are trespassing upon the functions of the county assessor, because the information to be adduced by the plaintiff was work which should be done by the county assessor, and that the county assessor had the right under the law to select his deputies, and the commissioners only have the right to fix the compensation.

[1, 2] While it may be true that the information which is sought by this contract is information which undoubtedly was for the purposes of the county assessor's office, it likewise was information which the county commissioners necessarily must have in order to fully and properly discharge the duties of the board in equalizing the assessments of the county (sections 9200-9207, Remington & Ballinger's Codes of Washington), as a basis for the levy for taxes. The county commissioners are not concluded by the valuations placed upon property by the county assessor, nor is the assessor bound by the valuations fixed by plaintiff. The timber lands in this country are of such a character, and the value of timber is a matter which is not within the common knowledge of citizens, and under the system of listing and assessing property it is practically impossible for the assessor to list and assess the timber upon lands in his county without aid given by persons who have special knowledge or qualifications. The proper administration of the business of the county is through its authorized administrators, the county commissioners, upon whom must fall the burden of securing the expert information which cannot be obtained

otherwise, Burnett v. Markley, 23 Or. 436, 31 Pac. 1050. The county commissioners, being the administrative officers of the county (Nelson v. Troy, 11 Wash. 435, 39 Pac. 974), are given under section 3890, Remington & Ballinger's Codes of Washington, subd. 6, "the care of the county property and the management of the county funds and business, and in the name of the county to prosecute and defend all actions for and against the county, and such other powers as are or may be conferred by law." The legislative policy of the state of Washington has been to allow the commissioners full scope in the administrative power, even though not expressly granted. Whitney v. Friars, 10 Wash. 348, 39 Pac. 104; Williamson v. Snohomish County, 64 Wash. 233, 116 Pac. 675.

I do not think that the "tax ferret" cases cited by the defendant are pertinent here, nor exert any controlling influence. I think the complaint states a cause of action.

AMERICAN POTATO CORP. v. BOCA GRANDE S. S. CO.

(District Court, E. D. Pennsylvania. June 28, 1916.)

1. ADMIRALTY ⟸32—ATTACHMENT—PROCESS.
   In admiralty, service of process may be had on the owner of a steamship by attachment in any federal district in which the owner's property may be found, though his residence and principal place of business be in another district.
   [Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 306–312; Dec. Dig. ⟸32.]

2. ADMIRALTY ⟸32—PROCESS—SERVICE.
   In admiralty, the ordinary monition may issue in any district where a shipowner maintains a statutory agent on whom process can be served.
   [Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 306–312; Dec. Dig. ⟸32.]

3. ADMIRALTY ⟸47—ATTACHMENT—FOREIGN CORPORATIONS—"DOING BUSINESS."
   Though the captain of a vessel, who was president, treasurer, general manager, and majority stockholder of the corporation owning the vessel, was within the federal district where the vessel was seized under foreign attachment, the vessel at that time being docked for repairs, the corporation was not doing business within the district, and foreign attachment could issue (citing Words and Phrases, First and Second Series).
   [Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 396–403; Dec. Dig. ⟸47.
   For other definitions, see Words and Phrases, First and Second Series, Doing Business.]

In Admiralty. Foreign attachment by the American Potato Corporation against the Boca Grande Steamship Company. On motion to quash writ. Motion denied.

Howard M. Long, of Philadelphia, Pa., for libelant.

White, White & Taulane, of Philadelphia, Pa., and Gifford, Hobbs & Beard, of New York City, for respondent.

McPHERSON, Circuit Judge. This is a motion to set aside the seizure of the coasting steamer New Orleans under a writ of foreign attachment. The vessel belongs to the Boca Grande Steamship Company, and was seized in the port of Philadelphia in a suit in personam brought for the breach of an executory contract to carry several cargoes of potatoes. The libelant was obliged to ship the potatoes by rail, and sues to recover damages for the steamer's failure to carry. The merits of the dispute are not involved; the only point to be considered is, whether under the facts in evidence a writ of foreign attachment could lawfully be levied in this district.

[1, 2] The court has jurisdiction of the subject-matter, but jurisdiction of the steamship company could only be obtained by direct service of process on the respondent if the latter could be found within the district. It is a Delaware corporation, whose main office is in New Orleans, and nothing before the court shows the existence of an office in the Eastern district of Pennsylvania. Apparently, therefore, direct service of process on the company could be made only in Delaware or in Louisiana. But the libelant was not obliged to go to either district, if lawful service could be made elsewhere; and it is well settled, that in admiralty such service may be made by attaching a respondent's property in any other federal district than the district of his residence, so as to compel him to appear and defend. Atkins v. Disintegrating Co., 85 U. S. (18 Wall.) 272, 21 L. Ed. 841. And of course the ordinary monition may issue in any district where the respondent maintains a statutory agent upon whom process may be served. In re Louisville Underwriters, 134 U. S. 488, 10 Sup. Ct. 587, 33 L. Ed. 991. The steamship company maintains no such agent in Philadelphia, but the vessel was here, and was duly seized by a procedure formally regular in all particulars.

[3] The seizure is now attacked, however, on the ground that the company itself was within the district, and therefore that no foreign attachment could lawfully issue or be levied. This position rests on the following facts: Capt. Lawrence, the master of the vessel, is also the president, treasurer, general manager, and majority stockholder of the company, and is duly authorized to transact all its business; and the vessel itself, although a tramp coaster without a regular run, was being repaired in Philadelphia, and was awaiting and actually loading a cargo of coal. Upon familiar principles, therefore, it is argued that, as the company was doing business here, and as Capt. Lawrence was a proper official upon whom service of a monition could have been made, no foreign attachment could lawfully be levied.

The position does not seem to be well taken. Evidently the mere presence of Capt. Lawrence in Philadelphia was not equivalent to the presence of the corporation, and therefore the success of the motion depends wholly upon the view that should be taken of the facts above stated. Are they sufficient to justify a finding that the corporation was "doing business" here within the legal meaning of that phrase? In my opinion, the answer should be in the negative; but, as the general subject has already been so much discussed, I do not think it necessary to do more than refer to the decisions. Some of them will be

found in the notes to Cone Export Co. v. Poole, 24 L. R. A. 295, Penn. Co. v. McKeever, 2 L. R. A. (N. S.) 127, and Booth v. Weigand, 10 L. R. A. (N. S.) 693; and others are collected in 3 Words and Phrases, 2155, and 2 Words and Phrases (2d Ser.) 108.

The motion is refused.

In re SHUTE et ux.

(District Court, W. D. Washington, N. D. February 21, 1916.)

No. 5581.

1. BANKRUPTCY ⟸192—LIENS—PROTECTION—CONTRACTS.

Petitioner contracted with a bankrupt to furnish labor and materials for putting in a chain and railing at the bankrupt's place of business. While this work was in progress, another contractor agreed to build tables for the bankrupt, and such contractor being unable to obtain the materials, and having no credit, the bankrupt agreed that, if the petitioner would furnish the materials, he would pay him directly. Petitioner did so, and, after all of the work was finished, filed under Rem. & Bal. Code Wash. §§ 1154, 1155, providing for liens on chattels, and that the statement shall state the terms of the contract, a claim for a lien on the several articles as if they had been constructed under a single contract. *Held*, that the two contracts were entirely distinct, and therefore the lien must be denied.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 294; Dec. Dig. ⟸192.]

2. BANKRUPTCY ⟸205—RIGHTS OF TRUSTEES—ATTACK ON LIENS.

As Bankr. Act July 1, 1898, c. 541, § 47a(2), 30 Stat. 557, as amended by Act June 25, 1910, c. 412, § 8, 36 Stat. 840 (Comp. St. 1913, § 9631), vests title to all property of the bankrupt in the trustee with all rights, remedies, and powers of a person holding a lien by legal or equitable proceedings, the trustee may contest the validity of a lien sought to be asserted against the bankrupt's property.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 234, 303; Dec. Dig. ⟸205.]

In Bankruptcy. In the matter of James L. Shute and wife, bankrupts. On petition to review an order of the referee. Order affirmed.

Cook & Waite, of Seattle, Wash., for petitioner.

Charles E. Congleton, of Seattle, Wash., for trustee.

NETERER, District Judge. This is a petition to review the order of the referee denying the claim of lien on the part of petitioner. It appears that the petitioner contracted with the bankrupt to furnish labor and materials for putting in certain chain and railing in the place of business of the bankrupt. While this work was in progress the bankrupt contracted with one Kitak to furnish labor and materials for the construction of 36 tables. Kitak did not have the materials or credit to obtain them, and the bankrupt agreed with the petitioner that, if he would furnish the material, the bankrupt would pay him direct therefor. The petitioner furnished the material for the tables, which were constructed at the place of business of Kitak. Upon the completion of the chain and railing, and also on the completion of the

tables, the petitioner, pursuant to sections 1154 and 1155, Rem. & Bal. Code Wash., filed a claim for lien upon the several articles as constructed under one contract, for a total of $181.32. The referee denied the right of lien, but allowed a general claim against the estate for the amount due, $149.90.

[1] The decision of the referee is unquestionably right. The labor and material was furnished under two distinct contracts, entered into at different times, and between different parties. The contention of the petitioner that since the labor and materials were furnished to the same person, by the same person, at practically the same time, upon the same premises, under the liberal construction which should be given to the lien statutes of this state (section 1209, supra), the lien should be held valid, cannot be sustained. The cases cited, Wheeler, Osgood & Co. v. Ralph, 4 Wash. 617, 30 Pac. 709, and Seattle Lumber Co. v. Sweeney, 33 Wash. 691, 74 Pac. 1001, do not sustain such position. These were both suits under the general lien statute, in which a number of buildings were constructed upon contiguous lots, under one contract, but between the same owner and the same contractors, the materials being used indiscriminately in all of the houses, and there were no intervening rights of third parties, and the court rightly held that it was not vital to the lien under the circumstances that the materials in each building were not separately designated in the lien. In the instant case the labor and materials were furnished under separate contracts, for the construction of separate groups of chattels.

[2] Nor is there any question as to the trustee's right to attack the validity of the lien, since section 47a(2) of the Bankruptcy Act, as amended in 1910, vests the title to all property of the bankrupt in the trustee, with all the rights, remedies, and powers of a person holding a lien by legal or equitable proceedings thereon.

"The status of the general creditors by such act was changed, and by operation of law a lien was created and established in favor of the trustee for the general creditors." In re Pacific Electric Automobile Co., 224 Fed. 220, 224.

The order of the referee is affirmed.

UNITED STATES v. REINHEIMER.

(District Court, E. D. Pennsylvania. June 27, 1916.)

No. 62.

POST OFFICE ⇐32—OFFENSES—MAILING OBSCENE "LETTER."

In view of the fact that, after the enactment of the statute making the mailing of obscene publications an offense, Congress included the mailing of obscene letters (Act March 4, 1909, c. 321, § 211, 35 Stat. 1129, as amended by Act March 4, 1911, c. 241, § 2 [U. S. Comp. St. 1913, § 10381]), the mailing of such sealed letters addressed to the sender is not an offense, the statutory purpose being to protect morals, though the writer intended in that way to lay the basis for criminal charge against

a third person, for the term "letter," as used, does not include a writing mailed by the writer to himself, but indicates some element of publication.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. § 51; Dec. Dig. ⊂=32.

For other definitions, see Words and Phrases, Letter.]

Tillie Reinheimer was indicted for sending obscene matter through the mails. On demurrer to indictment. Demurrer sustained.

Robert J. Sterrett, Asst. U. S. Atty., and Francis Fisher Kane, U. S. Atty., both of Philadelphia, Pa.

Bertram D. Rearick, of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. The entry of a nolle prosequi has eliminated counts 1 and 2 from this indictment. The demurrer interposes the objection that no offense defined by any law of the United States is charged to have been committed by the defendant. Because of the general nature of the charge, it is only fair to the defendant to have put of record that her real defense is a denial of her guilt in fact. If, however, the facts as averred do not constitute a legal crime, there is no occasion to inquire into them.

We must, of course, assume the facts to be as averred. It is entirely consistent with the averments made and implied in them, and necessary to bring out the point now involved, to further state that the defendant is charged with having deposited in the mails a sealed envelope addressed to herself. There is no point made that the manuscripts inclosed are not of the obscene character defined by the acts of Congress (U. S. Comp. St. 1913, § 10381). It is therefore unnecessary that we should be informed of what the writings are. Indeed, it is better that our minds should be uninflamed by a knowledge of what the envelopes contained. The bill of particulars accompanying the indictment discloses the name of a former husband of the defendant, from whom she is now divorced, as the apparent sender of the missives. The motive ascribed to the defendant is to have the husband implicated in the same crime now charged against her, in the expectation that he would be convicted and punished. However heinous such an act may have been, it is clear she cannot be tried and punished for it by a conviction under this indictment.

This brings us to the question: Does the indictment charge a legal offense? The United States has asked that the question be ruled upon demurrer, rather than as a trial question. The charge breaks upon the rock presented in the question: Did Congress mean to extend the statute so as to make it a penal offense for a person to mail a writing inclosed in a sealed envelope addressed to the sender? The answer to this question is found in the genesis of the present enactment. The case of exposed writing, either upon a postal card or upon the outside of the envelope, is provided for in a separate enactment. The other enactment was originally confined to the use of the mails in the carrying of objectional publications. The case of the sending of a letter in a sealed envelope arose. This presented the question of whether such an act was within the prohibition of the law. The word "writ-

ing" appeared in the act of Congress. The word "letter" or "letters" did not. It was held that a "letter" was not one of the prohibited writings. The construction was based upon the fact that in all its other legislation, when Congress meant to include letters, it had used that word. U. S. v. Chase, 135 U. S. 255, 10 Sup. Ct. 756, 34 L. Ed. 117.

Following this ruling the word "letters" was inserted by amendment. Since then written messages or correspondence commonly known as letters, sent by one person to another through the mails, have been held to be within the Act. Is this idea of "sent by one person to another" involved in the idea called up by the word "letters"? This is, so far as we have been able to consult the lexicographers, the lexical meaning of the word. This is persuasive evidence of its meaning in common speech, and this is the common use of the word. This, in consequence, is presumptively the sense in which the word was used by Congress. There is the other view, which may be taken, not because of the word "letters," but because of the general purpose of Congress to deny the use of the mails for the carrying of any lascivious or obscene book or writing. The prohibition is directed against the use of the mails, not to the harm or annoyance which the sender may cause another. In this view the offense would be the same, whether a book were purchased of a publisher and sent by the purchaser through the mails, directed to himself, at his own address, or whether it were sent to him by the seller. It is the vile thing itself which is excluded from the mails, and the offense consists in the sending of what is thus excluded, and neither the sender nor the addressee is of any importance, except that it is the one who deposits it in the mail who is the guilty party named by the law. There is, however, involved in the thing condemned the thought of something published, and this element is lacking in a writing mailed by a person to himself.

Judgment on the demurrer is accordingly entered in favor of the defendant, that she go without day, etc., and an exception is allowed to the United States.

CLARK-MONTANA REALTY CO. et al. v. BUTTE & SUPERIOR COPPER CO.

(District Court, D. Montana. January 22, 1916, and May 29, 1916.)

No. 19.

1. COURTS ⇐367—FEDERAL COURTS—STATE LAWS AS RULES OF DECISION.
Where the rights of locators of mining claims, whose declaratory statements, required by state law to be recorded, were not properly verified, had become fixed and vested by patents prior to a decision of the state court that such defective verifications rendered the locations void, it was the right of the parties to have and the duty of the court to exercise its independent judgment upon the validity and effect of the declaratory statements and locations, and though, to avoid confusion, it would lean to agreement with the state court, if in its judgment the state rule of decision was unsound, it would refuse to follow it.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 958, 959; Dec. Dig. ⇐367.]

2. MINES AND MINERALS ⟸21(1)—LOCATION OF CLAIMS—DECLARATORY STATEMENT—DEFECTS.

Under a Montana statute requiring discoverers of mining lodes or veins to record a declaratory statement on oath, but prescribing no forfeiture for noncompliance, a defective verification of a declaratory statement did not render the location void, as discovery with intent to claim is the principal thing, and vests an estate in the discoverer, while the record is not necessary to create the estate, but only as notice, and to secure to the discoverer his discovery.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 46, 47; Dec. Dig. ⟸21(1).]

3. MINES AND MINERALS ⟸43—LOCATION OF CLAIMS—ESTOPPEL.

Plaintiff's and defendant's predecessors in title located adjoining mining claims conflicting to some extent; plaintiff's being the older location. Neither party properly verified the declaratory statement, recorded as required by the state statute. A patent was first issued for defendant's claim, and included the conflict area. *Held* that, if the statute made recording of the nature of conditions subsequent, the owners of defendant's claim securing the conflict area were at most assignees of a part of plaintiff's claim, within the common-law rule that such conditions are to be but substantially performed, and that no assignee of a part of the premises to which the conditions attach can take advantage of their breach.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 125–129; Dec. Dig. ⟸43.]

4. MINES AND MINERALS ⟸14(1)—LOCATION OF CLAIMS—OPERATION AND EFFECT OF STATE STATUTE.

Under the federal statute, authorizing local rules governing the location of mining claims and the manner of recording, state statutes governing these matters are of no more force and effect than miners' rules.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 18; Dec. Dig. ⟸14(1).]

5. MINES AND MINERALS ⟸44—PATENTS—CONCLUSIVENESS.

A patent for a mining location, covering a conflict with another location, which conflict was excluded when a patent was subsequently issued for the other location, was not conclusive that the location first patented was the older, as the land department does not determine nor try priorities, and has no jurisdiction to do so farther than that entry made and patent issued is an implied, if not an express, conclusive determination that the patentee has priority to the surface area.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 130; Dec. Dig. ⟸44.]

6. MINES AND MINERALS ⟸39—PATENTS—ADVERSE CLAIMS.

Though an applicant for a patent for a mining location conflicting with another location is a subsequent locator, the law requires the issuance of the patent to the applicant, unless the prior locator files an adverse claim and litigates it in the proper court.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 114; Dec. Dig. ⟸39.]

7. MINES AND MINERALS ⟸41—PATENTS—ADVERSE CLAIMS.

A prior locator of a mining claim can abandon and refuse to litigate a conflict area claimed by a subsequent locator in applying for a patent, without creating a presumption to his prejudice in respect to the remainder of his claim, whether he abandons the conflict because of fear or favor or pure indifference.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 116–119; Dec. Dig. ⟸41.]

8. MINES AND MINERALS ⊂=43—LOCATION—DEFECTIVE COMPLIANCE WITH LOCAL RULES.

In so far as there is no conflict if the government does not avoid a mining location for defective compliance with local rules, but issues a patent, the patent vests all the extralateral rights appropriate to the veins within the surface as of the date of discovery, of which no third party can complain.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 125–129; Dec. Dig. ⊂=43.]

9. MINES AND MINERALS ⊂=38(16)—SUITS TO QUIET TITLE—ADMISSIONS.

Where, in a suit to quiet title to minerals, defendant admitted that an exhibit to the complaint was the declaratory statement for plaintiff's location, that none other was recorded, and that the patent proceedings were based thereon, it of necessity admitted that the patent for plaintiff's claim issued upon such statement.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 102½; Dec. Dig. ⊂=38(16).]

10. MINES AND MINERALS ⊂=38(14)—SUITS TO QUIET TITLE—BURDEN OF PROOF.

In a suit between the owners of adjoining mining claims, in which each sought to quiet title to minerals, it was admitted by defendant that the apex of the R. vein crossed the common side line of the two claims, that from its apex in plaintiff's claim it extended on its dip under defendant's claim, and that the body of ore in dispute under both claims and in places bisected on the strike by the common side line was in such vein. *Held*, that this admission overcame the common-law presumption that defendant owned that part of the ore under its own claim, and imposed upon it the burden of proving by a preponderance of the evidence that its claim was the older location, and that the J. vein, having its apex in its claim, united with the R. vein above a part of the ore claimed by it.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 101; Dec. Dig. ⊂=38(14).]

11. MINES AND MINERALS ⊂=38(15)—SUITS TO QUIET TITLE—BURDEN OF PROOF.

Such burden, resting on defendant, could not be sustained by leaving the issue in doubt or balance.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 102; Dec. Dig. ⊂=38(15).]

12. EQUITY ⊂=172—PLEADING—CONFESSION AND AVOIDANCE—CONFESSION AS ADMISSION.

In equity, as at law, if a fact is admitted and another fact is averred to avoid it, the fact admitted is proved, with all its consequences, and stands as though the fact in avoidance had not been averred, unless it also is proved.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 408; Dec. Dig. ⊂=172.]

13. EVIDENCE ⊂=265(7)—ADMISSIONS—JUDICIAL ADMISSIONS.

A fact admitted at the trial is proved, as though admitted in the answer on oath.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1035; Dec. Dig. ⊂=265(7).]

14. MINES AND MINERALS ⊂=38(18)—SUITS TO QUIET TITLE—BURDEN OF PROOF.

In a suit to quiet title to ore, defendant admitted that the apex of the R. vein crossed the common side line of plaintiff's and defendant's claim, that from its apex in plaintiff's claim it extended on its dip under defendant's claim, and that the ore body in dispute was in such vein, but claimed that the R. vein united on strike and dip with the J. vein, while plaintiff claimed that the J. vein on strike and dip crossed the R. vein.

Held, that plaintiff was not required to prove that the two veins crossed, but only to offset defendant's evidence that they united, and, if the alleged union was in doubt or balance, the finding must be that they did not unite, though the evidence would not warrant a finding that they crossed.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 104; Dec. Dig. ⟸38(18).]

15. MINES AND MINERALS ⟸38(18)—QUIETING TITLE—SUFFICIENCY OF EVIDENCE.

In a suit to quiet title to ore in a vein the apex of which crossed the common side line of plaintiff's and defendant's mining claims, and which from its apex in plaintiff's claim extended on its dip under defendant's claim, evidence *held* insufficient to show that such vein united on strike and dip with a vein having its apex in defendant's claim, as asserted by defendant.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 104; Dec. Dig. ⟸38(18).]

16. MINES AND MINERALS ⟸38(18)—QUIETING TITLE—ADMISSIONS AND CONCESSIONS.

Where, in a suit to quiet title to ore, defendant alleged that two veins united, and claimed an estate by reason of such union, while plaintiff denied that they united, and alleged that they crossed, and admitted a different estate in defendant by reason of the crossing, defendant, though it failed to prove the union, was entitled to the estate that plaintiff admitted or conceded to it.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 104; Dec. Dig. ⟸38(18).]

17. MINES AND MINERALS ⟸31(1)—EXTRALATERAL RIGHTS—END LINES.

There can be but one set of end lines for a mining claim, and if the located end lines fixed extralateral rights upon one vein, they fixed them upon all veins.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 75; Dec. Dig. ⟸31(1).]

18. MINES AND MINERALS ⟸38(18)—QUIETING TITLE—SUFFICIENCY OF EVIDENCE.

In a suit to quiet title to ore, evidence *held* insufficient to show that a strand of a vein crossed the east end line of defendant's claim.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 104; Dec. Dig. ⟸38(18).]

19. MINES AND MINERALS ⟸54(2)—CONVEYANCES—EXTRALATERAL RIGHTS—"IN."

Plaintiff owned a mining claim containing the apex of a vein passing on its dip under the B. claim, adjoining it on the north, and also owned an undivided one-fourth interest in the B. claim. It executed an option to purchase all of its right, title, and interest in and to the B. claim, and pursuant to a resolution of its directors executed a deed conveying all of its title and interest in and to such claim, together with all dips, etc., and all metals therein, and all rights and privileges incident and appurtenant thereto. *Held*, that this merely conveyed the B. claim and its extralateral rights, and gave the grantee no title to the dip of veins apexing in plaintiff's claim and extending under the B. claim, or to such portions of veins apexing in the B. claim as dipped under plaintiff's claim, if the facts as to location and patent made the extralateral rights of plaintiff's claim and not those of the B. claim attach thereto, as veins to which plaintiff's extralateral rights applied were not "in" the B. claim, though they dipped under its surface.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 150; Dec. Dig. ⟸54(2).

For other definitions, see Words and Phrases, First and Second Series, In.]

20. MINES AND MINERALS ⊂=51(2)—ACTION FOR ACCOUNTING.
In a suit between the owners of adjoining claims, each party alleged ownership of ores, unfounded adverse claims beclouding title, underground trespasses and removal of ores, that the amount and value could be ascertained only by discovery and accounting, and that the adverse party threatened to, and would, unless restrained, remove and convert the ores, inflicting irreparable damage. Each prayed that its title be quieted, that the assertion of adverse claims and further entry and removal of ores be enjoined, that the adverse party be required to account, and that decree for the value of the ores wrongfully taken be rendered. *Held*, that the suit was not for damages, but for an accounting, and plaintiff, having elected its remedy, could not, because of a rise in the value of zinc, claim damages as for conversion.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 138; Dec. Dig. ⊂=51(2).]

21. MINES AND MINERALS ⊂=51(2)—CONVERSION—ACTS CONSTITUTING—REMEDY.
Where ore, the title to which was in dispute, was mined by the owners of adjoining mining claims under an agreement that, when the ownership was determined to the satisfaction of both, an accounting and settlement would be had, the taking was not conversion, but sounded in contract, and the only remedy was to compel the promised accounting.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 138; Dec. Dig. ⊂=51(2).]

22. PLEADING ⊂=36(2)—ADMISSIONS—CONCLUSIVENESS.
In a suit to quiet title to ore, and for an accounting for ore mined by defendant and claimed by plaintiff, plaintiff admitted that ores taken by defendant from beneath its own mining claim, but from a vein having its apex in plaintiff's adjoining claim, were taken by defendant in the honest belief that it owned them. Ores taken by defendant from beneath plaintiff's claim were known to be in the same vein, and it was known that the same portion of the apex would control the ownership of all of the ores. *Held*, that plaintiff was precluded by his admission from contending that defendant did not honestly believe it owned the ores taken from beneath plaintiff's claim.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 81; Dec. Dig. ⊂=36(2).]

23. MINES AND MINERALS ⊂=51(5)—ACCOUNTING—DAMAGES.
In accounting in equity for portions of realty severed and appropriated under the honest belief of ownership, no other injury appearing, the award to the owner is the value in place, which, in the case of ores, is reached by deducting from the amount that ought reasonably to have been received by the appropriator, the reasonable cost of mining, marketing, or reducing to money, or the actual cost, if less than the reasonable cost.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 141; Dec. Dig. ⊂=51(5).]

24. MINES AND MINERALS ⊂=51(5)—ACCOUNTING—DAMAGES.
In such case, no freight to mill could be allowed beyond what it would have cost plaintiff to transport the ores to its own mill.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 141; Dec. Dig. ⊂=51(5).]

25. MINES AND MINERALS ⊂=51(5)—ACCOUNTING—DAMAGES.
In such case, defendant could not be charged with the value of mill tailings, which would have had a value at the time of the accounting, had they been saved, where at the time the ores were taken no buyer in the then experimental state of science would have taken them into account in fixing a purchase price.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 141; Dec. Dig. ⊂=51(5).]

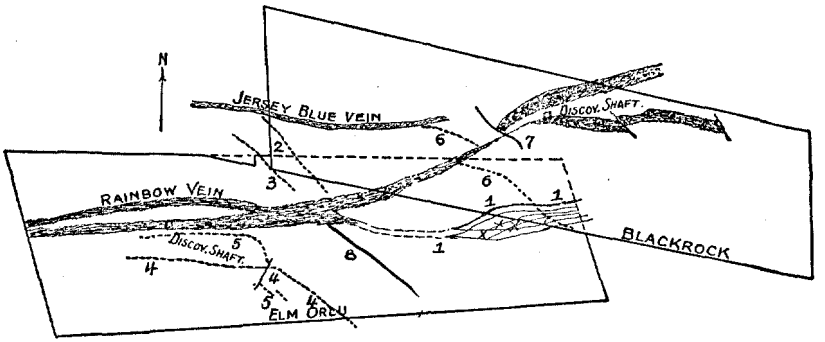
26. MINES AND MINERALS ⟸38(25)—QUIETING TITLE—DECREE.

In a suit between the owners of adjoining mining claims, a decree that each party was entitled to so much of certain veins as lay within the determined end line planes projected where the apices crossed the common side line *held* sufficiently definite, without fixing the point where certain veins and strands crossed the common side line.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 111; Dec. Dig. ⟸38(25).]

In Equity. Suit by the Clark-Montana Realty Company and others against the Butte & Superior Copper Company. Decree as stated in opinion.

The following is a general sketch of the claims involved:



1. Pyle at Elevation Blackrock 1100.
2. Creden at Orlu 1100.
3. " " " 1200.
4. Copper " " 800.
5. " " " 1400.
6. Jersey Blue, as claimed by plaintiff.
7. Deadwood, near surface.
8. Unnamed "Blue" vein.
   Rainbow and Jersey Blue at Surface.

John P. Gray, of Cœur d'Alene, Idaho, M. A. Folsom, of Spokane, Wash., and W. A. Clark, Jr., J. L. Templeman, and Geo. F. Shelton, all of Butte, Mont., for plaintiffs.

W. H. Dickson and A. C. Ellis, Jr., both of Salt Lake City, Utah, and Kremer, Sanders & Kremer, of Butte, Mont., for defendant.

BOURQUIN, District Judge. An apex controversy, both parties seeking to quiet title and damages. The premises are in the Butte district. The Realty Company called plaintiff, owns the Elm Orlu claim, and defendant owns the Blackrock and other claims. Only the two named need be referred to, save in the decree. They have a common side line for 850 feet of the Elm Orlu east end and of the Blackrock west end.

It is now admitted that the Rainbow vein at the apex crosses the Elm Orlu west end line, courses easterly, crosses the common side line and branches in the Blackrock, one strand crossing the Blackrock north side line, and one coursing easterly a disputed distance;

that the Pyle strand of the Rainbow at some depth in the Elm Orlu diverges from the south side of the said vein and, coursing easterly, unites with the Rainbow at the Blackrock 1,100 level; that the Jersey Blue vein at the apex crosses the Blackrock west end line and courses easterly a disputed distance, it and the Rainbow converging on strike and dip to union or crossing; that the Creden vein at some depth in the Elm Orlu near the Blackrock west end diverges from the north side of the Rainbow, courses northwesterly under both claims, and unites with or is cut off by the Jersey Blue. Very large ore bodies are in the Rainbow under both claims, at places bisected on strike by the common side line, and both parties have mined them under both claims. From various names of the veins those herein are chosen to avoid confusion. The issues remaining are as follows:

Plaintiff alleges that the Elm Orlu is the older location, and defendant alleges the Blackrock is. Plaintiff alleges that the apex of the Pyle strand is in the Elm Orlu and crosses the Elm Orlu east end line, and that the vein on strike and dip unites with the Rainbow vein; and defendant denies all thereof at points east of the Rainbow apex crossing of the common side line that would give extralateral rights to plaintiff. Defendant alleges that the Rainbow and Jersey Blue unite on strike and dip, and plaintiff denies it and alleges that on strike and dip the latter crosses the Rainbow. Defendant alleges the easterly strand of the Rainbow crosses the Blackrock east end line, and plaintiff denies it. Defendant asserts some ownership of ore bodies under both claims by virtue of estoppel by deed executed by plaintiff to defendant's predecessor in interest, and plaintiff denies estoppel. Both parties allege and deny trespass and damages, and accounting is deferred. Appropriate legal consequences and rights are asserted by both parties. The trial consumed 16 days. There are nearly 1,600 pages of testimony, and 130 exhibits. Maps and models are duplicated, save in more or less theoretical geology, from which unwarranted impressions are to be avoided. The testimony is of five experts for each party, all men of eminence in geology, or mining engineering, or both. For plaintiffs are Greene, of Butte, Irving, of Yale, Weed, of New York, Searls, of Nevada, and Winchell, of Minneapolis. For defendant are Finch, of Denver, Emmons, of Minnesota, Salisbury, of Chicago, and Burch and Wiley, of California. There is some conflict of facts and more of argument, opinions, and conclusions. Most of it can be imputed to the complex geological and other problems, conditions underground, difficulties of observation, and honest differences of interpretation by reasonable and learned men. But in instances partisanship apparently impaired judgment. As a whole, however, the testimony inspires confidence and deserves careful consideration. The judge gave two days to inspection of the premises, but since some places in evidence had been stoped and others obscured by fallen ground or timbering, with intermittent crevices and small openings through which to peer and distinguish granite, altered and otherwise, slips, faults, gouges, aplite, quartz seams, and veins, he has not been greatly aided to determine what evidence is more credible and weighty. The complexities which learned doctors studied for weeks, months, or

years (which to solve at a minor point one of defendant's witnesses said was beyond him, in that it would take a year's study), and now disagree upon, are not much clearer now than before that hurried passage through many workings.

In the matter of priority of location, plaintiff attached to the complaint as exhibits a copy of the declaratory statement of each claim, alleged the locations, that based thereon patent had issued upon each claim, and defendant by answer in effect admits all thereof. Plaintiff offered in evidence the patent proceedings, and introduced oral testimony of the Elm Orlu location, to all of which defendant objected that both locations were invalid when made, and neither could be established, save as of date of patent entry. Defendant's patent entry is the older, and on it defendant relies as the date of the Blackrock location. The Elm Orlu declaratory statement recites location of the "lode" in April, 1875, and it was recorded a few days later, and that of the Blackrock recites location of the "claim" in November, 1875, and it was recorded a few days later. At that time a Montana statute provided that all discoverers of lodes or veins "shall" record a declaratory statement thereof "on oath," but prescribed no forfeiture for noncompliance. The oral testimony sufficiently proves that at least in 1875, and shortly after the Blackrock location, its owners knew the Elm Orlu was then claimed; that at least in 1876 a vein had been discovered in the Elm Orlu and the corners staked; and that thereafter annual labor was continuously performed, the claim leased, and ore mined; and it was well known and to the knowledge of the owners of the Blackrock thenceforward. In November, 1880, the Blackrock owners applied for patent based on the aforesaid declaratory statement, no adverse claim was filed, entry was made, and patent issued in February, 1882. In December, 1882, the Elm Orlu owners applied for patent based on its aforesaid declaratory statement. The proceedings showed and excluded a conflict area with the Blackrock, and theretofore included in the Blackrock patent. Entry was made and patent issued in January, 1884.

[1] The verifications to said declaratory statements were defective, in that in substance each of them merely recited that the locators were citizens and that the instrument was a copy of the original notice of location posted on the claim. In 1885 the Montana territorial Supreme Court first held that for like defective verification the declaratory statement was void. Later this was expanded to hold the location also was void. See Hickey v. Mining Co., 33 Mont. 46, 81 Pac. 810. And that continued the rule of decision until 1907, when it was modified by statute, providing that the record of the certificate of location is for constructive notice, that a certified copy thereof is prima facie evidence of all facts properly recited in the certificate of location, and that no defect is material save in favor of subsequent locators "in good faith and without notice." Laws Mont. 1907, c. 16, § 11. All rights to the premises involved had become fixed and vested by patents prior to the said rule of decision. Hence it is the right of the parties to have and the duty of the court to exercise its independent judgment upon the validity and effect of the declaratory statements and

locations; and though for comity and to avoid confusion the court leans to agreement with the state tribunal, if in its judgment the state rule of decision is unsound, it must refuse to follow it. See Kuhn v. Coal Co., 215 U. S. 353, 30 Sup. Ct. 140, 54 L. Ed. 228.

[2] A location and its record are different things. The federal and most state statutes distinguish between them, the former even in authorizing local rules "governing the location" and "manner of recording." Comp. St. 1913, § 4620. The statutory object is to protect and reward discoverers of mines. Discovery with intent to claim is the principal thing and vests an estate—an immediate fixed right of present and exclusive enjoyment in the discoverer. The record is incidental machinery to secure to the discoverer his reward and to give notice to others. The spirit of all recordation acts is notice to protect others against secret equities. If the record is not necessary to create the estate (as it is in the matter of homestead exemptions and mechanics' liens), the statute providing for recording is but a direction to do certain acts and does not create conditions subsequent; and if the statute provides no forfeiture for failure to record, by failure the estate is not divested. Recordation of mining locations cannot be a condition precedent, for the estate arises before recordation is to be performed.

[3] If the Montana statute made recording of the nature of conditions subsequent (of feudal origin), at common law such conditions are to be but substantially performed. And no assignee of *part* of the premises to which the conditions attach can take advantage of their breach; and the owners of the Blackrock, securing the conflict area, were at most assignees of but part of the Elm Orlu premises. The United States forfeited neither claim for defective verification—if a breach of condition subsequent. The estate in neither, if voidable, was avoided. Both were confirmed and patented. Where Congress intended forfeiture of mining and other public lands claims for breach of conditions subsequent, it plainly said so. Vide forfeiture for failure to perform or contribute to annual labor. Recording acts that expressly provide forfeiture for failure to comply with them do so in favor of only subsequent bona fide claimants. Forfeitures are odious and not to be implied. Prior to patent entry of these claims, a Montana statute provided that all ambiguous statutes should be construed "in favor of natural right," and it would not have been too far-fetched to apply it to the statute directing recordation of mining claims. In 1875 Montana was indeed primitive. Those learned in the law were few. It is doubtful if there was a lawyer in Butte. The prospectors, pioneers and founders of this wonderful West, seeking in good faith to comply with the recordation law, for mere technical failures therein should not have been subjected to so harsh a construction of that statute and deprived, as many of them were, of their discoveries. And deprived for whom? Subsequent bona fide discoverers and locators? No; as a rule for those unspeakable creatures who search public records to discover and take advantage of defects in their neighbors' titles.

[4] These statutes are of no more force and effect than miners' rules. Both are authorized by the one federal statute. The better, if

not prevailing, rule always has been that, if the recordation law does not expressly provide forfeiture for failure to record, the location is valid though not recorded. That is the rule of this Circuit. Last Chance Mining Co. v. Bunker Hill Mining Co., 131 Fed. 586, 66 C. C. A. 299. In Yosemite Mining Co. v. Emerson, 208 U. S. 30, 28 Sup. Ct. 196, 52 L. Ed. 374, the Supreme Court held that one with knowledge of the existence of a mining location could not take advantage of the locator's failure to post two notices required by local rule, he having posted but one, the rule not providing for forfeiture, in that he had all the information the notice was designed to give, and that to hold that the failure to post the second notice "would work a forfeiture would be to permit the rule to work injustice and to subvert the very purpose for which it was enacted."

True, the posted notice is temporary, and the recorded one permanent. But the principle is the same, viz., that the failure to comply with local rules or statutes that do not prescribe forfeiture as a consequence is immaterial so far as those with knowledge of the locations are concerned. If one such statutory requirement does not imply forfeiture for failure, why should another? If in the case cited partial failure was not fatal, why should it be in the case at bar? No reason appears why the rule of the Yosemite Case does not control this at bar. The state rule of decision, now set aside by statute, does not commend itself as sound, and cannot be followed here.

[5-9] From the declaratory statements it appears the Elm Orlu is the older location; and if we reject both statements, by oral testimony the same fact appears. In the matter of the plaintiff's contention that the Elm Orlu is the older for the additional reason that it was exclusively possessed and worked for the local period of limitations for the recovery of real property, prior to the Blackrock patent entry, and secured thereby the equivalent of a valid location, the evidence is not sufficiently clear and definite to prove it. And in the matter of defendant's contention that in any event the Blackrock is the older by reason of a conclusive presumption created by the patent for the conflict area, citing the Stemwinder Case, it suffices to say that it seems that the cited case is superseded by the Lawson Case, 207 U. S. 1, 28 Sup. Ct. 15, 52 L. Ed. 65. The principle of the Lawson Case is that, if to a patent application there is not filed and in court tried and determined an adverse claim, the patent proceedings decide nothing, save that the applicant is entitled to a patent for the surface area applied for. That is the decision, though the court proceeded to fortify it by elaboration that might confuse. The land department does not determine nor try priorities. It has no jurisdiction to do so, farther than that entry made and patent issued is by it an implied, if not express, conclusive determination that to the surface area entered and patented the patentee has priority. Although the applicant is a subsequent locator, if the prior locator does not file an adverse claim and litigate it in the proper court, the law directs that patent shall issue to the applicant. A protest filed in the land office by the prior locator would be ignored. Public policy forbids that a prior locator cannot abandon and refuse to litigate the conflict area claimed by a subse-

quent locator without creating a presumption to his prejudice in respect to the remainder of his claim. Whether he abandons the conflict because of fear or favor or pure indifference is immaterial. And not claimed, or if abandoned, there is no conflict, even though the location lines overlap. Locations are of surface, including veins. In so far as there is no conflict, if the United States do not avoid a location for defective compliance with local rules, and issue patent, the patent vests all the extralateral rights appropriate to the veins within that surface and as of date of discovery, of which no third party can complain. Defendant, admitting that the exhibit to the complaint is the Elm Orlu declaratory statement, that none other was recorded, and that all Elm Orlu patent proceedings were based thereon, of necessity in substance admits the Elm Orlu patent issued upon said declaratory statement, and invokes the principle of the Lawson Case against itself. And the facts were also proven—as potent as stipulation or other admissions.

The court finds that the northerly wall of the Rainbow apex crosses the common side line 190 feet from the southwest corner of the Blackrock, and that the southerly wall so crosses 301 feet from said corner. For plaintiff the testimony is that the latter crossing is "about" 308 —"rather the extreme and indefinite limit of the mineralization which accompanies the vein"—to 314 feet; for defendant, "about" 300 to 301 feet. All agree there is no defined wall—that it is indefinite and leaves much to judgment. Considering the evidence in light of inspection and that the burden of proof is upon plaintiff, it is believed that the concession of defendant is more nearly right and as favorable to plaintiff as the facts warrant. The exposure is in a surface trench, and it is difficult to distinguish vein matter in place from mere seepage effect in adjacent country, whether of vein solutions or surface waters, and perhaps mushrooming beyond the limits of the vein proper below. A shaft might have contributed to accuracy. Finch testified that within the limits of the 300 feet he included 15 feet to the extreme limit of rock alteration, with a few little seams in it "to be consistent with the interpretation of a vein at other points." This is admirable frankness, but imports that at vital points and to indefinite extent he characterized that as vein which in his judgment is not vein, to serve his client and avoid hazard of comparison. The difficulty is that, when an expert shades his testimony upon the principle of do ut des, partisanship is likely, if not certain, to favor his client, and the court cannot determine to what extent, inevitably detracting from the weight of his opinion.

Adverting to the Pyle strand, it is known to diverge from the south side of the Rainbow at and above the Elm Orlu 1,200 level, and coursing easterly and at points 100 feet south of the Rainbow it crosses the common side line at the elevation of the Blackrock 1,100 level, 250 feet west of the Elm Orlu northeast corner, and unites on strike and dip with the Rainbow in the Blackrock at said level, 230 feet east of said crossing and 60 feet north of said corner. At this union it is a strong vein, 15 feet wide. One hundred feet west of the union there is a raise upon the Pyle, which, offsetting west, ends 40 feet above the

Elm Orlu 500 level. In this raise the Pyle dips vertical to the Blackrock 800 level, then north 75 degrees to the union. The Pyle dwindles in width going upward. It is known in the raise to 40 feet below the Elm Orlu 500, and there it may be cut off by a southerly dipping gouge slip, or this latter may be the Pyle fissure extending upward: the mineralization there having ceased temporarily or permanently. If this gouge slip continues to surface and with the dip it has in the raise, it would roughly approximate the Rainbow dip and apex in the Blackrock. In some zigzag workings from the raise in the Elm Orlu 500 the Pyle appears, if at all, in small, irregular, dislocated quartz seams and gouge. This is the greatest elevation at which the Pyle has been identified throughout a block from the raise to the Elm Orlu east end line, 150 feet; to the Rainbow west, 475 feet; to the Elm Orlu north side line, 50 to 150 feet; and to surface, 380 to 410 feet. The Pyle has the characteristic branching of the Rainbow. East of the raise and on the various Blackrock levels below the Elm Orlu 500 the Pyle or its branches have been developed easterly. At the Blackrock 800 level an erratic, branching strand has been followed easterly, and one branch of a few inches in width crosses the Elm Orlu east end line. At its western end the Pyle has been developed at its union with the Rainbow on various Elm Orlu levels below and perhaps to the 500.

Three hundred and fifty feet above the raise the country has been thoroughly crosscut by the Clark tunnel and connected workings, in which are slips, seams, and more than 15 small veins, some in each claim, some of those in one claim as reasonably to be correlated with the Pyle as those in the other. These premises are filled with slips, gouges, seams, veinlets, and veins, and will not permit correlation nor projection of small features like the Pyle at the Elm Orlu 500, save for slight distances. Plaintiff's witnesses are in doubt whether the Pyle ends in the raise or continues to the surface. Defendant's witnesses incline to the opinion it continues upward; that the southerly dipping slip in the raise is the Pyle fissure and should apex in the Blackrock. This slip, if the Pyle fissure, may contain ore above though mineralization ceased in the raise, and have its apex in some indefinite place above. Where is the apex of that part of the Pyle at the union on the Blackrock, 1,100 level is conjecture. Even if that "sliver" of the Pyle crossing the Elm Orlu east end line at the 800 level could serve as a vein to confer extralateral rights, where is its apex, and whether on dip it unites with the Rainbow, are also conjecture. And to what extent, if at all, the Pyle from its western divergence from the Rainbow unites with the latter on dip is not apparent. At the west it may be a part of the considerable ore body in which is the Bruce raise, and may go down vertically indefinitely, or end in lenticular form, or feather out and not unite on dip with the Rainbow. The patent presumption that the apex of a vein in the Elm Orlu, discovered before entry, extends across the east end line, cannot attach to the Pyle; and all that is proven is that the Pyle is known at its western divergence from the Rainbow and at other points, making it clear that at the points of divergence and for some undefinable distance easterly its apex is in the Elm Orlu.

[10-14] Whether the Jersey Blue unites with the Rainbow is the most contested issue. In view of the finding that the Elm Orlu is the older location, each party contends against its own interest. During the trial and argument for defendant, it was admitted that the Rainbow apex crosses the Elm Orlu west end line and the common side line; that from its apex in the Elm Orlu on its dip it extends under the Blackrock; that the great ore body in dispute west of the apex crossing at the common side line, under both claims and in places bisected on strike by said side line, is in said vein; and that it extends downward to the uttermost depths. These facts are conclusively proven as well. This admission overcomes the common-law presumption that defendant owns that part of that ore body under the Blackrock west of the apex crossing, and imposes upon defendant the burden of proving by a preponderance of the evidence (1) that the Blackrock is the older location; (2) that the Jersey Blue unites with the Rainbow above any part of that ore body by defendant claimed. The whole is a single ore body under both claims, the apex of the whole being in the Elm Orlu. To avoid the otherwise inevitable legal consequences, the defendant must prove the union of veins, even as it must prove the estoppel by deed it alleges. And this burden cannot be sustained by leaving the issue in doubt or balance. This is clear in respect to (1) that part of the ore body above the alleged union and under both claims; (2) that part of it below the union and under the Elm Orlu. And so is it in respect to that part of the same ore body below the union and under the Blackrock. Defendant confesses and avoids. In equity, as at law, if a fact is admitted and another fact is averred to avoid it, the fact admitted is proven with all its consequences, and stands as though the fact in avoidance had not been averred, unless the latter also is proven. See Clements v. Nicholson, 6 Wall. 315, 18 L. Ed. 786. Of course, a fact admitted at trial is proven even as though admitted in answer on oath. Otherwise, perjury in pleadings would be encouraged. And the plaintiff is required to only offset defendant's evidence that the veins unite. It is not required to prove they cross. The question or issue is, Do they unite? and evidence that they cross is only in support of the denial that they unite. Hence, if upon all the evidence the alleged union is in doubt or balance—in doubt or balance whether they unite or cross—the finding must be that they do not unite even though the evidence would not warrant a finding that they cross. Any extended review of the evidence is impracticable, but a general survey of it will aid in determining the issue.

[15] The premises are in granite country. The Rainbow is of an east and west vein system of the first fissuring resulting in veins in the district. When these veins were well mineralized, there occurred a northwest system of fissures crossing the east-west veins, often very obscurely (and which were also mineralized in the latter age of east-west vein mineralization, but to a less degree), designated as "Blue" veins. Of the "Blue" veins at least three are in these premises—the Deadwood, which crosses and faults the Rainbow near the Blackrock discovery shaft; the Copper, which to some extent also crosses and faults the Rainbow, is itself irregular and dislocated by faults, and is

in the southwest part of the Elm Orlu; and a nameless one, of which little is known, near the center of the Elm Orlu.

Plaintiff classifies the Jersey Blue as a "Blue" vein, and defendant denies it, contending it is a strand of the Rainbow and an east-west vein. The Rainbow is one of the greatest veins in the district. It was early and extensively mined for some 2 miles in length and in places to 1,500 feet in depth. In general, it is a broad zone of multiple and complex shattering, wherein largely by replacement mineralization occurred—at some places, in a wide, continuous vein; at others, in several roughly parallel strands, which may unite on strike or dip, or both; at others, in detached lenticular bodies; at others, in spurs or strands diverging from the main portion on strike, dip, or rise, and either feathering out or ending in lenticular form. At places in these premises it is 200 or more feet in width and largely commercial ore, while at others it narrows to a few feet, if not to a mere fissure, so far as ore is concerned. It has been greatly disturbed and faulted, not only by the "Blue" veins and other northwest fractures, but also by a later great series of multiple postmineral fractures designated the Blackrock fault. In these premises, the general course of this fault is that of the Rainbow. It is sometimes in four or more strands, sometimes parallel in and along the Rainbow, branching and uniting—sometimes in the vein or along and now the old wall of the vein or itself defining the line of least resistance at the limits of mineralization, and now itself the wall of the vein; perhaps sometimes a strand in the Jersey Blue, sometimes diverging into the country. The direction and extent of movement along it is vague. The several segments of country and vein between its strands all may have diversely moved. Most of the witnesses appear to believe the south side moved west at least, though Emmons testifies that to seek the segment of the Jersey Blue vein on the south side of the Rainbow and the Blackrock fault, if it crosses them, you could look for 200 feet either way from the Jersey Blue vein on the north side. The Rainbow apex in the Elm Orlu is from 50 to 100 feet wide. It dips steeply south to the Elm Orlu 800 level, then flatly north 55 degrees. It is probable that the Rainbow or a strand of it also descends vertically, having branched near or below where it dips flatly north. As it descends it widens. Where from the west it approaches and crosses the common side line it may be 200 feet wide, largely of commercial ore; and of these magnificent dimensions it courses easterly practically throughout the Blackrock. The Jersey Blue at the Blackrock west end line is 250 feet from the Rainbow. It courses more easterly than the latter and is of a dip more steeply maintained, so that from surface somewhere 300 feet east of the Rainbow apex crossing of the common side line to beyond the Blackrock west end line, and there 1,300 to 1,600 feet below the surface, the two veins have converged to union or nonunion, if not crossing.

The Jersey Blue is relatively regular and narrow, 2 to 30 feet in width. It is little mineralized, especially in the upper levels, having less than 1 per cent. stoping ground; the Rainbow having 40 to 50 per cent. Even at the point where it does or does not unite with the Rain-

bow it is relatively small, sometimes about 2 feet in width and poorly mineralized, in striking contrast to the great ore body at that point and above and below it in the Rainbow. So little is the worth of the Jersey Blue that in argument it is characterized by defendant's counsel as "not worth six pence, * * * the insignificant Jersey Blue vein which don't amount to a hill of beans anyway." And this is so for 1,000 feet of length that is known and to 1,300 feet in depth. As these veins converge the country between them is somewhat fractured and mineralized, at places having some commercial value.

Defendant's witnesses describe this as more or less conjugated fracturing, but forming a "horse-tail" structure uniting the two veins, though Emmons testified it did not make them one vein, but is an ore body between the veins. Finch imputes it to tension fracturing; Emmons to that of compression. It is apparent that they include in this "horse-tail" structure much that is internal transverse structure of the Rainbow and south of the Rainbow's well-defined hanging wall. Defendant's maps show it, and it is clear from the testimony of Finch and Emmons. When they admit that the Rainbow hanging wall is in the raise from the Blackrock 1,300 level (and it is also conclusively proven), they admit the Rainbow hanging wall both ways from the raise and north of the "horse-tail" structure. Finch testified that south of said hanging wall the Rainbow structure parallels the wall, and south of that is the "horse-tail" structure transverse the Rainbow, pointing to the Elm Orlu 1,300 level stopes. They also testified that this "horse-tail" structure diverges from the south side of the Jersey Blue and extends to the north hanging wall of the Rainbow, pointing it out on defendant's maps, where it is so painted but—in wholly undeveloped country.

This mineralization outside of and between the veins is of little extent and consequence. It doubtless at some places extends from vein to vein and some thereof in transverse fissures. But little of it is of commercial value and it by no means merges the veins. Both, as Emmons testified, retain their identity by reason of a "pretty definite limiting zone outside the two master fractures" of the two veins. It is not near as extensive as painted by defendant; otherwise, and if Finch's theory is correct (all the fissuring here is steep and seems normal—of tension), it ought to also appear where it does not, north of the veins at depth where the north country is the hanging wall side. The fracturing may be there, but not the mineralized "horse-tail" structure; and it is fair to infer that the mineralization between the veins came in connection with the great mineralization of the Rainbow and little from the barren Jersey Blue. These two veins have points of resemblance, but more of difference. The Jersey Blue more approximates to the "Blue" veins than to the Rainbow. Defendant's witnesses are of the opinion the Rainbow and Jersey Blue are of the same age and unite, the latter a strand of the former. Plaintiff's witnesses are of contrary opinion. The latter definitely describe places where the Jersey Blue crosses the Rainbow, from observation. But it is difficult to determine whether the testimony of defendant's witnesses that the veins unite is theory, inferences from or reflection of

defendant's maps, or actual underground observation. Close scrutiny of the testimony discloses that none of defendant's witnesses testified that he actually saw in the ground a union or merger of the veins, save Finch, who by reason of special observation was evidently put forward for the specific purpose; and in every instance, and they are but three or four that Finch testified to a "definite junction" of the veins or where "seen to unite," he not only did not describe the manner of the union, save in one instance, that it was not along gouge, but in a "mass of ore," but he placed it in undeveloped territory or in the "horse-tail" structure and north of the Rainbow hanging wall; and he so pointed it out and measured distances on defendant's maps. Converging strike and dip are no more persuasive of union than of crossing of veins. In these premises veins are shown to cross as often if not oftener than they unite. It is a circumstance to be noted that in testimony and argument it is insisted in defendant's behalf that its maps are evidence, intended to speak for themselves and to illustrate faults, ore, and ore structure in the veins. This may be allowed in so far as they conform to proven facts or are not self-serving. And looking to these maps, they show the Jersey Blue ore structure at an angle to, and not merging in, the Rainbow structure, and abutting against faults or gouge, and not against Rainbow ore. But this is largely theory.

It is surprising in view of what is involved, that so little development has been done at the points of first contact between these veins, and where union or nonunion or crossing ought to be more open to determination than elsewhere. It is realized development is expensive. The ground is heavy and difficult to hold. Each party did some development work for the other. Their workings unite at many points. But in instances both parties halted development at seeming vital points, as though fearful of results damaging to their theories. To briefly review this development, it is largely post-litigation. In all the years subsequent to location of the Blackrock and until this litigation threatened, no workings from the discovery shaft were on the Jersey Blue. This shaft is in the easterly Rainbow strand about 100 feet from where the Rainbow branches. But on the tunnel level, 50 feet below the surface and 400 feet west of the discovery shaft, was the face of a drift on the Jersey Blue, and on the 400 level was a drift through the country for 1,200 feet west of the shaft, from which three or four crosscuts were run to the Jersey Blue. After this litigation threatened, defendant ran two parallel drifts, with crosscuts, from the drift face aforesaid, easterly to the discovery shaft. For the first 100 feet one drift is on a clay slip, the other on the vein. There the vein ended. Defendant's witnesses testified it was cut off by the Deadwood, and, as the Deadwood is admitted a "Blue" vein, urge this as proof that the Jersey Blue is of older age than the Deadwood, and so not a "Blue" vein. For the next 150 feet, and to the Rainbow, defendant's witnesses testified the workings are in highly mineralized and altered granite, filled with what Finch described as crisscross quartz seams or stockwork and Emmons as a sheeted zone of closely-spaced parallel quartz seams with some cross quartz seams, and which is claimed by them to unite the Jersey Blue, so continued, with the

broad side of the Rainbow. They placed the limits of this stockwork or sheeted zone continuation of the Jersey Blue at walls 20 feet apart and in undeveloped country. Beyond the Rainbow, there 24 feet wide, some of them testified that the Jersey Blue likewise continued to the discovery shaft and beyond and across the Blackrock east end line.

On suggestion that they were virtually describing the Jersey Blue as crossing the Rainbow, they explained both veins merged into each other, or in a hub of mineralization around the discovery shaft, and as one vein branched in four directions. Defendant's sampler testified that, as these workings were run, he sampled all vein matter and quartz disclosed; that from where the Jersey Blue ended, 100 feet from the old drift face in the new drift, he went east 36 feet for the next sample, then east 53 feet for the next, then east 83 feet for the next, which was in the Rainbow; that in the parallel drift from opposite the point aforesaid he went east 22 feet for the next sample, then east 60 feet for the next, then east 22 feet, then 20 feet, then 20 feet for the next in the Rainbow. Westward in old workings, where the vein is unquestioned, he sampled at 10-foot intervals. Plaintiff's witnesses testified that the Jersey Blue ended and was not cut off by the Deadwood; that from there to the Rainbow is only unaltered granite, with no stockwork or sheeted zone and no quartz seams, save the insignificant ones and joint seams in the granite of the district everywhere; that from near the old drift face the main part of the Jersey Blue coursed southeasterly, along which a drift was run until it reached and was cut off by the Blackrock fault along the north side of the Rainbow; that the drift was continued through and to the south side of the Rainbow and the Jersey Blue there found and drifted upon for 100 feet. No segment of the Jersey Blue was found in the Rainbow where the drift crosscut it, and this, plaintiff's witnesses explained, is due to the fact that there the Rainbow is between two branches of the fault; that they did not think to develop to find it, though movement had so crushed the Rainbow it probably would not be found. Defendant's witnesses testified that what in plaintiff's behalf is there described as the Jersey Blue is only a fault gouge transverse to Jersey Blue structure and having in it some irregular bunches of quartz.

On the Blackrock 400 level, the Jersey Blue is not developed to the north side of the Rainbow, but from a crosscut entirely through both claims plaintiff drifted west 100 feet to the Rainbow, upon what its witnesses claimed is the Jersey Blue, consisting of parallel gouges and quartz 2 feet wide, faulting the Rainbow and ending within the latter against the Blackrock fault. Defendant's witnesses describe this as nothing but a branch of the Blackrock fault, and not the Jersey Blue. On the Blackrock 700 level conditions and testimony are like to that in relation to the level last mentioned, save that the Rainbow is plainly more faulted by what plaintiff's witnesses describe as the Jersey Blue on the south side of the Rainbow; and upon this is a raise to the Elm Orlu 800 level, 40 feet above. On the 800 level the Jersey Blue is developed on the north side of the Rainbow, and plaintiff's witnesses testified it curves northeasterly for a distance along the Blackrock fault,

there the Rainbow north wall; that on the south side of the Rainbow it appears in a short easterly drift upon it. Some of the defendant's witnesses testified that in the drift upon the north of the Rainbow the Jersey Blue does not reach the fault, but departs from the south side of the drift, and the veins "have to unite" in "undeveloped territory," though Emmons testified it did proceed along the fault as stated by plaintiff's witnesses. Here the fault has four branches in the Rainbow, and Emmons testified that because of probable diverse movement between and along them, the Jersey Blue south of the Rainbow, if it crossed, might be looked for within 200 feet either way.

On the Blackrock 900 level Greene testified that on the south side of the Rainbow the latter is cut off by the Jersey Blue, and he is unable to say why the western segment of the Rainbow does not reappear in workings farther west, unless faulted beyond them. There are no workings on the Jersey Blue immediately north of the Rainbow, and no other witness refers to this place. On the Blackrock 1,000 level Greene and Irving testified that on the south side of the Rainbow the latter's ore body is cut off by the Jersey Blue, and that the Rainbow's western segment is not observable. The working in which this is said to be seen crosses through to the north side of the Rainbow and then along the Jersey Blue on the said north side. Greene further testified that the Jersey Blue there north of the Rainbow is but 8 to 10 inches wide, and on the south side it is 4 feet wide. No other witness referred to this place, save Finch, who testified that in a working north of the Rainbow is a positive, actual junction developed between the two veins; but the point he refers to is in what defendant's map depicts as "horse-tail" structure from the Jersey Blue and north of the Blackrock fault, which is along the hanging wall of the Rainbow. In reference to the Blackrock 1,100 and 1,200 levels Searls testified that in stopes below the 1,100 and across the Rainbow he saw the Jersey Blue cutting and "terminating absolutely" the bands of zinc ore of the Rainbow, "just as distinct in the stope as it is here on this paper" (an illustrative sketch), and that it was unquestionably the Jersey Blue, because also visible in a drift four feet below. Greene testified that the stopes at the 1,100 on the south side of the Rainbow end against a northwest fault he believes to be the Jersey Blue; that he could not say how wide the Jersey Blue is there, as it was lagged, but in the stope it was 3 or 4 feet wide; that on the 1,200 on the north side of the Rainbow the Jersey Blue faults the Rainbow, and that on the south side of the Rainbow for 80 feet it cut off the big stopes in the Rainbow ore body. No other witness refers to these places, save Finch, who testified that on the 1,200 in the crosscut a little farther west and on the north side of the Rainbow is a "definite junction of the two veins developed," though, he says, undoubtedly they also join farther west at this elevation; that the junction is not along gouge, but in the midst of a mass of ore. And there again he pointed it out on defendant's map in "horse-tail" structure from the Jersey Blue and north of the Rainbow hanging wall. In reference to the Blackrock 1,300 level plaintiff's map depicted the Jersey Blue within the Rainbow and crossing it at an acute angle, for 400 feet. Plaintiff's witnesses

testified to its existence there in the stopes. Some 20 feet north of where so located on the map, unknown to them, defendant had raised to the Blackrock 1,200, from whence the raise formerly had been carried to the surface. This fact developed while plaintiff's case in chief was in progress.

In defendant's case in chief, its witnesses testified that the Jersey Blue and Rainbow veins are to be seen in the bottom of that raise; that on the level the lagging had been removed from the raise to the south side of the Rainbow; that the exposure across was solid zinc ore, without transverse fissures or gouge, and for 35 feet. Finch testified that in the raise and 25 feet above the sill of the 1,300 level the Jersey Blue and Rainbow "are seen to be united," but as it conclusively appears that the veins are converging at the first floor of the raise, he again places the union in "horse-tail" structure, if anything, and north of the hanging wall of the Rainbow. Salisbury testified he was in the raise, and the veins "should come together about at the sill floor," which was "not now open to observation"; that in the stopes east of the raise "there is well exposed the so-called crossing of the Jersey Blue vein of the plaintiff in the midst of the so-called Rainbow lode of the plaintiffs"; that "the crossing is not very evident, but the thing which seems as I interpret it to be the Jersey Blue vein of the plaintiff * * * is, as I interpret it, a slip through the ore of" the Rainbow; that "the slip is distinct"; that in reference to the structure of the ore following the slip he did "not so interpret it"; that at the Rainbow north wall the structure parallels it for 3 or 4 feet very distinctly, but further south ceased to be banded, and he would speak of it as having the structure of the granite it had displaced, and it is that structure which is the so-called Jersey Blue crossing; that the slip has gouge, with walls perfectly well defined, and "if you stand at just the right place" there seems, so far as the walls of the gouge "are concerned, a structure of ore running in that direction, but I could make out" that there was other structure "than that which seems to be outlined by the two walls of the gouge"; that on the south "that structure does not seem to me to obtain"; and that the so-called Jersey Blue had a strike more nearly east than on plaintiff's map and seemed to be merely a fault slip made after the ore was formed. Burch testified that on the level he could not find the Jersey Blue where plaintiff's map placed it; that from the raise south, where the timbers were removed for the width of 30 feet of the Rainbow, is almost solid zinc ore, without gouges or slips or transverse structure; that looking up at the foot of the raise he could not tell how the structure of the zinc ore dipped; that it is not appreciably banded, but is irregular blocks, appearing more like the original granite structure; that he did not see anything that looked like "the ore coming down and being faulted"; that looking at the ore and rocks just southerly of the foot of the raise it is not evident that the bands of the Rainbow vein coming down are faulted by a southerly dipping fault—nothing that he "could possibly interpret in that line." Wiley testified that in the raise the veins united and below are one—"come down and join as in that model can be seen"; that east of the raise, in the stope and in the Rain-

bow are "two little mud slips" 10 feet apart, striking north 85 degrees west and dipping south 75 degrees; that one is a "very distinct gouge or mud slip" and without banding parallel to it, "except as you may have banding in the Rainbow lode itself"; that from the raise south across the Rainbow is "no plain diagonal structure of any kind cutting through there"; that there is hardly a stope in the mine where you cannot see these little gouges in the ore and along them the ore breaks, requiring extra timbering.

Two days before the testimony concluded, plaintiff's witnesses visited the raise at that 1,300 level, and after defendant rested Greene testified that in the west side of the raise at the first floor is a well-defined vein with two wall gouges separated 5 feet, and in which next the south wall are 6 or 8 inches of quartz practically vertical, and next the north wall is about the same amount of quartz and zinc ore, between them being altered granite containing little seams of quartz and zinc; that immediately south of this vein is rich zinc ore banding, approaching and abutting against it at a dip of north 53 degrees; that the north wall gouge (referred to as the Jersey Blue) appears east of the raise and diagonally crossing the drift at the first floor, still dipping steeply; that along the north side of that drift and the stope farther east is a strong gouge wall dipping north 80 degrees to apparently normal Rainbow dip of north 64 degrees; that south of this wall is very solid zinc ore, and six sets south is a gouge having along it 8 inches of quartz, with some pyrite and a little zinc in it, striking north 73 degrees west and dipping south 79 degrees; that it goes up to and across the back of the stope and "could be followed as you would follow one of these pilasters" of the courtroom, disappearing in the stoping; that south of that gouge is the solid zinc ore of the Rainbow. On cross-examination he sought to explain his former testimony and the map, and testified that in his opinion the Jersey Blue in five branches crosses the Rainbow on that level. He also testified to gouges in the Rainbow and due to internal movement.

Irving testified that in the west side of the raise at the first floor he saw and entered in his notes "10 to 18 inches of quartz with some gouge cutting the Rainbow banding"; that the Rainbow banding seemed to come in on the south side of the raise and toward the vein described; that the vein last aforesaid dipped practically vertical and is of strike probably more west than north 70 degrees west; that it is the Jersey Blue, or a strand of it; that east of the raise in the stope he saw that vein in the Rainbow, and he described it about as did Greene, his notes reading, "nearly vertical very strong wall opening Rainbow material, good gouge, north 80 degrees west"; that in the west end of the stope and in the roof he saw, as he read from his notes, "beautiful vein, unmistakably Jersey Blue, about 6 or 8 inches good vertical zinc in it," which he considered the Jersey Blue or a strand of it. On cross-examination he testified that he could not see the bottom of the raise; that he thinks there are two strands of the Jersey Blue at that level, one in the raise and one in the stope, probably overlapping, and that there may be more; that the strike of the strand in the stope is north 80 to 85 degrees west and the dip is south

73 degrees; that in the stope he did not observe Rainbow banding—"very definitely to decide whether it was cutting across the banding or not"—but the Jersey Blue dips in the opposite direction to the usual dip of the ore; that at an acute angle it cuts across the Rainbow banding that is a little farther north and dipping north; that the Jersey Blue there forms "a vein which shows in the roof beautifully," about 12 inches wide; that north of the Jersey Blue in the raise is ore which may be part of the Jersey Blue; that if the two strands of the Jersey Blue continue on strike till opposite each other they will be 18 feet apart, though the one in the raise likely "peters out" and an overlapping strand continues the Jersey Blue.

Searls testified that in the raise the Rainbow plain banded structure dips north 55 degrees, and across and cutting and breaking it down is a plain south wall of at least that portion of the Jersey Blue, nothing obscure nor hard to see, dipping vertically; that the polishing and slickensiding of the previously existing ore with striations to the east at an angle of 15 degrees to the strike are plainly observable on the Jersey Blue south wall, which strikes north 77 degrees west; that the wall is a thin gouge, and next to and plainly across the severed strands of ore are 10 inches of parallel quartz, lying right against the north dipping structure of the Rainbow; that the Jersey Blue the width of the raise to the north is vertical structure, zinc and quartz banded, absolutely vertical; that in the drift east from the raise the Jersey Blue can be seen in a corner at least 6 feet wide, diverging to the south, with a strike north 60 to 65 degrees west; that the angle between the hanging walls of the veins, 30 degrees, can be seen very clearly defined in the roof of the drift, and that it is perfectly obvious that the Jersey Blue departs southeast from the drift; that where these two hanging wall gouges are together it is impossible to see one gouge cut through the other, and they are apparently merged for 6 feet on strike, though the intersection on dip is plain, as in the raise can be seen the Jersey Blue gouge of vertical dip; that the Jersey Blue south wall cutting across the Rainbow in the raise and its north wall cutting across the Rainbow in the drift are "just as plain as that same wall of the court-room"; that in the level and stopes the Jersey Blue structure does not all persist, but is interrupted strands, which is common where veins cross from one variety of country rock to another, the Rainbow here being of the nature of country rock to the Jersey Blue; that four floors below the level he could see the Jersey Blue with a strong blue gouge and parallel zinc banding cutting the Rainbow wall and traversing it diagonally, the same Jersey Blue he saw in the workings at the level. On cross-examination he testified that from the raise he saw no strand that died out; that 10 feet up in the roof of the stope, where Irving saw the beautiful vein, he saw some white material which he thought is quartz, though he did not try to inspect it closer; that in Rainbow stopes are almost innumerable small cracks like one on the 1,300 level he thought might have occurred at the time the Jersey Blue faulted the Rainbow.

Winchell testified that a pile of muck concealed the level below the raise, but at the first floor he saw the Rainbow solid mass of zinc ore

dipping flatly north 50 to 60 degrees; that the Jersey Blue there dips southerly, or nearly vertical, "going directly across the banded structure of the Rainbow." He then describes it in the drift east from the raise and in the stope approximately as did Searls. He further testified that veins will split when they encounter harder material, and the fissures in the latter will "heal" and leave little evidence of crossing; that this has happened where the Jersey Blue crosses the Rainbow; that on the 1,300 level the Jersey Blue crosses the Rainbow at an acute angle and is split into stringers; that the like occurs on the Blackrock 1,400 level, and he correlates the strands in these two levels. He was not cross-examined.

Weed testified he agreed generally with Greene, Irving, and Searls in reference to the situation in the raise and stopes on that level.

In rebuttal Finch testified that in a new westerly drift from the stope of the 1,300 a strand described as of the Jersey Blue by plaintiff's witnesses is a mud seam or gouge, taking a strike of south 73 degrees west. Burch testified that "mud seam" dwindled to a crack, as did Wiley.

The judge twice visited this raise at the level, but conditions were such at the last visit that it added nothing to judgment. On the Blackrock 1,400 level and stopes above it, all below the point of alleged union, Greene testified that in stopes and crosscuts the Jersey Blue could be seen in the Rainbow. Irving testified that in a stope four floors above the level the Jersey Blue is found cutting the Rainbow. Searls testified that on the ninth floor above the level the appearance is of another vein coming in the stope; that the banded zinc ore of the Rainbow striking slightly northeast comes up against and is terminated by a distinct vertical gouge, the zinc ore being dragged around slightly and crushed into breccia; that "this structure" strikes north 70 degrees west, dips vertical, and is traceable across the stope to the end of that floor; that the conclusion is irresistible that the Rainbow is there broken and cut off by a later vein. He further testified veins often cross without faulting. Winchell testified on this level the Rainbow is faulted along its south side, in the stopes, by the Jersey Blue; that the Jersey Blue is about 8 feet wide in a crosscut there south of the Rainbow. Finch testified that on this level, to his knowledge, no vein crosses the Rainbow as depicted on plaintiff's map, though there are some fault slips. Burch testified to transverse seams of gouge there, but so far as he could see or find for lagging there is only the Rainbow. So, likewise, Wiley.

The Elm Orlu 1,500 level is 40 feet above the Blackrock 1,400 level, and from the former a crosscut was run into the Blackrock. Greene testified that therein the Jersey Blue is found cutting through the Rainbow and that the veins showed different structure. Irving testified that there at one point the Jersey Blue is wholly in the Rainbow; that the latter dips north 45 to 50 degrees, and the former dips 87 degrees—nearly vertical; that the Jersey Blue banding goes directly through the Rainbow banding and it is a vein made up of pink manganese—"the clearest case" of crossing he knows of. Finch testified that what the plaintiff's witnesses call the Jersey Blue on this level

is nothing but fault gouges, as does Wiley. Neither specifically refers to the pink manganese mentioned by Irving. On the Elm Orlu 1,700 level a northeast crosscut from the Elm Orlu shaft to near the Blackrock west end line is claimed by plaintiff's witnesses to have cut near its face the Jersey Blue entirely through the Rainbow and south of it. Some development was done by drift and raise. Defendant's witnesses are of contrary opinion. This crosscut, 600 feet long and in progress during the trial, cuts more than eight veins and five slips, of varying sizes, strikes, and dips.

In reference to the Creden vein defendant's witnesses testified it united the Rainbow and Jersey Blue, and plaintiff's witnesses that it diverges from the Rainbow and is cut off by the Jersey Blue. So far as appears it is a strand of the Rainbow, diverges from the latter's north side in the Elm Orlu at depths of 1,000 to 1,200 feet, extends no farther east than crosscut 1,218 on the 1,200 level and the Blackrock west end line on the 1,300 level, strikes northwesterly under both claims, and unites with or is cut off by the Jersey Blue. It is not proven to unite with the Jersey Blue. Its apex is probably in both claims. Neither party seems much interested in it, and it is of little importance in itself, though careful investigation might have furnished light upon this issue.

Taking into consideration all the evidence, the inspection, and the undefinable impressions received during the trial, the court is not persuaded that by a preponderance of the evidence it is proven that the Jersey Blue vein and the Rainbow vein unite. Consequently the finding must be and is that they do not unite. At the tunnel level the Jersey Blue ends 150 feet west of the Rainbow. The stockwork claimed to continue it, even if there, has neither strike nor limits. It answers no definition of a vein. Apparently here is one place where Finch found it necessary to some indefinite extent to characterize as vein what in his judgment is not vein. The sampler's conduct during the progress of the work speaks loudly. He found no vein matter or quartz for 53 feet in one drift and for 60 feet opposite in the parallel drift, when the ground was fresh and no timbering to obstruct his view. Plaintiff's evidence that here is only country rock permeated with the joint and quartz seams common throughout the district is persuasive and superior in weight to that of the defendant. Defendant's contention that the Jersey Blue is faulted by the Deadwood is not supported by the evidence. Some small slips are probably at or near the termination of the Jersey Blue, but to correlate them with the Deadwood requires a series of sweeping curves and projections unwarranted by any development upon the Deadwood there or below, and impossible in these premises. On the Elm Orlu 800 level, where union is next claimed, the Blackrock fault separates the veins, and by Finch the union is placed in the slightly mineralized country in undeveloped territory between veins. The other points of developed union claimed are on the Blackrock 1,000, 1,200, and 1,300 levels, and in every instance by Finch, who alone purports to have perhaps seen them, are placed in the mineralized country between the veins. This is not union within the meaning of the statute. The veins have not merged and lost their

identity in the mineralized country between them, even if it is sufficiently mineralized to be classed as ore. Both veins are there distinct and within clearly defined walls. The mineralized country is not part of either vein, and, if ore, is, as Emmons testified, ore between the veins.

The conditions at the Blackrock 1,300 level and the testimony in relation to them are somewhat surprising. It is remarkable that defendant's witnesses said so little, not only in chief, but in rebuttal, of the appearance of the veins at the first floor of the raise and in the walls of the stope. They, too, returned and reviewed the place about the time that plaintiff's witnesses first viewed it. Finch testified that in the raise and 25 feet above the level the veins "are seen to be united," and his colleagues testified they should come together at or blow the level. Finch previously testified the Jersey Blue branches wherever it approaches the Rainbow, so whatever he saw might have been a branch of the Jersey Blue departing from the raise, and which might be one of the strands plaintiff's witnesses testified are in the workings below. Not only did defendant not lower the raise to disclose the actual point of contact of the veins and their relation there, but the floor of the level and the west wall of the raise were obscured, so that none of even its own witnesses saw either. It is apparent that a very limited additional development, or even clearing away obstructions, might have furnished evidence to fully determine the issue. This appears to be the most favorable point of approach of the veins to determine the issue. In so far as the crossing of the veins is concerned, the evidence equally fails to persuade that they do. It is true that conditions and appearances in the raise of the Blackrock 1,300 level tend to support the interpretation of plaintiff's witnesses, but not to the extent claimed by them. It is also true some of the plaintiff's witnesses testified definitely to and described crossings of the veins at points whereon defendant is wholly silent. And this is significant in this: It is obvious, and also admitted, that if the veins cross at any one point, they must cross at all points, even though so obscurely as to be undiscoverable. But this is not so of union. Every appearance of union and merger may exist at many places, but if one point of crossing is proven, all evidence of union avails nothing and the veins are proven to cross throughout. Healing and cementation may destroy evidence of crossing in many places. Where the "Blue" fractures crossed the well mineralized east-west veins, in most places there was nothing to replace and the fractures healed. Only where there was yet unreplaced granite would there be much evidence of cross-vein structure.

At the same time, there are so many slips and gouges in the Rainbow, as well as out of it, so much transverse structure in the Rainbow, and so much obstruction to the view, that it is easy for the expert to be deceived, or to deceive himself, and to misinterpret geological phenomena there. "If you stand at just the right place," as Salisbury puts it, may to some extent be taken figuratively as well as literally. The Blackrock faults have so complicated the situation that it is doubtful if the problem is capable of solution. Whether they

united or crossed, the movement along the Blackrock fault strands appears to have cut off and shifted the point of convergence of the veins at many, if not all, places, and the original point may be undiscoverable, the continuity of the Jersey Blue destroyed. Emmons believes the throw of these faults may have been in several directions and for as much as 200 feet either way. The Deadwood may indicate less throw. In these premises where veins cross as often or oftener than they unite, converging strike and dip are not presumptive of union. It is admitted "Blue" veins cross obscurely—that the Deadwood does so. This latter crossing has been stoped by the defendant in connection with the Rainbow, but beyond the testimony that the crossing is obscure, there is little in evidence by way of comparison with the Jersey Blue at union or crossing and south of the Rainbow.

[16, 17] In view of all the circumstances, and that reasonable and learned men may honestly differ in their interpretation of geological phenomena in these premises, the court is constrained to say the evidence is in equipoise; and so the determination is dictated by the burden of proof. Even as defendant fails to prove the veins unite, so would plaintiff fail to prove they cross, if the burden of proof was upon it. A principle of law, however, demands that the court shall find that the veins do cross. Defendant alleges they unite and claims an estate by reason of it. Plaintiff denies they unite, and alleges they cross, and admits a different estate in defendant by reason of it. Though defendant fails to prove the union, and the estate it claims, the law is it must be awarded the estate that plaintiff admits or concedes to it. And accordingly the finding is that the veins cross, and, save at the intersection, defendant is entitled to all ore bodies in the Jersey Blue south of the Rainbow and wherever it goes or where plaintiff admits it goes, if not otherwise found. The Rainbow strand easterly from the Blackrock discovery shaft extends about 400 feet east and to within 250 feet of the Blackrock east end line, where it is cut off by a northwest fault. Even at the discovery shaft it is east of any extralateral rights of plaintiff. No discovery shaft was required when the Blackrock was located. Both the Jersey Blue and the Rainbow were discovered when the location was made, or at least before the patent entry. Evidently the cropping of the two veins gave the appearance of one continuous east-west vein and the location was made accordingly. Neither the Jersey Blue nor the Rainbow is a secondary vein. Both are primary. The Jersey Blue overlaps the Rainbow. Extralateral rights based on it extend east beyond where the like rights based on the Rainbow begin. Indeed, taking the course of the Jersey Blue where fixed by plaintiff south of the Rainbow, it is probable it crosses the Blackrock south side line east of the Elm Orlu east end line. That the Rainbow crosses both side lines is not controlling. There can be but one set of end lines, and if the located end lines fix extralateral rights upon one vein, as they do upon the Jersey Blue, they fix them upon all veins.

[18] Although it is immaterial whether or not the easterly strand crosses the Blackrock east end line, it is observed that where it is cut off by the northwest fault old stopes show it about 20 feet wide. From

the fault to the east end line the facts are much the same as from the Jersey Blue termination west of the discovery shaft and to the Rainbow on the tunnel level. This is another place where it would seem that Finch characterizes as vein what in his judgment is not vein, and to an indefinite extent. For defendant it is claimed conjugated quartz seams, stockwork, east of the fault and 250 feet to and across the east end line, are the continuation of the easterly strand of the Rainbow. Plaintiff contends the easterly strand has been cut off by a northwest fault, and that east of the fault is but country, with some quartz seams parallel to the fault, and some joint and other quartz-filled seams common to the country. Nothing appears here for the distance of 250 feet to satisfy the definition of a vein. Again is no strike or boundaries, save for some individual northwest quartz seams. This stockwork, if it exists, does not measure up to Salisbury's illustration of interior stockwork on strike connecting two separated segments of a vein. Here the stockwork is claimed to extend 250 feet from the segment of the vein to the west, but no connected segment to the east appears.

It is probable that the eastern segment of the easterly strand was faulted to the north and may appear in a trench north of the Blackrock north side line. And this may be the apex of the great ore bodies at depth in the easterly part of the Blackrock. Considering the evidence in connection with the patent presumption, it does not persuade that the easterly strand crosses the east end line.

[19] In the matter of the estoppel by deed claimed by defendant, in August, 1906, plaintiff executed to defendant's predecessor in interest an option to purchase "all of the right, title and interest" of plaintiff "in and to the Blackrock quartz lode mining claim—being an undivided one-quarter thereof." This was recorded October 31, 1906. October 26, 1906, plaintiff's directors adopted a resolution of sale to the optionee and authorizing its officers to execute to him a deed of "an undivided one-quarter interest in and to that certain quartz lode mining claim known as the Blackrock quartz lode mining claim; * * * it being the sense of the board of directors that said company shall convey * * * all of the right, title and interest" it has "in and to the above described property." This was recorded May 1, 1907. October 29, 1906, plaintiff executed to the optionee a deed reading that plaintiff—

"does remise, release and forever quitclaim unto the said party of the second part, and to his successors forever, all the right, title, interest, claim and demand of the party of the first part in and to that certain portion, claim and mining right, title and property on those certain ledges, veins, lodes or deposits of quartz and other rock in place, containing precious metals of gold, silver and other metals, * * * the following described mining property, to wit: An undivided one-quarter interest in and to that certain quartz lode mining claim known as the 'Blackrock' quartz lode mining claim. * * * It being the intention of the party of the first part to convey to the party of the second part all its right, title and interest in and to the above described property. Together with all the dips, spurs and angles and also all the metals, ores, gold, silver and metal-bearing quartz, rock and earth therein, and all the rights, privileges and franchises thereunto incident, appendant and appurtenant, or therewith usually had and enjoyed; and, also, all the estate,

right, title, interest, possession, claim and demand whatsoever of the said party of the first part of, in or to the said premises and every part or parcel thereof."

November 1, 1906, the optionee and grantee in said deed conveyed all received by virtue of it to others, who in turn conveyed to defendant. Defendant's contention is that in any event by this deed plaintiff conveyed one-quarter of any ore bodies beneath the Blackrock that apex in the Elm Orlu and also the like portion of any ore bodies beneath the Elm Orlu that apex in the Blackrock and which otherwise might belong to plaintiff. To maintain this contention defendant appeals to Montana Mining Co. v. St. Louis Mining Co., 204 U. S. 204, 27 Sup. Ct. 254, 51 L. Ed. 444. But that case is distinguishable from this. There the deed was to settle litigation and was of a portion of the St. Louis claim, "together with all the minerals therein contained." A vein apexing in said claim dipped under the deeded portion. And the court held that the segment of the vein under the deeded portion was "therein contained" and so was conveyed by the deed. Although the court rested the decision somewhat on the rule of common law, it seems clear that in any view the segment of the vein was *in* the deeded portion—was "therein contained"—and within the intent of the deed. A vein apexing in a claim is *in* every part of that claim under which it dips. But in the case at bar there was no litigation to settle. Veins apexing in the Elm Orlu and to which that claim possessed extralateral rights were not *in* the Blackrock, though they dipped under its surface. Nor were they carved out of the Blackrock, for never were they *in* it. The property conveyed by the Elm Orlu patent was not a rectangular block to the center of the earth, but was such block with all projecting veins apexing therein wherever they extended; and those projecting veins were as distinct and separate from the surface beyond the Elm Orlu under which they dipped as like surface projections nearly surrounded by adjacent property would be from it; and no more *in* it in the former case than in the latter. Clearly, a deed of land and all *therein* would not convey land projecting in and nearly surrounded by it.

Suppose this deed was of warranty; would plaintiff be liable when the owners of other veins dipping under the Blackrock, of which there are doubtless some, assert their rights thereto? Are those veins *in* the Blackrock? And if not, why are these of the Elm Orlu? The option was to convey the Blackrock only, not any part of the Elm Orlu. There is nothing to show that the optionee had any knowledge plaintiff owned the Elm Orlu. The circumstances and the language of the deed warrant the construction that only the Blackrock and its extralateral rights were within the intent of the parties. Giving effect to every one of the profuse words in the deed, this seems the right conclusion. The same is true of such portions of veins apexing in the Blackrock and dipping under the Elm Orlu. If the facts are such that by virtue of location and patent, not the Blackrock's extralateral rights, but the Elm Orlu's attached thereto, those portions were not *in* the Blackrock, but were *in* the Elm Orlu from the beginning. The claim of estoppel fails.

It appears that each party has mined ore that is the property of the other, and accounting will be had. From the findings the conclusions and the decree are clear. Plaintiff is owner of and entitled to all ore bodies in dispute (1) in the Rainbow vein throughout depth between the Elm Orlu west end line and a parallel line projected from the Rainbow south wall apex crossing of the common side line; (2) in the Creden vein so far as its apex is within the Elm Orlu and between end lines there projected; (3) in the Pyle strand in so far as its apex is within the Elm Orlu and between end lines there projected. Defendant is owner of and entitled to all ore bodies in dispute (1) in the Rainbow vein throughout depth east of where the Rainbow south wall apex crosses the common side line and the Elm Orlu end line there projected; (2) in the Creden vein in so far as its apex is within the Blackrock and not within Elm Orlu end lines projected where the Creden vein apex departs from the Elm Orlu; (3) in the Pyle strand in so far as its apex is within the Blackrock and east of the Elm Orlu end line or the end line projected where the Pyle apex crosses the common side line; (4) in the Jersey Blue vein throughout depth save where it crosses the Rainbow vein between the Elm Orlu west end line and the end line projected at the Rainbow south wall apex crossing of the common side line. Each party will pay its own costs.

A great chancellor once said that the test of a good decree was that it satisfied neither party. If that quality attaches to this decision some consolation ought to be found in the reflection, not of influence in the decision, however, that each party is awarded everything and deprived of nothing that, apparently, it thought itself entitled to until recently.

Upon accounting had, defendant waived in respect to its ores taken by plaintiff. It appears defendant's taking of plaintiff's ores was continuous from March, 1910, to May, 1913, both inclusive. The place was the Blackrock 1,200, between the Blackrock west end, and the 301 plane established at the Rainbow apex crossing of the common side line, and from said vein where bisected on strike by said side line. In 1910 there were no workings above that point that served to determine what vein (and where was its apex) was being mined by defendant.

Plaintiff having access at all times to defendant's workings with its consent, in June, 1910, observed defendant was taking said ores from beneath the Elm Orlu, and claimed a trespass. Later inspection disclosed like taking by defendant from beneath the Blackrock. At some time subsequent to March, 1910, plaintiff took some of defendant's ores from the same vein beneath the Blackrock. A controversy arose in respect to all said ores and more, and was the subject of discussions, negotiations, understandings, and agreements between the parties. In March, 1912, they agreed that "to facilitate the settlement of the controversy as to the ownership of said ores and ore bodies from which ore has been extracted, if any, by either of the parties hereto, and to provide a reasonable length of time within which the parties may negotiate, * * * and endeavor to complete a settlement as to the

ownership" of "ores heretofore extracted, * * * and which may hereafter be extracted," and of ore bodies, they would for three years waive the plea of limitations in any suits involving said ores and ore bodies. In July, 1912, "to afford both * * * ample opportunity of determining the disputed matter to the satisfaction of both," and without waiver of rights or acknowledgment of claims, they agreed upon certain areas within which neither would extract ores until by exploration work they might determine the location, extension and apices of the ore bodies "as soon as we can conveniently do so," both privileged to do development work and to inspect therein, and that "a record of the tonnage of all ores extracted and the assay values thereof shall be kept by both companies for the purpose of accounting for the same after the ownership of such ores shall have been determined."

Later in the same month, to determine the location, position, and apices of the veins and ore bodies and to facilitate the settlement of the disputes, they agreed that each with diligence would do certain development for and at the expense of the other. Development work progressed, and in July, 1914, so far determined "the disputed matter to the satisfaction" of plaintiff, but not defendant, that plaintiff commenced this suit. The next month, in lieu of injunction pendente lite, for economic reasons, and not by way of limiting rights or admitting claims, they agreed upon areas wherein neither would mine, and areas wherein each might mine to the exclusion of the other, expressly stipulating that each was given the right pending suit to mine ore bodies claimed by the other, each to keep account of ore mined and places where, to be furnished the other on request, that the agreement would endure until decree herein, and that prior understandings and agreements in reference to reciprocal development work would continue.

[20] Neither party demanded accounting prior to suit, and each demands it from the other, in the pleadings herein. During the accounting and now it is plaintiff's contention that, in so far as the ores are concerned, the suit is for damages for conversion of personal property. Defendant urges that it is for accounting in equity for the value of portions of realty severed and removed. This is material, in that by reason of the advance in the price of zinc, due to the war, the award to plaintiff might be about 1,000 per cent. greater under its theory than under defendant's. The decision heretofore is not accurate in its characterization of the suit. Both parties alleged ownership, unfounded adverse claims beclouding title, underground trespasses and removal of ores (secretly and willfully, plaintiff alleges; wrongfully, defendant alleges); that the amount and value of such ores can be ascertained only by discovery and accounting; and that the adversary threatens to and will, unless restrained by the court, remove and convert all ores, or the value thereof, inflicting irreparable damage. The prayers are to quiet title, to enjoin assertion of adverse claims, to enjoin further entry and mining and taking ores, that the adversary "be required to account for all ores" taken, and the complainant have "decree for the value" of such ores wrongfully taken, and for other and further relief. The suit, in so far as the ores are concerned, is not for damages eo nominee, but for accounting for the

value of ores taken. Neither in form nor theory is it for damages for conversion of ores as personal property. And plaintiff, having elected its remedy, cannot now, dazzled by the possibilities perceived in the subsequent spectacular rise of zinc, choose another, that does violence to its bill of complaint.

[21] Furthermore it is doubtful if conversion of ores is made out. Certainly it is not in respect to those taken subsequent to the agreement of July, 1912—a compromise agreement. When disputed property is in part taken by both claimants under an agreement that, when ownership is determined "to the satisfaction of both," an accounting and settlement will be had, the taking is not conversion, it sounds in contract, is lawful, resembles mutuum of Roman law, in legal contemplation is a sale at common law, and the only remedy is to determine ownership and compel the promised accounting. The conduct of the parties and all other evidence are persuasive that the difficulties in the way of a determination of ownership of the ores induced an understanding for mutual advantage, labor and aid to that end, pending which both might mine some of the ores, dispose of them with other of their own, and, ownership determined, accounting would be had in respect to all ores taken whether before or after the agreement of July, 1912, a balance struck and paid. The stipulation in said agreement that it was without waiver of rights and without acknowledgment of claims cannot refer to taking and accounting for ores as therein agreed, and seems of superfluous precautionary words relating to the disputed ownership and not to remedies. As this view has not been urged, and is unnecessary to the decision, it may be left here.

In deference to the argument herein it may be observed that though in equity relief is limited to compensation, and damages in the sense understood at law are not determined and allowed, save where a court sitting in equity is so authorized by some statute (see Root v. Railway Co., 105 U. S. 215, 26 L. Ed. 975; 2 Dan. Ch. *1080), yet in view of the duty to herein administer local law (see Railway Co. v. Telegraph Co., 234 U. S. 376, 34 Sup. Ct. 810, 58 L. Ed. 1356; Trust Co. v. Krumseig, 172 U. S. 358, 19 Sup. Ct. 179, 43 L. Ed. 474) no reason is perceived why the local statute authorizing the injured party to elect the highest value between conversion and decision, creating a substantive right, should not be applied herein, had conversion been counted on and maintained.

[22] The ores taken by defendant aggregate 31,825 tons. Plaintiff admits those taken from beneath the Blackrock were taken in honest belief that defendant owned them, but contends otherwise in respect to those from beneath the Elm Orlu. This contention is founded upon the presumption that ores beneath a claim are presumed to be of that claim, in the absence of proof that they are in a vein apexing without it. In the face of the admission the contention fails. At the time when taken the ores were known to be of a single vein and at places where the same portion of the apex would control the ownership of all of them. Hence defendant, honestly believing it owned the ores

beneath the Blackrock, obviously likewise believed it owned those beneath the Elm Orlu.

[23] In accounting in equity for portions of realty served and appropriated under honest belief of ownership, no other injury appearing, the award to the owner is the value in situ. This is arrived at in the case of ores by deducting the reasonable cost of mining and marketing or reducing to money, or what it cost the trespasser, if less, from the amount that ought reasonably to have been then received for or from them; the balance being their value in situ and the award to the owner. See Guffey v. Smith, 237 U. S. 101, 35 Sup. Ct. 526, 59 L. Ed. 856. In this case the ores contained 20.5 per cent. zinc, 6 oz. silver, and 40 cents gold per ton. The parties are in accord that in the then state of the science of treatment of like ores, 65 per cent. recovery and 48 per cent. concentrates, was reasonably good practice. Plaintiff claims to have done better in treating like ores, and defendant slightly less in treating these ores. This reasonable result, in view of the law aforesaid, is the basis of recovery herein.

Defendant mined and milled the ores in connection with operations of which these ores were about 7.6 per cent. Allowances to defendant are, per ton of ore, $2.33 for mining, 17 cents for freight to mill, $1.19 for milling, and $2.06 for freight to the nearest purchasing smelter. For general expenses nothing is allowed, in that segregation is impossible, and nothing appears to show that defendant expended anything during the trespass that it otherwise would not. For instance, engineers, firemen, supervision, office help, shaft repairs, pumping, power, air, etc., were doubtless not appreciably increased. The theory of allowances is that the trespasser expended what the owner otherwise would have. But here, aside from direct mining and milling and freight, none such was expended.

[24] To illustrate, the defendant's drifts and sill floors will not relieve plaintiff from duplicating them to reach the same place and mine the balance of the same ore body. No freight to mill can be allowed beyond what it would have cost plaintiff to transport the ores to its own mill. The suit is for compensation to plaintiff, not to defendant; otherwise, if defendant transported to mill so far that freight absorbed all profit, plaintiff would be without remedy. The price received for the concentrates from the smelter equaled 82 cents per ton crude for all metals save zinc, and $105,118 for the zinc therein. The zinc values are arrived at by computing the values of the ores mined in each month, at the average price of zinc when reaching market the succeeding month, at the rates then paid by the smelter for concentrates of the recovery and grade aforesaid. Simple interest is awarded on all amounts thus found, from the date of sale to that of this decision. The total award is $177,707.40.

[25] Plaintiff's claim for the values in the mill tailings which defendant did not save is disallowed. Though valuable now, had they been saved, they added nothing to the value of the ores when taken. In the then experimental state of the science in respect to these ores, no buyer would have taken the possibilities of the tailings into account

in fixing a purchase price for the ores, in so far as increased price is concerned.

[26] In the matter of the decree the case was virtually reargued in relation to the Creden vein and Pyle strand. Both parties contend that definiteness requires that the court fix where the Creden apex crosses the common side line. Plaintiff also contends that for the same reason the court should find that the apex of the Pyle strand is in the Elm Orlu, at least as far east of the Rainbow as the Pyle raise, while defendant contends the finding should be that no part of the Pyle strand apex within the Elm Orlu extends farther east than the 301 plane. The findings heretofore made will stand.

A decree should be as definite as the case admits of, and it is believed that a decree conforming to the findings is sufficiently so herein. The evidence demonstrates that the Creden apex is in both Elm Orlu and Blackrock, but does not disclose the point where it crosses the common side line. The same may be true of the Pyle strand. A decree that each party is entitled to so much of said veins as lies within the determined end line planes projected where the apices cross the common side line, can be made certain by following the apices to the crossing.

True, the parties may later dispute the point of crossing, and so new litigation arise to identify, to determine it—the boundary line; but that is no more than is probable in respect to the Rainbow, the apex crossing of which is determined. At 100 places where the Rainbow dips beneath the claim not having the apex, what is the Rainbow, where is the bounding wall, what is ore in the Rainbow, and what adjacent, but without it, may furnish the subject-matter of a hundred suits. A decree may quiet title on a vein but partly developed, on presumptions, from end line to end line, which later may be found to cross side lines and between the same parties require new litigation to identify and fix the point of crossing. Other like situations may be conceived. The inherent nature of the property involved must be had in mind.

It must be noted the suit is not confined to specific ore bodies, but by defendant at least, by virtue of its claim of estoppel by deed, was broadened to involve every part of the Elm Orlu—every vein apexing in the Elm Orlu, unknown as well as known, that may dip beneath the Blackrock. There are unknown veins within the Elm Orlu; that is, many veins the development of which is too slight to admit of definitely fixing where on strike they cross the Elm Orlu boundaries, or where they dip, as undoubtedly some of them do, beneath the Blackrock. Doubtless, too, are veins wholly unknown in unexplored Elm Orlu territory. Is not plaintiff entitled to a decree quieting its title to all such veins in so far as their apices may be found to be within the Elm Orlu bounding planes fixed or projected, and that may be found to dip beneath the Blackrock? Is not such a decree sufficiently definite in view of the circumstances? It is believed the answer must be in the affirmative. And the *decree will be as definite as the patent that conveyed such veins as a part of the Elm Orlu* to plaintiff.

The Pyle strand undoubtedly apexes in the Elm Orlu, and since it

unites with the Rainbow beneath the Blackrock at the 1,100, whereof the controlling portion of the apex is yet unknown, it may at depth further unite where the controlling apex will be found in the Elm Orlu; and a decree following the findings will protect the rights of both parties. Even as it is not known to what extent the Pyle dips beneath the Blackrock, it is not known to what extent the Rainbow east of the 301 plane dips beneath the Elm Orlu.

A decree conforming to the findings and quieting each party's title to all veins apexing in its claim, wherever they dip, would not be impaired, should deeper development disclose union of veins owned by them respectively. For at the union the junior location's vein would be at an end, and below would be only the senior location's vein. Some of the like difficulties attendant upon apex litigation are noted in Keely v. Mining Co., 169 Fed. 603, 95 C. C. A. 99.

Decree accordingly.

UNITED STATES ex rel. WILLIAMS v. SEUFERT BROS. CO.

(District Court, D. Oregon. May 1, 1916.)

No. 6766.

1. INDIANS ⟸3—CONSTRUCTION OF TREATY—FISHING RIGHTS.

In 1855 the United States concluded treaties with the different Indian Tribes occupying the territory now comprising the states of Washington and Oregon, by which it sought to extinguish their title to all the land in such territory excepting that included within the reservations therein delimited. The boundaries between the lands claimed by the different tribes were indefinite, and those fixed by the treaties were more or less arbitrary. The tract ceded by the Yakima tribes by the treaty of June 9, 1855 (12 Stat. 951), was bounded on the south by the Columbia river. Such treaty reserved to the Indians the right of taking fish "at all usual and accustomed places in common with the citizens of the territory." *Held*, that such provision should not be construed as limited in its application to places within the boundaries of the land ceded, and that the right thereby secured to the Indians extended to their usual and accustomed fishing places on the south side of the Columbia river.

[Ed. Note.—For other cases, see Indians, Cent. Dig. §§ 5–7, 11; Dec. Dig. ⟸3.]

2. TREATIES ⟸7—RULES OF CONSTRUCTION.

Treaties, like contracts, must be construed as a whole to ascertain their true meaning and intendment.

[Ed. Note.—For other cases, see Treaties, Cent. Dig. § 7; Dec. Dig. ⟸7.]

3. INDIANS ⟸3—TREATIES—RULES OF CONSTRUCTION.

A treaty with Indians should be construed as nearly as may be ascertained as the Indians understood it, and they should be given the benefit of any doubt as to the meaning of its provisions.

[Ed. Note.—For other cases, see Indians, Cent. Dig. §§ 5–7, 11; Dec. Dig. ⟸3.]

4. INDIANS ⟸6—STATUS—TERMINATION OF GOVERNMENT GUARDIANSHIP.

An Indian who, although he received an allotment on a reservation which he still holds, has ceased to live on the reservation, has acquired a

homestead on which he resides, and has adopted the habits of civilized life and become a citizen by virtue of Act Feb. 8, 1887, c. 119, § 6, 24 Stat. 390, is no longer a ward of the government in such sense that the United States may maintain a suit to protect fishing right claimed by him under a treaty with the tribe of which he was a member.

[Ed. Note.—For other cases, see Indians, Cent. Dig. § 12; Dec. Dig. ⊂=6.]

5. INDIANS ⊂=3—TREATIES—FISHING RIGHTS.

Indians, given by treaty the right of taking fish at all usual and accustomed places, are not limited in fishing at such places to methods used by them in times before the treaty, but may adopt and use any modern method.

[Ed. Note.—For other cases, see Indians, Cent. Dig. §§ 5–7, 11; Dec. Dig. ⊂=3.]

In Equity. Suit by the United States, as trustee and guardian of the Confederated Tribes and Bands of Yakima Indians and as trustee and guardian of and on the relation of Sam Williams, against Seufert Brothers Company. Decree for complainant as guardian of Yakima Tribes, and dismissed as to relator Williams.

Clarence L. Reames, U. S. Atty., and Robert R. Rankin, Asst. U. S. Atty., both of Portland, Or.

R. R. Butler and Bennett & Galloway, all of The Dalles, Or., for defendant.

WOLVERTON, District Judge. [1] This is a suit first instituted by the United States of America, on the relation of Sam Williams, against Seufert Bros. Company, a corporation, to establish ancient fishing rights at a place described as:

"That certain portion of the rocks which, at low water, constitute the south bank of the Columbia river opposite lot No. 3, in section 36, township No. 2, north of range 13, east of the Willamette Meridian, in the county of Wasco, state of Oregon."

By leave of the court first had and obtained, the bill of complaint was amended so as to make the United States of America, as trustee and guardian of the confederated tribes and bands of Yakima Indians, and as trustee and guardian of and ex rel. Sam Williams, plaintiff, against Seufert Bros. Company, a corporation, defendant. Being so amended, the further allegations with reference to the locus in quo of the fishing ground are as follows:

"With the increased commercial fishing on the Columbia river, the places for the Indian fishing became very confined and narrowed in their limits, and a particular fishing place now claimed by this plaintiff in the behalf and for the benefit of the Yakima Nation of Indians and the most recent and consistent user, Sam Williams, is particularly described as follows, to wit: That certain point situated 28.53 chains north and 12 chains west of the quarter section corner between section 1, in township 1, and section 36 in township 2, both townships north of range 13 east of the Willamette Meridian in the county of Wasco, state and district of Oregon.

"Said place is further identified as the usual place where Sam Williams, as a Yakima Indian, was accustomed to fish with dip net and scow fish wheel for several years last past, and where this Indian has driven iron pins in the

rocks to which to anchor his scow fish wheel to the south bank of the Columbia river, and where the letter and figures 'O 34' are marked on the rocks, the same being the number of the fishing license issued by the state of Oregon to Sam Williams for the fishing season of the year 1913.

"This fishing place, as in this paragraph generally and particularly described, was, at the time of said treaty, always has been, and now is, one of the usual and accustomed places to which Indians belonging to one or more of the confederated tribes and bands of Indians of the Yakima Nation have continually resorted for the purpose of securing fish, and which place was secured to them for their use and benefit, and which place said tribes and bands of Yakima and their Indian representatives have fished according to their customs and by more civilized methods except when prevented by high water, by the construction work of the United States government in widening the channel of the Columbia river at this point, or by the threats and acts of the defendant company, its officers, agents, and employés, as hereinafter particularly set forth and complained of."

Under the testimony, the locus in quo was considerably extended so as to comprise the entire point known by the Indian tribes as Kum-sucks, reaching from below the point where Sam Williams had his wheel set in the years 1910, 1911, 1912, and 1913, and where he attempted to maintain it in the year 1914 as against the claim of the defendant company, around the point up the river to and even beyond a point where Henry Gulick or his wife claims to own and possess, including the location where Peter Jackson, an Indian, has for a time and does now maintain a fish wheel. The description is perhaps broad enough to suggest an inquiry as to the ancient fishing rights of the confederated tribes of the Yakima Indians to the entire point known as Kum-sucks, whether it be immediately at the point or for a stretch around and below or around and above such point. Such, therefore, will be the present inquiry.

To sustain the fishing rights, it is further alleged, in effect, that from time immemorial there have been and now are maintained by the confederated tribes and bands of Yakima Indians now settled upon the Yakima Indian Reservation in the state of Washington usual and accustomed fishing places which, by treaty regulations, belong to such tribes and bands as of right, and to which they "are entitled to resort for the purpose of gathering fish for food and domestic and other uses."

On June 9, 1855 (12 Stat. 951), the general government made and entered into a treaty with the following named confederated tribes and bands of Indians occupying lands in Washington territory, to wit, Yakima, Palouse, Pisquouse, Wenatshapam, Klikatat, Klinquit, Kow-was-sav-ee, Li-ay-was, Skin-pah, Wish-ham, Skyiks, Ochechotes, Kah-milt-pah, and Se-ap-cat, who, for the purposes of the treaty, were considered as one nation under the name of "Yakima," with Kamaiakun as its head chief.

By article 1 said confederated tribes and bands ceded to the government certain territory specifically described by metes and bounds. Among other courses, the following are prescribed:

"Thence, in a southwesterly direction, to the Columbia river, at the western extremity of the 'Big Island,' between the mouths of the Umatilla river and Butler creek; all which latter boundaries separate the above confederated tribes and bands from the Walla-Walla, Cayuse, and Umatilla tribes and

bands of Indians; thence down the Columbia river to midway between the mouths of White Salmon and Wind rivers; thence along the divide between said rivers to the main ridge of the Cascade Mountains; and thence along said ridge to the place of beginning."

Article 2 reserves from the territory described by article 1 a specific tract for the exclusive use and benefit of such confederated tribes and bands of Indians as an Indian reservation.

By article 3:

"The exclusive right of taking fish in all the streams, where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with the citizens of the territory, and of erecting temporary buildings for curing them; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land."

By the eighth article said confederated tribes and bands of Indians acknowledged their dependence upon the government of the United States. 2 Kappler's Indian Affairs, Laws and Treaties, 524.

The first and most important question of legal import to be determined is whether, by intendment of the treaty, the usual and accustomed fishing places of any of these confederated tribes or bands of Indians situated on the south bank of the Columbia river opposite the territory ceded, if they had such so situated, were reserved for their use and benefit.

The question depends for its solution entirely upon the construction of the treaty. It is urged with strong persuasion that the government and these tribes of Indians were dealing alone with the territory ceded, and none other, and that, when the right of taking fish at all usual and accustomed fishing places was reserved, reference was had to such fishing places as were comprised by the territorial boundaries of the ceded domain. This would be true, undoubtedly, had the two parties been citizens of equal experience and intelligence, and had the government not been seeking in a sense to encompass the guardianship of these untutored races, where the broadest scope of good faith and fair dealing should always, as in like and similar conditions, be exercised.

[2] Treaties, like contracts, must be taken by their four corners, and construed as a whole, in order to ascertain their true meaning and intendment. Furthermore, it is helpful to put oneself in the place of the contracting parties, and view their situation and surroundings, and read the minds, if possible, that formulated and finally concluded the articles which they have made their own by their signatures.

On the same day that the Yakima treaty was concluded, to wit, June 9, 1855 (12 Stat. 945), the government concluded another treaty with the Walla-Walla, Cayuse, and Umatilla tribes and bands of Indians for ceding territory contiguous in part to the territory ceded by the Yakimas, and containing a like stipulation respecting the right of taking fish "at all other usual and accustomed stations in common with citizens of the United States." 2 Kappler's Indian Affairs, Laws and

Treaties, 521. And a little later, on June 25, 1855 (12 Stat. 963), the government concluded a treaty with the tribes and bands of Indians of Middle Oregon, whereby such Indians ceded to the general government the territory lying to the south of the Columbia river opposite the southern boundary of the lands ceded by the Yakima nations. 2 Kappler's Indian Affairs, Laws and Treaties, 536.

The territory ceded is bounded in part by a description, "commencing in the middle of the Columbia river, at the Cascade Falls," and running thence southerly, etc., to the headwaters of Willow creek; "thence down stream to its junction with the Columbia river; and thence down the channel of the Columbia river to the place of beginning." This treaty contained, also, a stipulation to the effect that the Indians should have the right to take fish "at all other usual and accustomed stations, in common with citizens of the United States."

Other treaties were concluded about the same time, namely, with the Nez Perces and other tribes, ceding lands further to the east as well as further to the west. So that it can readily be seen that the broad purpose of the government was to conclude equitable and lasting treaties, if possible, with all the tribes and bands of Indians in the Northwest, so as to extinguish the Indian title to all the lands in the country not set apart to the Indians for reserves, and to open up the same more fully to general settlement and occupancy. The Indian tribes did not themselves occupy definite territory with fixed and exact boundaries, and it is without doubt that the different tribes commingled more or less, and roamed about, in their hunting and in the chase, over the demesnes one tribe of another. And so of their fishing—there was no monopoly by any one tribe of any specific and fixed territory.

The tribes and bands were very numerous, and it was most convenient to treat with them in groups, as their settlement in definite locations could be agreed upon, and the combined territory of the groups relinquishing title was comprised by one boundary. In this wise, taking them by groups, all the territory was covered by relinquishment of Indian title. The group boundaries were consequently, in many instances at least, made contiguous, and they very naturally only followed in a general way the very general idea that the Indians had of their territorial delimitations.

Now, it cannot be predicated of the Indian mind in those early times that particular stress was laid upon any precise or exact boundary line as a delimitation of ceded territory; nor was it of especial concern to the general government, as its ultimate object was to obtain a cession of the Indian title to all Indian territory, and that within a comparatively short compass of time, so that great emphasis cannot be ascribed to any idea of absolute exactness in establishing the delimitations of ceded territory. It was not a thing, under the conditions then existing and in view of the matters in contemplation, of very great essentiality to either party to the treaties being negotiated. The Indians were giving up all they had for a lesser area, with enlarged rights pertaining thereto, and the government was getting relinquishment of the Indian title to all public lands.

[3] Now, with this premise in view, we may the more confidently discuss the meaning and intendment of the clause "all usual and accustomed places." "All," of course, is a term of very broad significance, and it must be limited by the context and by the understanding that the Indians probably had of it at the time the treaty was consummated. Mr. Justice McKenna, in United States v. Winans, 198 U. S. 371, 380, 25 Sup. Ct. 662, 664 [49 L. Ed. 1089], has made use of this significant language:

"And we have said we will construe a treaty with the Indians as 'that unlettered people' understood it, and 'as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection,' and counterpoise the inequality 'by the superior justice which looks only to the substance of the right without regard to technical rules' "—citing Choctaw Nation v. United States, 119 U. S. 1, 7 Sup. Ct. 75, 30 L. Ed. 306, and Jones v. Meehan, 175 U. S. 1, 20 Sup. Ct. 1, 44 L. Ed. 49.

The clause giving the exclusive right of taking fish in all streams where running through or bordering on the reservation is immediately followed by the words, "as also the right of taking fish at all usual and accustomed places, in common with the citizens of the territory." No particular stress can be laid upon the words "citizens of the territory," as other lands were being ceded out of the same territory by other tribes; and then, by reference to the treaties made with the Walla-Wallas, Cayuses, and Umatillas, and the Central Oregon tribes, it would seem that "citizens of the United States" were probably intended. By the former part of the clause, the right of taking fish was defined by exact limitations, while in the succeeding part the right is extended to all usual and accustomed places. To the Indian mind this would comprise all places where they were wont to take fish. They would not stop to consider any limitation of the territory they were then ceding to the government. It would probably not occur to the Indians that the circumstance of territorial boundary would have anything to do with it, since, to their mind, all such places were being reserved for their benefit anyway. Quite true, some famous chiefs participated in negotiating these treaties; but none of them were trained in the art of drawing contracts, nor were they adepts in the exact use of a language with which they were not familiar. It may well be that they had no intention of depriving themselves of a right to resort to any fishing places where they had previously been wont to fish, and they are in justice and right entitled to the benefit of any doubt on that subject.

The Indians could not be supposed to know the rule of law that the thing excepted or reserved must be out of the thing granted, and hence but little weight must be ascribed to such and like rules in dealing with this unlettered and untutored race of people.

It is true, also, that the limitations of the territory ceded by the Middle Oregon Indians conforms with the boundary of the territory ceded by the Yakima Indians. But this again is referable to the Indian mind for construction, and so it is that the Columbia river as a boundary may not mean as much to them as to the mind of the superior white man.

One of the conditions attending the negotiations of such treaties is the fact, which I deem has been fairly established by the testimony, that the Indians from one side of the river were accustomed to cross to the other side for taking fish, and vice versa, and thus the Indians of either side were accustomed to resort to the usual places of taking fish upon the other side. They intermarried and intermingled freely, and the Indians of one side neither claimed nor asserted any monopoly of the fishing places as against the Indians on the other side of the river, and all, whether from the one side or the other, seem to have had free access and recourse to the fishing places wheresoever located. In the nature of things, all could not fish at the same time, but they came and went as their wants were satisfied. One Indian likened the river to a great table where all the Indians came to partake. It is related especially of the Wish-ham Tribe, though few in number and occupying but small territory on the Washington side, that they spoke the language of the Wascos, that the two tribes intermarried freely and were interrelated, and that they were wont freely to pass from one side of the river to the other, and to take fish at the ancient and usual fishing places upon either side, treating such fishing places at all times as common property or possession, to which all had a right in common to resort. The Wish-ham Tribe, we may be reminded, is one of the contracting parties to the Yakima treaty. So that, taking into view the context of the treaty, the parties contracting, the nature and subject-matter, the conditions existing at the time, and the circumstances attending the negotiations, I am persuaded that, by intendment, the usual and accustomed fishing places on the south side of the Columbia river to which the confederated tribes and bands of Yakima Indians, or portions of them, were wont to resort, were included by its terms.

The next question is one of fact, which is, whether Kum-sucks was a usual and accustomed fishing place for any of the confederated tribes and bands of Yakima Indians entering into the treaty with the general government of June 9, 1855. The testimony on the subject is so voluminous that it is quite out of the question to attempt to review or analyze it. I can do no more than set forth general conclusions.

Many witnesses have testified to the general fact that the Wish-hams and other Indians from the Washington side, including Yakimas, from a very early date came over every year, and from year to year, to fish at Kum-sucks. Kum-sucks has relation to the particular point of rocks from which the Indians fished. Wah-sucks denoted the camping place of the Indians, which was located back and inland of the point of rocks, and both are referred to by the Indian witnesses, sometimes interchangeably. Wah-sucks signifies "lone tree," taking its name from a pine or fir tree which formerly stood near or at the place. Kum-sucks was a somewhat earlier fishing place than others farther up the river, and the Indians would resort to it at the earliest opportunity for catching fish to supply themselves with food.

At the preliminary hearing for an injunction, it was strongly contended that the Indians could not cross the river in the near vicinity because of the turbulency of the stream; but the testimony on the final hearing was of such a character as to dissipate any doubt on the sub-

ject. There was one crossing just above and quite near the point, and two or three others not far above; and besides Indians crossed some distance, even miles above, and came down on the south side of the river to the point, and others were wont to cross at The Dalles and go up the river to reach it.

It is still maintained, however, that the point was not, and never was, a usual and accustomed place for the Indians to fish, and much testimony of a negative character has been adduced to substantiate the position. The testimony, on the other hand, of an affirmative nature, however, persuasively establishes the fact of the existence of a usual and accustomed fishing place at Kum-sucks; and this having due regard for the significance of the terms "usual" and "accustomed." The Wish-hams from the north side fished mostly at the point; and the Skins and some Yakimas and still others were wont to make that a resort for catching fish. They not only fished there regularly and continuously during the fishing seasons, but they camped at Wah-sucks and constructed platforms and houses in which to dry and cure their fish, through this means preparing it for winter use, and in due time the Indians from the north carried away their fish to their habitations upon the other side of the river. The Indians from the south, and especially the Wascos, made the place a rendezvous for fishing, even to the extent of establishing and maintaining for a long space of time an Indian village at Wah-sucks, and to this day some of their huts and habitations still remain. The Indians both from the south and from the north habitually for many years resorted to this place for the purpose of taking fish for food purposes.

I take it that the fact that Kum-sucks was a usual and accustomed fishing place, not only for the South bank Indians but for the North bank Indians as well, and especially for the Wish-hams and Skins and others of the Yakima confederated tribes, has been fairly well established, and so hold.

[4] Another question presented is whether Sam Williams is a ward of the government in the sense that the government is required to or should interpose in his behalf to protect any fishing rights he may have or possess at Kum-sucks.

Williams was born off the Yakima Indian Reservation. His mother was a Cowlitz, and his father a Yakima Indian. He is an allottee (No. 1525) on the reservation, his patent having been issued to him July 10, 1897. He subsequently disposed of a portion of his allotment, the transfer being made through the interposition of the government. The date of this transfer is July 11, 1910. The remainder of the allotment he still holds. He has lived for the last 21 years off the reservation, has taken a homestead, and, as conceded by the government, has become a citizen of the state of Oregon. His allotment was made in pursuance of the general act of Congress of February 8, 1887 (24 Stat. 388), providing for allotments of lands to Indians. By section 6 of this act, upon completion of the allotments and the patenting of the lands, each and every member of the respective bands and tribes of Indians to whom allotment was made was accorded the benefit of and made subject to the laws, both civil and criminal, of the state or terri-

tory in which he might reside. And it was further provided as follows:

"And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property."

In the case entitled Matter of Heff, 197 U. S. 488, 25 Sup. Ct. 506, 49 L. Ed. 848, the Supreme Court declared that an Indian who had received an allotment and been granted his first patent was no longer a ward of the government, but a citizen of the United States and of the state in which he resided, and was without the pale of Indian police regulations on the part of the government.

Williams is not only an allottee, but has voluntarily taken up, within the limits of the United States, his residence separate and apart from any tribe, and has adopted the habits of civilized life. He is entitled under either or both the conditions of the statute to all the rights, privileges, and immunities of a citizen of the United States, and, being so entitled, is declared to be a citizen of the United States. As said in the Heff Case, the government is under no perpetual obligation to continue the relationship of guardian and ward, and it may at any time abandon its guardianship and leave the ward to assume and be subject to all the privileges and burdens of one sui juris.

A later statute, namely, the Act of Congress of May 8, 1906, c. 2348, 34 Stat. 182 (Comp. St. 1913, § 4203), has left the impress that Congress believed that it acted hastily in adopting the 1887 statute, and especially since the construction placed upon the latter by the court in the Heff Case. United States v. Celestine, 215 U. S. 278, 30 Sup. Ct. 93, 54 L. Ed. 195.

The act of 1906 contains an amendment of section 6 of the act of 1887, and extends the same benefits to allottees as the original act; but they do not become effective until the expiration of the trust period. And later in the act it is specifically declared that, until the issuance of fee-simple patents, all allottees to whom trust patents shall "hereafter" be issued shall be subject to the jurisdiction of the United States. The special declaration is indicative of a careful regard on the part of Congress for the rights previously acquired under the act of 1887 before amendment, and of a purpose not to impair or curtail the benefits received under that act in any way. So that Williams' rights and immunities acquired by his allotment were not in the least disturbed by the amendatory act. Being entitled to such immunities, he should not be permitted to disavow any of the benefits accorded him.

But, further than this, Williams has voluntarily separated himself from his tribe (assuming that he became a member of the Yakima confederated tribes by his allotment), and has taken up his abode else-

where, and adopted the habits of civilized life. This he is precluded by his own acts and demeanor to deny, and it is hardly possible to conceive of a condition that would more completely impose upon him the status of a citizen and evidence a more perfect waiver of all dependence for affording him redress upon the government in the capacity of a guardian of one acting under any legal disability. Regarding the situation in which he has placed himself, therefore, it is confidently believed that Williams is not now a ward of the government, much less can he demand the interposition of the government for the protection of any fishing rights that he may now have or may heretofore have had as a tribal Indian allied with the confederated Yakima tribes and bands now settled upon the Yakima Indian Reservation.

That the government still remains Williams' trustee as it relates to the title to his allotment, and any money distribution that he may be entitled to by reason of once having been a member of the Yakima confederated tribes, can have no bearing upon the question as to whether he continues to be a ward of the government.

Another feature of the controversy to be observed is that the testimony falls short of establishing the fact that the place where Williams is seeking to have his wheel located, or its immediate environment, ever was a usual and accustomed fishing place for the Indians of the Yakima confederated tribes. There has been some evidence adduced to the effect that such Indians may have at some time in the past fished at the place but the great mass of evidence indicates that the ancient fishing places extended from the extreme point known as Kum-sucks, perhaps from a point around it somewhat below, thence up stream to and beyond where Jackson's wheel is located.

Of course, Williams must prevail, if at all, by the establishment of an ancient fishing right; nor he claims none other, and could not succeed in this suit upon any other hypothesis. Such a right, being reserved by the treaty, is paramount to any subsequent right attempted to be granted by the government, and especially any right which the state might assume to confer. United States v. Winans, supra.

Williams' failure to succeed, however, does not detract from the right of the confederated tribes and bands of Yakima Indians to succeed, for the suit is by the government as their trustee and guardian, as well as the trustee and guardian of Williams, and their success is in no way dependent upon that of Williams.

To be particular, it is my judgment that the right of the Yakima confederated tribes to take fish at Kum-sucks as a usual and accustomed fishing place has been established under the evidence to that part of the south shore or bank of the Columbia river beginning at the furthermost point down stream of the removal of rock at Kum-sucks by the government in constructing the Celilo Canal, and extending thence up stream around the point to where the shore line meets the premises of Henry or Harriet Gulick, including the place where Peter Jackson's wheel is now located. The defendant should be enjoined from exercising any pretended fishing right along or within this space.

The question was also presented whether the Indians were entitled

to employ any other methods for catching fish than they were wont to employ in more primitive times.

[5] Without discussing the subject at length, I see no reason why Indians may not be permitted to advance in the arts and sciences as well as any other people, and, if they can catch their supply of food fish by a more scientific and expeditious method, there exists no good reason why they may not be permitted to do so. Even more, they ought to be encouraged to adopt the more modern and advanced ways of prosecuting their enterprises.

The rights here ascertained and determined, it must be understood, are to be exercised in common with citizens of the United States, as the treaty so provides. How the common privilege is to be exercised is a subject with which we are not now concerned. When the subject arises, there will be found, it is hoped, a way of satisfactory adjustment.

I deem it equitable that neither party should recover costs or disbursements, and the decree will so provide.

THE DRILL BOAT NO. 4.

(District Court, D. Massachusetts. March 31, 1916.)

No. 776.

1. SHIPPING ⊂=207 — LIMITATION OF LIABILITY — UNSEAWORTHINESS — IMPROPER MANNING.

Petitioner, under a contract with the government to blast ledges in Boston Harbor, had a drill boat stationed over a ledge in the center of the channel. One night, when the boat was not being operated, but was in charge of two watchmen, some of the spuds by which it was held became jammed in the housings as the tide fell, and, the watchmen being unable to free them, it overturned and sank. The watchmen left in a scow which was alongside, and which was brought back in the morning by a boat which picked them up, did nothing to mark the wreck, nor did the day crew, which came out, and after 8 o'clock a steamer entering the port came into collision with the wreck and was severely damaged. There were 26 feet of water over the ledge, and vessels of moderate draft gave it no attention while navigating the channel. The watchmen were mechanics, but not seamen. *Held*, that the boat was unseaworthy, because improperly manned, and that because of such fact, and also because of the failure of petitioner to at once mark the wreck, it was not entitled to a limitation of liability.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 555, 643, 644; Dec. Dig. ⊂=207.]

2. COLLISION ⊂=109—LOSS OF VESSEL—DUTY OF CREW TO MARK WRECK.

It is the duty of the crew of a vessel which sinks in a harbor channel to take reasonable precautions to prevent injury to their own and other vessels from collision with the wreck.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 232; Dec. Dig. ⊂=109.]

3. NAVIGABLE WATERS ⊂=24—WRECK—DUTY OF OWNER TO MARK.

The duty to immediately mark the position of a sunken vessel, imposed by Act March 3, 1899, c. 425, § 15, 30 Stat. 1152 (Comp. St. 1913, § 9920), is

a personal duty of the owner, which cannot be delegated, so as to relieve him from responsibility.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. § 66; Dec. Dig. ⟸24.]

In Admiralty. Petition by the Great Lakes Dredge & Dock Company, as owner of Drill Boat No. 4, for limitation of liability. Petition denied.

C. E. Kremer, of Chicago, Ill., Fitz Henry Smith, Jr., of Boston, Mass., and Frank S. Masten, of Cleveland, Ohio, for petitioner.

Edward S. Dodge, of Boston, Mass., and Benjamin Thompson, of Portland, Me., for damage claimant.

MORTON, District Judge. These proceedings arise out of a collision between the steamship Massachusetts, belonging to the damage claimant, and a sunken drill boat, belonging to the petitioner for limitation of liability. The accident occurred in Boston Harbor, a short distance above Spectacle Island, about 18 minutes after 8 in the morning, on July 5, 1913. The facts are as follows:

[1] The Great Lakes Dredge & Dock Company, which will be referred to as the Dredge Company (or as the petitioner), had a contract with the United States for the removal of ledges in Boston Harbor. Under this contract it had, about two weeks before the accident, put to work drill boat No. 4 at the place where the accident occurred, on ledge numbered 20 on the government dredging charts. This ledge lies about in the center of the full width of the channel, which at that point is something over one-quarter of a mile wide; it is just at the eastern edge of the 35-foot channel, near red gas buoy No. 4. There had, for many years, been 26 feet of water upon it, and vessels of moderate draft paid no attention to its existence. As to them, it was not an obstruction, and they frequently, if not generally, passed over it when running on the upper Spectacle Island range, the government lights for which were maintained until July 15, 1913.

Drill boat No. 4 was about 130 feet long and about 35 feet wide, a square float, divided into five water-tight compartments, and carrying on its deck a boiler, drilling machinery, and other apparatus. It was comparatively new, and seems to have been as good a boat of its kind as was then in existence. Its mechanical equipment and furnishings throughout were sufficient and in good order. It was held in place by four "spuds," one near each corner. These were straight beams of iron, which slid vertically in housings or guides attached to the hull. They had heavy iron feet, and each weighed about 12 tons. They were raised and lowered by steam engines, one to each spud, which, through multiplying gearing, operated pinions that engaged a rack fastened to the spud. From each corner of the boat a kedge anchor was run in a diagonal direction.

The spuds rested continuously on the bottom to hold the boat in place. As the tide in Boston Harbor had, at the date in question, a rise and fall of about 10 feet, it is evident that some means had to be provided for permitting the boat to slide up and down on the spuds. This was done by leaving a little steam on the engines, with the valve

gear so set as to turn them in the direction in which the tide was moving; i. e., up or down. The valve gear had to be shifted each time the tide turned; in other respects the arrangement worked automatically. Spuds are an effective device for holding a drill boat in position; there was, so far as appears, no other or better way of accomplishing that result. The use of them is attended, however, by this risk: If at the top of the tide, two spuds happen to rest upon rocks which slant outward, and the spuds settle down hard on these slanting rocks, then, as the boat falls with the tide, these spuds may get caught in their angular positions and jam in their housings. The jammed spuds hold up the end or side of the boat on which this occurs; and it does not go down with the water, while the opposite end or side continues to do so. This at first causes the boat to tilt over on the caught spuds, and eventually, if the tide drops far enough, to upset completely. It is an accident which has not happened often; but the possibility of it in vessels secured by spuds, like dredges or drill boats, in tidal waters, is well recognized.

In the usual operation of the drill boat, holes were drilled in the ledge, which were then charged with dynamite and exploded. The dynamite was carried in two small scows, which were used with the drill boat and were customarily moored to it. After the work of blasting had been completed, the drill boat would be moved away, and a dredge would be used to raise the shattered rock, and put it into scows for removal. No special dredge was used with any particular drill boat. A copy of the contract between the petitioner and the United States is annexed to the answers to the interrogatories. It provides for payment by the cubic yard.

No work was done by drill boat during the daytime on the 4th of July, nor on the night of July 4–5. The crews did not live aboard, but went ashore at the end of each period of work. About 6 p. m. on the 4th, the night crew came aboard the drill. It consisted of two men, Folz, who acted as watchman and mechanic, and Murphy, who acted as fireman. It was Folz's duty to attend to all matters on deck and to look after the safety of the boat. It was Murphy's duty to keep steam on the boiler and to do such other things as Folz might direct. High water occurred about midnight. About 1 o'clock Folz, who was working inside the house, noticed that the boat had taken a pronounced list. He went on deck and discovered that two of the spuds had caught as above described, and that the front side of the boat was not going down with the tide and was already 14 or 15 inches higher than it ought to be. He at once put steam on the engines and tried to draw up the spuds in question in order to relieve the boat. He was unable to start them and called Murphy to his assistance; they worked with bars, and were still unable to do so. During this time the back side of the boat was settling with the tide, and the whole boat was tilting more and more.

They did not succeed in releasing the spuds. Finally the tilt became so great that they were afraid of an immediate upset. Thereupon they hastily left the drill boat and went on one of the powder scows. One of the two ropes which held the scows to the dredge was cut by

them. There was a small boat fastened to one of the scows, the oars for which had been on the deck of the dredge, but were not taken by the two men; there was, however, one oar in the boat. There were lanterns and plenty of ropes on the dredge. All the appliances necessary to hold to the drill boat, to mark it if it should go down, or to get assistance, were at hand. Several minutes later, the drill boat upset completely and went to the bottom. At this time the last rope holding the scows to it broke, the men made no effort to hold to the wreck, and the scows and the rowboat drifted off with the men down the harbor. This happened not later than 2 a. m. It was a clear and quiet summer night. Castle Island was about one-half a mile off, Governor's Island about three-quarters of a mile, and Spectacle Island about a mile, with the tide flowing in that direction. Assistance could probably have been obtained at any of these places, but the two men made no effort to reach them.

There were many projecting pipes and appliances on the drill, and in its unlighted condition it constituted during the rest of the night a menace to navigation of the most dangerous character, against which Folz and Murphy made no effort to protect other vessels. About half past 3 that morning the tug Sadie Ross found the two scows and the men on them in the outer harbor and towed them up past the place where the wreck lay. At this time, parts of it were visible above the water. It would have been an easy matter for the Ross to have fastened the scows or a boat to it as a warning; but no request to do so was made by Folz or Murphy. They were taken by the Ross to drill boat No. 8, also belonging to the petitioner, in the upper harbor, and were left there with the scows at about 5:30 a. m.

[2] About 6 a. m. the Boston police boat, which had been notified of men adrift in the harbor, and had later been informed that the men had been picked up and taken to drill boat No. 8, went to that boat and inquired if the men were there. An affirmative answer was given, but no request was made that the police should place warnings or markers at the wreck. About the same time the day crew of No. 4 started from shore to go out to it. They discovered soon after leaving shore that it had sunk; but they kept on, and, passing by the location of the wreck, went on to drill boat No. 8, arriving there about 6:20 a. m. Hancock, the foreman of No. 4, was in this gang. He testified that he looked at the wreck from No. 8, and concluded that certain pipes which he saw projecting above the surface sufficiently marked it to warn other vessels. He made no effort to mark it further, although he could very easily have done so. He went back ashore with his men and hunted up Mr. Williams, the general superintendent of the petitioner's operations around Boston, whom he informed of the accident. Mr. Williams, without taking steps to have the wreck marked, at once set about making arrangements to have the drill boat raised. He made only a casual examination from a distance as to whether enough of her was showing, and would continue to show as the tide rose, to warn other vessels of her presence. Neither Williams, nor Hancock, nor anybody connected with the petitioner, adequately appreciated the very great peril to other vessels which this wreck, lying

in the center of this narrow channel, created, nor the legal obligation on its owner to mark it, nor the practical necessity of immediately doing so in an adequate manner. No warning marker was put there until about 9:30, and then only because the police authorities ordered Williams to do so at once, instead of waiting, as he evidently intended to do, until the arrival of the derrick and salvaging vessels.

In the meantime the Massachusetts, a large steamer inward bound, struck the wreck and received very severe injuries. The damage claimant's statement of damage and demurrage amounts nearly to $50,000.

The Dredge Company have petitioned for limitation of liability upon offering to surrender the drill boat in its sunken condition. To this petition the damage claimant, having presented its claim, answers that the petitioner is not entitled to limitation of liability, because (among other reasons) the faults which occasioned the injury were attributable to the owner personally, and were not, therefore, without its privity or knowledge. On this point certain other facts should be stated. The petitioner is a New Jersey corporation having its home office at Chicago, Ill., where its officers were located. Its work and its plant in Boston Harbor were wholly in charge of Williams, a superintendent appointed by the vice president and general manager. No corporate officer had anything to do with the details of the actual work in Boston, except to receive and act upon reports or communications from Williams. There was on each drill boat a foreman, who had charge of the work and crew of that vessel. As above stated, the foreman of No. 4 was one Hancock. Under him was a night foreman, Maguire, who selected Folz and Murphy as the night watch for the time in question. Williams was not aware what men Maguire had assigned to that duty. Williams, Hancock, and Maguire were all thoroughly competent men for the operation of drill boats. None of them appears to have been a competent seaman, or to have had any general knowledge of vessels, or the proper management of them; nor does it appear that there were such men among those from whom Maguire selected Folz and Murphy. Apparently the two named were as competent in those respects as anybody available. Hancock testified that he thought he would have picked them out himself. Williams had received no instructions from his superiors about marking wrecks or sunken obstructions caused by the petitioner's work; and he had never given any such instructions to the men under him. He knew in a general way that there was a duty to do so.

The right to limit liability exists only in cases where the fault was "without the privity or knowledge of the owner," and the petitioner contends that the faults alleged here were of that character. The damage claimant, on the other hand, charges two personal faults against the owner of the drill boat: First. That it was unseaworthy, because insufficiently manned, and that the upset and the collision are both attributable to this fault. Second. That the wreck was not marked immediately, as required by the Act of March 3, 1899 (30 Stats. 1152); this duty to mark being, it is contended, one resting upon the owner personally, which cannot be delegated.

Was the drill boat properly manned? Folz was a competent ma-

chinist and drill operator. He was no seaman; he had no general knowledge of or acquaintance with boats, and no experience which fitted him to deal with a marine emergency. And so with Murphy. He had been to sea, it is true, but in the fireroom, not on deck, and he was wholly unequipped to assist effectively in the situation which developed. The drill boat was in fact treated by the petitioner and its representatives, not as a vessel, but as a piece of machinery, and was manned accordingly. It was, however, stationed in the center of the channel into a frequented port. It was not probable that accidents would happen to it, but it was always possible that they might. Vessels stationed in harbors are subject to certain recognized hazards out of which emergencies may arise. In this case there was the additional risk caused by the possibility that the spuds might stick. If, from collision or upset, or any other cause, the drill boat did sink on its station, it would immediately become a great source of danger to other vessels. It was the duty of the petitioner to keep it properly manned for the work and situation in which it was stationed, by men fitted to exercise, under any conditions which might reasonably be foreseen, prudent and careful seamanship. Neither of the men on the drill boat had such ability, and the petitioner had no reason to suppose that they did. The Cygnet, 126 Fed. 742, 61 C. C. A. 348 (C. C. A. 1st Cir.). The drill boat was insufficiently manned, and was therefore unseaworthy; and this fault is attributable to the petitioner personally. In re Pacific Mail S. S. Co., 130 Fed. 76, 82, 64 C. C. A. 410, 69 L. R. A. 71 (C. C. A. 9th Cir.).

The next question is whether the crew of the drill-boat acted negligently. For handling the spuds, engines, and other machinery they were competent men. I am not quite prepared to say that they were negligent in not sooner discovering that the spuds were jammed, or in the efforts made to free them. So far as the sinking itself is concerned, I do not think that the petitioner can be held at fault for it.

The failure properly to man the drill boat did not enter into the accident, unless there was a further duty on Folz and Murphy, as its crew, to take steps after the sinking to warn other vessels of the wreck. If there was such a duty, Folz and Murphy were clearly negligent in not fulfilling it; and this was because the men, as above stated, had no previous training or experience which at all fitted them to cope with such a situation. This fault would be directly attributable to the improper manning. Folz and Murphy were hired as a night watch for the drill boat. They did not live aboard it, but went back and forth to it from the shore. Their employment did not terminate when their vessel sank. "The duty of the seamen continues on these melancholy occurrences as long as they can be useful in preserving the property at risk and gathering up its fragments." Story, J., The Two Catherines, Fed. Cas. No. 14,288. See, too, The Massasoit, 1 Sprague, 97, Fed. Cas. No. 9,260; The Dawn, Fed. Cas. No. 3,666 (2 Ware, 126); The D. M. Hall and The John Land, Fed. Cas. No. 3,939; Daniels v. Atlantic Mutual Ins. Co., 24 N. Y. 447.

If this be the duty of ordinary seamen, whose wages under such circumstances depend upon property being saved, it was clearly the

duty of Folz and Murphy, whose wages were not so conditioned. The danger of further injury to the drill boat from collision with other vessels was great; it was in fact seriously damaged by the Massachusetts. It was clearly the duty of its crew to use reasonable care and diligence to protect it against such damage, and in connection therewith to warn other vessels against colliding with it. This they failed to do, and there were not overweighing considerations—e. g., of personal safety—which justified them in disregarding those duties. I therefore hold that the petitioner was personally at fault for the unseaworthy condition of drill boat No. 4, due to its being improperly manned, and that to this fault is attributable the failure of the crew to warn the Massachusetts, by marker or otherwise, of the existence of the wreck.

[3] The statute explicitly requires "the owner of such sunken craft to immediately mark it." 30 Stats. 1152. This was a personal duty, which could not be delegated, so as to relieve the owner from responsibility. The Anna M. Fahy, 153 Fed. 866, 83 C. C. A. 48 (C. C. A. 2d Cir.); The Macy, 170 Fed. 930, 96 C. C. A. 146 (C. C. A. 2d Cir.); Weisshaar v. Kimball S. S. Co., 128 Fed. 397, 402, 63 C. C. A. 139, 65 L. R. A. 84; In re J. Smith & Sons, Inc., 193 Fed. 395, 113 C. C. A. 391 (C. C. A. 2d Cir.). In the present case it was easy to have complied with it. Folz and Murphy could have slacked the line to the scows and have held them fast to the dredge; or they could have taken the oars and gone ashore in the rowboat for help; or they could have asked the tug to moor them to the projecting parts of the wreck, when she towed them past it about 5:30 a. m.; or they could have taken a boat and gone down from drill boat No. 8; or have asked the police boat when it called at drill boat No. 8, about 6 a. m., to mark the wreck. They made no effort to do any of these things. Hancock might easily have placed a marker at 6:30, when he came out in the launch with the day crew; and I think, although this perhaps is not so clear, that Williams was informed that the drill boat had sunk, early enough so that, if he had sharply set about marking the wreck, he could have done so before the collision. These witnesses testify that they did not place a marker because enough of the wreck was showing to warn other vessels of the danger, and to make marking unnecessary. Up to a certain time parts of the drill boat projected above the surface; that they were ever sufficient to furnish adequate warning of a submerged wreck to approaching vessels not expecting such a thing is doubtful. As the tide rose they became less conspicuous. The witness who last saw them before the collision, Capt. Sparks of the General Jessup, testifies that there were two or three slanting pieces, not of large size, the highest then about 3 feet out of water. Nobody testifies to having seen them after that time. Hancock says that, viewing them some time before the accident, he thought they were so high out of the water that the tide would not cover them before the petitioner's employés would get there to begin salvage operations. But Provonsha testifies that Hancock said that they must hurry to get back to the wreck before it was covered by the tide.

Capt. Daley, of the United States steamer Colonel Harwood, testifies that it was a very fine summer morning; that he was coming up the

Harbor, and had looked directly across the water where the accident took place from a distance of about 100 fathoms, just before the Massachusetts, which was overtaking and passing him, struck; and that there was nothing to indicate any obstruction or danger there. His testimony is apparently disinterested, and on this point fully corroborates that of the officers of the Massachusetts. Her captain and first officer were on watch in her pilot house; there was a lookout on her forward deck, and a quartermaster at the wheel. All were alert and attending to their duties. It seems wholly unlikely that they, as well as Capt. Daley, failed to see parts of the wreck sufficiently prominent to constitute adequate marking of it. Certainly such failure ought not to be found, except upon clear and convincing evidence that such projecting parts were then apparent; and there is no such evidence. Whether the projections of the wreck above the surface, noticed earlier in the morning, were lower than they had been judged to be by the men who saw them, and were covered by the rising tide, or whether the wreck had settled into a lower position before the collision, it is unnecessary to determine. The projections had neither such size nor such assurance of permanence as justified the petitioner and its employés in relying on them to make the wreck evident to other vessels, and excused the failure to mark it. There is no reasonable doubt that, when the Massachusetts came along, it was unapparent and unmarked. The Massachusetts was not at fault for failing to discover and avoid it, nor for passing over where the drill boat had been at work without first ascertaining that there was no obstruction there. If the petitioner's work caused an obstruction in the channel, it was the petitioner's duty to mark it, or to see that it was marked. Casement v. Brown, 148 U. S. 615, 623, 13 Sup. Ct. 672, 37 L. Ed. 582; Consolidated Co. v. Knickerbocker, etc., Co., 200 Fed. 840 (D. C. Me.).

The negligent and unexcused failure to mark the wreck, whether due to incompetence of the crew, or to disregard of the statutory duty, is attributable to the petitioner personally. It was the proximate cause of the collision. It follows that the petition to limit liability must be denied.

Many other points were argued, but those decided are sufficient to dispose of the case.

There must be a decree denying the petition to limit liability, establishing the claim of the Eastern Steamship Corporation for full damages, holding the Great Lakes Dredge & Dock Company personally and solely at fault for the damage which the Massachusetts sustained, and referring the case to an assessor to ascertain the amount of such damage.

UNITED STATES v. TAUSCHER et al.

(District Court, S. D. New York. June 12, 1916.)

No. 9–34.

NEUTRALITY LAWS ⟸3—"MILITARY EXPEDITION OR ENTERPRISE"—WHAT CONSTITUTES.

Where defendants conspired in the United States to blow up and destroy the Welland Canal in Canada, which was used by the King of Great Britain and Ireland for the transportation of supplies and munitions of war and the transportation of his armies and navies, by means of an expedition starting in the United States and equipped with explosives therein procured, they were guilty of conspiring to prepare a military expedition or enterprise against foreign prince or country with which the United States was at peace, contrary to Criminal Code (Act March 4, 1909, c. 321) § 13, 35 Stat. 1090 (Comp. St. 1913, § 10177), making such act an offense, for the project, being a bold and hazardous attempt to cripple military institutions in the British Empire, was a "military expedition or enterprise," though those composing it were not highly drilled soldiers.

[Ed. Note.—For other cases, see Neutrality Laws, Cent. Dig. §§ 3–8; Dec. Dig. ⟸3.]

At Law. Hans Tauscher and others were charged with conspiracy to commit an offense against the United States. On demurrer to the indictment. Demurrer overruled.

H. Snowden Marshall, U. S. Atty., of New York City, Roger B. Wood and Ben A. Matthews, Asst. U. S. Attys., both of New York City.

Felix H. Levy, of New York City (McCombs, Wellman, Smyth & Ryan, of New York City, of counsel), for defendant Tauscher.

WOLVERTON, District Judge. The defendants Hans Tauscher, Franz Von Papen, Wolf Von Igel, Alfred A. Fritzen, and Constantine Covani, alias Govani Gonzales, are indicted by six counts. The first is for conspiracy to commit an offense against the United States, namely, the offense denounced by section 13 of the Criminal Code. The second charges that the defendants and certain other persons, referred to in the indictment as "said other persons," did—

"begin and set on foot, and provide and prepare the means for, a certain military enterprise, to be carried on from within the territory and jurisdiction of the United States against the territory and dominions of the King of Great Britain and Ireland, a foreign prince with whom the United States then were, ever since have been, and now are at peace, to wit, against the Dominion of Canada, being then and there the territory and dominion of the said King of Great Britain and Ireland."

The third count charges that the defendants did begin a certain military enterprise, etc., the fourth that they did set on foot, the fifth that they did provide means, and the sixth that they did prepare the means for a certain military enterprise, etc. With these variations, all the counts set forth alike the facts which it is thought constitute the offense denounced by section 13 of the Criminal Code.

To these several counts the defendant Tauscher has interposed a

demurrer, challenging the sufficiency thereof to state facts constituting an offense under section 13 of the Criminal Code. On the argument of the demurrer, and by the briefs filed, but one point is presented for decision, which is that the matters charged do not constitute a military enterprise within the meaning of the statute. The section reads:

"Whoever, within the territory or jurisdiction of the United States, begins, or sets on foot, or provides or prepares the means for, any military expedition or enterprise, to be carried on from thence against the territory or dominions of any foreign prince or state, or of any colony, district, or people, with whom the United States are at peace, shall be fined not more than three thousand dollars and imprisoned not more than three years."

The charge is that the defendants did begin, and set on foot, and provide and prepare the means for a certain military enterprise, stating whence and against what country it was to be carried on. Then it is stated that the purpose and intent of the alleged military enterprise were the crippling and obstructing of military operations of the King of Great Britain and Ireland, by certain means and methods which are specifically described, namely, the use of bombs, dynamite, and other explosives with which to blow up and destroy the Welland Canal, which was being used by the King of Great Britain and Ireland for the transportation of supplies and munitions of war, and for the transportation of his armies and navies. As a part of said military enterprise, Fritzen and Covani were to go from the United States to Canada, and to employ other men likewise to go from the United States to Canada, with the intention and for the purpose of engaging in and effecting the objects and designs thereof. Tauscher, Von Papen, and Von Igel were to furnish Fritzen and Covani and other persons with pistols and revolvers and ammunition therefor, and with bombs, dynamite, and other explosives, and with money and credit, for carrying out the enterprise.

Then it appears, by way of the alleged overt acts, that Wachendorf arranged for five subjects of the Emperor of Germany to report to him at the Southern district of New York to aid and assist in carrying out the enterprise; that Tauscher provided and caused to be delivered to Wachendorf 200 pounds of 60 per cent. dynamite; that Fritzen and Covani left New York City for Buffalo, N. Y.; and that Von Papen paid to Wachendorf, by check, $200. The especial criticism of the indictment is that it contains no allegation or charge that the defendants were organized or equipped as a military force or unit, or that they constituted a body of men acting together or under command.

The federal District Courts have from time to time dealt with the question of what constitutes a military expedition or enterprise. Some in their interpretation of the term have signified that it requires a high degree of military organization, men drilled as soldiers, with officers having a military title in command, and appropriately equipped for engaging in war. United States v. Pena (D. C.) 69 Fed. 983; United States v. Hart (C. C.) 74 Fed. 724. On the other hand, some have not applied the term with such strictness respecting military organization. The Supreme Court, in Wiborg v. United States, 163

U. S. 632, 16 Sup. Ct. 1127, 1197, 41 L. Ed. 289, has had occasion to analyze the holdings of the lower courts, and has discarded the ultra view respecting military organization. After alluding to the definition of a military expedition by lexicographers as comprising a journey or voyage of a body of persons having the position or character of soldiers for a specific warlike purpose, also a body and its outfit, and that of a military enterprise as a martial undertaking, involving the idea of a bold, arduous, and hazardous attempt, the court quotes, with apparent approval, Judge Judson's charge to the jury in the case of United States v. O'Sullivan, Fed. Cas. No. 15,975, as follows:

That before a jury can convict "it must be proved to their satisfaction that the expedition or enterprise was in its character military; or, in other words, it must have been shown by competent proof that the design, the end, the aim, and the purpose of the expedition, or enterprise, was some military service, some attack or invasion of another people or country, state, or colony, as a military force."

It also quotes with approval the language of Judge Maxey in charging the jury in United States v. Ybanez (C. C.) 53 Fed. 536, wherein he said:

"This statute does not require any particular number of men to band together to constitute the expedition or enterprise one of a military character. There may be divisions, brigades and regiments, or there may be companies or squads of men. Mere numbers do not conclusively fix and stamp the character of the expedition as military or otherwise. A few men may be deluded with the belief of their ability to overturn an existing government or empire, and, laboring under such delusion, they may enter upon the enterprise. * * * Evidence showing that the end and objects were hostile to or forcible against a nation at peace with the United States characterizes it, to all intents and purposes, as a military expedition or enterprise."

And in the end the court affirms an instruction of the trial court given in language following:

"In passing on the first question, it is necessary to understand what constitutes a military expedition within the meaning of this statute. For the purposes of this case, it is sufficient to say that any combination of men organized here to go to Cuba to make war upon its government, provided with arms and ammunition, we being at peace with Cuba, constitutes a military expedition. It is not necessary that the men shall be drilled, put in uniform, or prepared for efficient service, nor that they shall have been organized as or according to the tactics or rules which relate to what is known as infantry, artillery, or cavalry. It is sufficient that they shall have combined and organized here to go there and make war on a foreign government, and to have provided themselves with the means of doing so. I say 'provided themselves with the means of doing so,' because the evidence here shows that the men were so provided. Whether such provision, as by arming, etc., is necessary, need not be decided in this case. I will say, however, to counsel that, were that question required to be decided, I should hold that it is not necessary."

The courts that entertain the view that there shall be a complete and high degree of military organization minimize the element of an enterprise or expedition, when it seems to be the intendment of the statute that both elements shall concur, namely, that there shall be an enterprise or expedition, and that such enterprise or expedition shall be military in character. The purpose of the expedition may serve

as well to give cast to the military character as even the organization by which the enterprise is to be carried into effect. Thus a most completely organized military detachment of soldiers marching from a neutral into a belligerent country, simply to march in and then out again, without threat or purpose of attack in any direction upon the belligerent, or upon any of its institutions, while it might impinge upon international neutrality regulations, would not, it is believed, contravene the statute; nor would a wholly unorganized and irresponsible mob of persons going from a neutral into a belligerent state, with a purpose of committing depredations upon the latter's military institutions, alone constitute an infringement of the statute. But if there be a preconcerted plan of operations, with leadership, and a co-ordination of men and arms and munitions and other means for attacking the armies or navies of the belligerent, or crippling or destroying her military institutions, set on foot for the purpose and with the intention of so attacking the belligerent nation in either aspect, and thereby to render aid and assistance to the enemy, the military enterprise or expedition contemplated by the statute would seem to be complete. I am supported in this view by the charge of Judge Bradford to the jury in United States v. Murphy (D. C.) 84 Fed. 609, 614. His language, so far as it is applicable here, is as follows:

"Where a number of men, whether few or many, combine and band themselves together, and thereby organize themselves into a body, within the limits of the United States, with a common intent or purpose on their part at the time to proceed in a body to foreign territory, there to engage in carrying on armed hostilities, either by themselves or in co-operation with other forces, against the territory or dominions of any foreign power with which the United States is at peace, and with such intent or purpose proceed from the limits of the United States on their way to such territory, either provided with arms or implements of war, or intending and expecting and with preparation to secure them during transit, or before reaching the scene of hostilities, in such case all the essential elements of a military enterprise exist."

The indictment here shows a preconcerted plan, the persons charged and the "said other persons" acting together for one common purpose, that of attacking and destroying a military institution of a belligerent nation, all directed by a common leadership, and I am impressed that it is sufficient under the authorities.

The demurrer will be overruled.

STECHER LITHOGRAPHIC CO. v. DUNSTON LITHOGRAPH CO.

(District Court, W. D. New York. February 23, 1916.)

1. COPYRIGHTS ⊂⊃28—REGISTRATION IN PATENT OFFICE—LITHOGRAPH—"CHROMO."

Rev. St. § 4952, as amended by Act March 3, 1905, c. 1432, 33 Stat. 1000, provides that the proprietor of any engraving, cut, print, or photograph, or negative thereof, or of a painting, drawing, or chromo intended to be perfected as works of the fine arts, shall have the sole liberty of vending the same. Act June 18, 1874, c. 301, § 3, 18 Stat. 79, which seems not to have been repealed, declares that no prints or labels designed to be used for any other articles of manufacture shall be entered under the copyright law, but shall be registered in the Patent Office. *Held* that, as the act of 1874 plainly omits chromos, which are known as chromolithographs and are pictures produced from drawings on stones, each color being represented by a different stone, registration of such pictures in the Patent Office is not necessary to obtain a copyright.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. §§ 27, 28; Dec. Dig. ⊂⊃28.

For other definitions, see Words and Phrases, Chromo.]

2. COPYRIGHTS ⊂⊃10—RIGHT TO—PICTURES.

That chromos were intended for advertising articles of commerce does not prevent the proprietor from obtaining a copyright thereof.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. §§ 8, 13; Dec. Dig. ⊂⊃10.]

3. COPYRIGHTS ⊂⊃10—RIGHT TO—PICTURES.

That chromos possess little artistic merit will not prevent the proprietor from obtaining a copyright, it being enough that they were originated by the proprietor.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. §§ 8, 13; Dec. Dig. ⊂⊃10.]

4. COPYRIGHTS ⊂⊃31—NOTICE OF COPYRIGHT—PURPOSE.

The purpose of requiring publication or notice of copyrights is to prevent innocent persons from suffering the penalty of the statutes for reproduction of the copyrighted articles.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 31; Dec. Dig. ⊂⊃31.]

5. COPYRIGHTS ⊂⊃29, 31—NOTICE OF COPYRIGHT—SAMPLES.

The sending of samples of chromos out to the trade is not a publication, and the fact that such samples were not stamped with notice of copyright does not authorize another manufacturer to reproduce them.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. §§ 29-31; Dec. Dig. ⊂⊃29, 31.]

6. COPYRIGHTS ⊂⊃29—VIOLATION OF COPYRIGHT—OMISSION OF NOTICE.

Under Comp. St. 1913, § 9541, providing that, where a copyright proprietor has sought to comply with the provisions of the act with respect to notice, the omission by accident or mistake of such notice from particular copies does not invalidate the copyright or prevent recovery for infringement after actual notice of the copyright, and that no damages are recoverable against an innocent infringer who has been misled by the omission, one infringing a copyright on chromos cannot escape liability because some were issued without notice, where that fact did not come to the knowledge of the infringer until after its infringement, which was committed knowingly.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. §§ 29, 30; Dec Dig. ⊂⊃29.]

7. COPYRIGHTS ⇐10—SUBJECT-MATTER OF COPYRIGHT.

A proprietor of a chromo depicting vegetables may acquire copyright in his particular arrangement, which another cannot violate, though the proprietor cannot prevent others from publishing chromos depicting the same vegetables.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. §§ 8, 13; Dec. Dig. ⇐10.]

In Equity. Bill by the Stecher Lithographic Company against the Dunston Lithograph Company. Decree for complainant.

Church & Rich, of Rochester, N. Y. (Frederick F. Church, of Rochester, N. Y., of counsel), for plaintiff.

Kenefick, Cooke, Mitchell & Bass, of Buffalo, N. Y. (Christopher Baldy, of Buffalo, N. Y., and L. L. Morrill, of Washington, D. C., of counsel), for defendant.

HAZEL, District Judge. This suit in equity was brought to compel the defendant, Dunston Lithograph Company, to account for the profits and damages arising from the infringement of 26 chromos or lithographs, and to restrain said defendant from further infringing them. The bill avers that in compliance with the Revised Statutes complainant secured copyrights on certain chromos or lithographs of vegetable products, such as carrots, beets, cabbages, radishes, etc.; that in the preparation and publication of such chromos or lithographs large amounts of money were expended; that such chromos were marked copyrighted and bore the date of copyrighting; that the defendant, having notice of such copyrighting, without license or permission from complainant and in violation of the latter's rights, made copies of such chromos, or of substantial portions thereof, in some instances copying the pictures outright, and in other instances merely reversing or transposing them, to the injury of complainant. The proofs support such allegations.

Defendant, in opposition to a decree for complainant, contends (1) that the copyright was invalid for lack of registration in the Patent Office; (2) that 17 of the 26 chromos in suit are shown to have been published without the copyright mark; (3) that the defendant had the legal right to produce pictures of vegetables and use them on seed packages; and (4) that no damages are shown.

[1] 1. The copyrights in question were obtained in the year 1908 under the act of 1905, which amended section 4952, and substantially provided that the proprietor of any engraving, cut, print, or photograph, or negative thereof, or of a painting, drawing, or chromo, intended to be perfected as works of the fine arts, should have the sole liberty of vending the same. Section 3 of the act of 1874, which seems not to have been repealed by the act of 1905, provides that in construing the acts the words "engraving," "cut," and "print" shall be applied only to pictorial illustrations or works of the fine arts, and that "no prints or labels designed to be used for any other articles of manufacture shall be entered under the copyright law, but may be registered in the Patent Office." Upon carefully reading such pro-

visions I am of the opinion that section 4952 makes a clear distinction between chromos and engravings, cuts, and prints, and as section 3 plainly omits chromos they do not come under the provision relating to registration in the Patent Office. In making the distinction Congress no doubt had in mind the ordinary definition of the word "chromo" or "chromo-lithograph," as a picture produced from drawings on stones; each color being represented by a different stone. This view I think finds support in Hills & Co., Limited, v. Austrich (C. C.) 120 Fed. 862, and in Hills & Co. v. Hoover (C. C.) 136 Fed. 701, wherein Judge Lacombe, and later Judge Holland, recognized the distinction between pictures produced from drawings on stones and pictures made from metal plates.

[2, 3] It makes no difference that the pictures in suit are intended for advertising articles of commerce. Louis De Jonge & Co. v. Breuker & Kessler Co. (C. C.) 182 Fed. 150, affirmed 235 U. S. 33, 35 Sup. Ct. 6, 59 L. Ed. 113, or that they possessed little artistic merit. Bleistein v. Donaldson Lithographing Co., 188 U. S. 239, 23 Sup. Ct. 298, 47 L. Ed. 460. It is enough that the evidence shows that the pictures in their details, design, and combination of lines and colors originated with the complainant and are in fact pictorial illustrations or works connected with the fine arts. There is believed to be no force in the contention that the productions in question were merely printing or labels. In Higgins v. Keuffel, 140 U. S. 428, 11 Sup. Ct. 731, 35 L. Ed. 470, the Supreme Court makes a clear distinction between labels placed upon articles manufactured or sold merely to describe or designate such articles and labels serving some other purpose than simply to advertise the subject to which they are attached.

[4, 5] 2. The purpose in requiring publication or notice of copyrighting is to prevent innocent persons from suffering the penalty of the statute for reproduction of the copyrighted article. Sarony v. Burrow-Giles Lithographic Co. (C. C.) 17 Fed. 591, affirmed 111 U. S. 53, 4 Sup. Ct. 279, 28 L. Ed. 349. It is shown that all copies of the chromos circulated contained the proper copyright notice, save a few which were distributed unmarked in sheets; but it does not appear that defendant was misled by such copies. Indeed, these sheets did not come to the attention of the defendant until after the infringing acts in question were committed. Prior thereto written notice of infringement had been given the defendant. In the circumstances it may be presumed that the sheets of pictures without the copyright mark were sent out to the trade as samples, and as said by Judge Shipman in Falk v. Gast Lithograph & Engraving Co., 54 Fed. 890, 4 C. C. A. 648, a sample "is not a published edition, within the meaning of the copyright laws." The defendant does not claim that the lithographs from which the infringing copies were made did not bear the statutory copyright notice.

[6] Section 9541 of the Compiled Statutes, subsection 20, substantially provides that, where the copyright proprietor has sought to comply with the provisions of the act with respect to notice, the omission by accident or mistake of such notice from particular copies does not invalidate the copyright, or prevent recovery for infringement

after actual notice of the copyright, and that no damages are recoverable against an innocent infringer who has been misled by the omission of the notice. Alfred Decker Cohn Co. v. Etchison Hat Co., 225 Fed. 135; Strauss v. Penn Printing & Publishing Co., 220 Fed. 977; Huebsch v. Arthur H. Crist Co., 209 Fed. 889. This provision is applicable to the present situation, and defeats the contention that 17 of the copyrighted chromos should be held not infringed, as they were published without the copyright mark.

[7] 3. The defendant, of course, had an equal right with complainant to make chromos or lithographs depicting vegetables, the identical vegetables with which we are herein concerned, and to use them for advertising purposes; but it had no right to adopt complainant's copyrighted portrayals of such subjects, or to transpose or reverse the same, even though they were produced without posing. To avoid infringement the defendant must form its own conception of the appearance and coloring of the vegetable, and not copy complainant's conception.

4. The questions arising from the sale of the infringing copies in Canada and not in the United States, involving the damages recoverable, are reserved to the accounting.

The complainant may have a decree as prayed for in the bill, with costs.

In re GAY & STURGIS.

(District Court, D. Massachusetts. February 24, 1916.)

No. 20856.

BANKRUPTCY ⟸348—PREFERRED CLAIMS—"WAGES"—"WORKMAN, CLERK, OR SERVANT."

A mining engineer, employed at a salary of $4,000 per annum, whose duty was to advise and assist the superintendent in developing and operating the mine, cannot claim priority for unpaid salary, under Bankr. Act July 1, 1898, c. 541, § 64b (4), 30 Stat. 563 (Comp. St. 1913, § 9648), as wages due a workman, clerk, or servant for his salary was not "wages," and the engineer, being a professional man, not occupying a subordinate position, was not a "workman, clerk, or servant."

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 536; Dec. Dig. ⟸348.

For other definitions, see Words and Phrases, First and Second Series, Clerk; Servant; Workman.]

In Bankruptcy. In the matter of Gay & Sturgis, bankrupts. The claim for priority for unpaid salary by an employé of the bankrupts was by order of the referee disallowed as a preferred claim, and the claimant petitions for review. Affirmed.

See, also, 224 Fed. 127.

Fred W. Fisher, of Boston, Mass., for creditor.

Carleton Hunneman, of Boston, Mass., for trustees.

MORTON, District Judge. The claimant was employed by the bankrupts as a mining engineer, at a salary of $4,000 per annum, payable monthly. His duty was to "advise and assist the superintendent in developing and operating the mine." (Referee's report.) In connection with this work he explored the mine, prepared plans, made cost sheets and forms for pay rolls, inspected the mine and machinery, and saw to it that the various appliances were safe and in proper condition. He claims that his salary, unpaid at the time of the bankruptcy, is entitled to priority under section 64b (4), as being "wages due to a workman, clerk or servant."

In a sense, everybody who works may be said to be a workman, and everybody who serves to be a servant; but as used in this section the words have a much narrower meaning, and include only those who work, labor or serve in a more or less subordinate capacity. Remington on Bankruptcy (2d Ed.) §§ 2169–2176, reviewing decisions. I doubt whether the earnings of a professional man, employed primarily because of his learning and his ability to advise helpfully, are properly described as "wages"; and I do not think that the man himself is a "workman, clerk or servant," within this section.

The order of the referee, disallowing the claim as preferred, was right, and is affirmed.

WESTERN UNION TELEGRAPH CO. v. NASHVILLE, C. & ST. L. R. CO.

(District Court, N. D. Georgia, N. W. D. April 22, 1916.)

No. 24.

TELEGRAPHS AND TELEPHONES ⊂=11—USE OF RAILROAD RIGHT OF WAY—CONSTRUCTION OF CONTRACT.

Where a contract between a railroad company and a telegraph company for use of the railroad company's rights of way by the telegraph company declared that it should cover and embrace all rights of way owned, leased, controlled, or operated by the railroad company, and should include any branch or branches that might be constructed, or other railroads that might be acquired by the company by lease or purchase, such contract extended to another line of railroad acquired by the railroad company, and fixed the rights of the parties thereto, notwithstanding the telegraph company, at the time of acquisition, had a contract with the owner of the line of railroad acquired.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 7; Dec. Dig. ⊂=11.]

In Equity. Bill by the Western Union Telegraph Company against the Nashville, Chattanooga & St. Louis Railroad Company. On motion to dismiss. Motion granted.

W. L. Clay, of Savannah, Ga., and Dorsey, Brewster, Howell & Heyman, of Atlanta, Ga., for plaintiff.

Claude Waller, of Nashville, Tenn., and Tye, Peeples & Jordan, of Atlanta, Ga., for defendant.

NEWMAN, District Judge. This case is now heard on a motion to dismiss. The facts which are set out in the bill make it a case which is controlled in every particular, it seems to me, by the decision of this court in the case of Western Union Telegraph Company v. Atlanta & West Point Railroad Company (D. C.) 227 Fed. 465, and especially by the case of Western Union Telegraph Company v. Louisville & Nashville Railroad Company (D. C.) 229 Fed. 234.

The lines involved in this case are the lines on the road from Kingston to Rome, and from 2 to 4 miles, according to the discussion here, of the old Nashville & Chattanooga Railroad, running through the county of Dade, in this state; both pieces of property being in the Northwestern division of this district.

The contract of June 18, 1884, referred to in the case of Telegraph Company v. Louisville & Nashville R. Co., supra, applies to the railroad in question here, because the contract of 1884 referred to the lines of the Nashville, Chattanooga & St. Louis Railway Company as a part of the lines embraced in the contract. A part of that contract, which was quoted in the opinion in the Louisville & Nashville R. Co. Case, is as follows:

"This contract is intended to cover and shall embrace all the railroad lines now owned, leased, controlled, or operated by the railroad company. * * * This contract is also intended to cover, and it shall include, any branch or branches that may be constructed by the railroad company, or other railroad or railroads that may be acquired by it, either by lease or purchase, or that may be controlled or operated by it during the existence of this agreement, should it be lawfully competent to include it or them."

The part of the Nashville & Chattanooga Railroad, stated to be from 2 to 4 miles, lying in Dade county, and a part of the old railroad line, was owned by the Nashville, Chattanooga & St. Louis Railroad Company at the time this contract of 1884 was made, and the line from Kingston to Rome was acquired in 1897. The contract of 1884 was to run for 25 years from July 1, 1884, and thereafter until the expiration of one year after written notice shall have been given by one of the parties of a desire or intention to terminate the same. So that the ownership of the part of the line in Dade county at the time the contract was made, and the acquisition of the other during the existence of the contract, brought them both within the terms of the contract.

I see nothing necessary to say in this case in addition to what has been said in the other cases referred to above, except that, whatever the rights of the Rome Railroad Company may have been prior to the time it was sold to the Nashville, Chattanooga & St. Louis Railroad Company, as between it and the Telegraph Company, they do not seem to me to affect, in any way, the rights as between the Telegraph Company and the Nashville, Chattanooga & St. Louis Railroad Company, as the contract was made, by express terms, to cover all railroad lines then owned, leased, controlled, or operated, and any that may be acquired by lease or purchase, or that may be controlled or operated during the term of the agreement.

For the reasons here stated, and for the additional reasons given in the two opinions above referred to, in the Atlanta & West Point Case and the Louisville & Nashville Case, the motion to dismiss must be sustained, and a decree to that effect may be taken.

BALDWIN CO-OPERATIVE CREAMERY ASS'N v. WILLIAMS, Internal Revenue Collector.

(District Court, W. D. Wisconsin. May 5, 1916.)

INTERNAL REVENUE ⊂=16—"ADULTERATED BUTTER."

Act May 9, 1902, c. 784, § 4, 32 Stat. 194 (Comp. St. 1913, § 6233), defines "adulterated butter" to be any butter in the manufacture or manipulation of which any process or material is used with intent or effect of causing the absorption of abnormal quantities of water, milk, or cream. A regulation of the Commissioner of Internal Revenue, approved by the Secretaries of the Treasury and Agriculture, provides that butter having 16 per cent. or more of moisture contains an abnormal quantity and is adulterated butter. Butter manufactured by plaintiff in the usual manner, without intent to cause the absorption of abnormal quantities of water, contained, according to some of the tests, slightly over 16 per cent. of water. *Held*, that it was not adulterated butter within the statute, and the tax imposed on plaintiff as a manufacturer of adulterated butter, together with the penalty, was improper, and might be recovered.

[Ed. Note.—For other cases, see Internal Revenue, Dec. Dig. ⊂=16.

For other definitions, see Words and Phrases, First and Second Series, Adulterate.]

At Law. Action by the Baldwin Co-operative Creamery Association against Burt Williams, Collector of Internal Revenue. Judgment for plaintiff.

Richmond, Jackman & Swansen, of Madison, Wis., for plaintiff.

John A. Aylward and A. C. Hoppmann, U. S. Attys., both of Madison, Wis., for defendant.

Findings of Fact.

SANBORN, District Judge. (1) That on or about August 12, 1914, the Baldwin Co-operative Creamery Association shipped to Messrs. Pitt, Barnam & Co., of New York 179 tubs of salted butter and 45 tubs of unsalted butter; that said butter was received at New York on or about August 18, 1914; that 5 tubs of said unsalted butter were sold to S. S. Long & Bro.; and that 2 of said tubs so sold were seized by John W. Sinzel, United States revenue agent.

(2) That in November, 1914, the Baldwin Co-operative Creamery Association was assessed $550 as special tax as a manufacturer of adulterated butter, together with 50 per cent. penalty, amounting to the sum of $275, and $12 stamp tax, making a total of $837; that said sum of $837 was paid on the 12th day of December, 1914, by said Baldwin Co-operative Creamery Association, under protest; that

on December 23, 1914, a petition was filed for review and refund; and that on March 19, 1915, the application for refund was overruled.

(3) That said butter was manufactured by the Baldwin Co-operative Creamery Association in the most approved manner; that said Baldwin Co-operative Creamery Association, in the manufacture and manipulation of said butter, used no process or material with the intent or effect of causing the absorption of any abnormal quantity of water.

(4) That said butter contained less than 16 per cent. of moisture.

Upon the foregoing findings of fact it was decided as follows:

Section 4 of the act of May 9, 1902 (32 Stat. 194, c. 784 [U. S. Compiled Statutes 1913, § 6233]), defines adulterated butter to be any butter in the manufacture or manipulation of which any process or material is used with intent or effect of causing the absorption of abnormal quantities of water, milk, or cream. A regulation of the Commissioner of Internal Revenue, approved by the Secretaries of the Treasury and of Agriculture, provides that butter having 16 per cent. or more of moisture contains an abnormal quantity, and is classed as adulterated butter. The butter in question in this case was examined by a revenue agent, and found to contain slightly over 16 per cent. of moisture. Other tests showed slightly less.

Under the statute it must appear that there was an intent to cause the absorption of an abnormal quantity of water. The testimony, however, shows that the butter was honestly made, and that there was no intent to adulterate it or produce an abnormal quantity of water. The butter was honestly made, in the ordinary way, and it also appears that there was nothing in the manipulation or manufacture which caused the product to contain more than 16 per cent. of water. It appeared in evidence that it was very difficult under some conditions to obtain butter having less than 16 per cent. water. In the absence of any intent to adulterate the butter, or produce an abnormal quantity of water, it was held that the case was not within the statute.

L. A. WESTERMANN CO. v. DISPATCH PRINTING CO.

(Circuit Court of Appeals, Sixth Circuit. June 22, 1916.)

No. 2663.

1. APPEAL AND ERROR ⟸1009(1)—REVIEW—EQUITY SUIT—PRAYER FOR DAMAGES.

Under Copyright Act March 4, 1909, c. 326, § 27, 35 Stat. 1082 (Comp. St. 1913, § 9548), providing that all proceedings contemplated, including those for injunction, damages, profits, and for the seizure of infringing copies, may be united in one action, a proceeding to enjoin an infringement and to recover damages for the several infringements should be treated on appeal as an equity suit; the prayer for damages not changing its nature, and the parties having adopted the forms of an equity suit.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3970, 3978; Dec. Dig. ⟸1009(1).]

2. APPEAL AND ERROR ⟸1009(1)—REVIEW—FINDINGS—EQUITY CASES.

In an equity suit, the appellate court will review questions of fact, subject to the rule that the findings of the trial court will not be lightly disturbed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3970, 3978; Dec. Dig. ⟸1009(1).]

3. COURTS ⟸356—RECORD—STATEMENT OF EVIDENCE.

Where, in an equity suit, the defeated party appealed and also brought error, and the evidence was brought up in a so-called bill of exceptions, it will, the intention being clear that it should be treated also as a statement of evidence under equity rule 75 (198 Fed. xl, 115 C. C. A. xl), be so regarded.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 937; Dec. Dig. ⟸356.]

4. APPEAL AND ERROR ⟸934(1)—REVIEW—PRESUMPTIONS.

Where defendant did not appeal, and complainant only appealed from the award of damages, claiming it inadequate, it will be presumed that the determination of the trial court that defendant was liable was correct, although such matter might be reviewed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3777, 3780, 3781; Dec. Dig. ⟸934(1).]

5. COPYRIGHTS ⟸87—INFRINGEMENT—DAMAGES—NEWSPAPER PUBLICATIONS.

Copyright Act, § 25 (Comp. St. 1913, § 9546), declares that, if any person shall infringe a copyright, he shall be liable to pay the proprietor such damages as may have been suffered, or, in lieu of actual damages, such damages as to the court shall appear just, and in assessing damages the court may, in its discretion, allow the amounts stated, but in case of a newspaper reproduction of a copyrighted photograph, the damages shall not exceed the sum of $200, nor be less than $50, and that such damages shall in no other case exceed the sum of $5,000, nor be less than $250, which shall not be regarded as a penalty. The section supplanted prior statutes making somewhat similar provisions for award of damages. *Held* that, where the copyright proprietor did not seek actual damages, but sought those provided in lieu thereof, he was, in case of a newspaper reproduction of copyrighted drawings, entitled to at least $250 damages for the infringement.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 81; Dec. Dig. ⟸87.]

6. COPYRIGHTS ⊂⊃87—"INFRINGEMENT"—WHAT CONSTITUTES.

Under Copyright Act, § 25, authorizing recovery of damages for infringement, and providing that if the proprietor does not seek recovery of actual damages, he may recover in lieu thereof fixed damages for each infringement, an "infringement" will be treated as those acts, whether one or many, constituting a connected and fairly unitary invasion of the proprietor's rights.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 81; Dec. Dig. ⊂⊃87.

For other definitions, see Words and Phrases, First and Second Series, Infringement.]

7. COPYRIGHTS ⊂⊃87—INFRINGEMENT—DAMAGES.

The proprietor of numerous sketches showing women's styles for an approaching season, who disposed of them to the trade, contracted with a retail dealer at one town, giving him the exclusive right to reproduce any sketches which he desired in his newspaper advertising. The defendant newspaper company published advertisements for other retail dealers, reproducing such copyrighted sketches. The proprietor sued, seeking an injunction, and claimed, under Copyright Act, § 25, that the publication of each separate sketch constituted an infringement entitling him to the minimum damages provided. *Held* that, while the sketches were separately copyrighted, yet as, under the act, the notice of copyright and not registration is all-important, and separate registration would give no greater rights, the several publications constituted only one infringement, entitling the proprietor only to a single award, for the several copyrights involved a related subject-matter, and, if suits for infringement of the copyright of each picture had been brought, they would have been consolidated.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 81; Dec. Dig. ⊂⊃87.]

Appeal and Writ of Error from the District Court of the United States for the Eastern Division of the Southern District of Ohio; John E. Sater, Judge.

Suit by the L. A. Westermann Company against the Dispatch Printing Company. There was a judgment awarding partial relief, and complainant appeals and brings error. Reversed and remanded, with directions.

Williams & Nash, of Columbus, Ohio, for appellant.

S. W. Bennett, of Columbus, Ohio, for appellee.

Before WARRINGTON and DENISON, Circuit Judges, and KILLITS, District Judge.

DENISON, Circuit Judge. The appellant was the plaintiff below. Although a corporation, it seems to be the enterprise of Mr. Westermann, and it will be convenient to speak of him as the plaintiff. The defendant was a newspaper publishing corporation. Plaintiff was engaged at New York in the business of selling illustrations of styles for women's dress. Pursuing his long-established method of business, when the fall season of 1911 approached he employed Mrs. Westermann, as artist and designer, to observe and reproduce and to design sketches of hats and gowns, among other things, illustrative of fall styles. These sketches showed women as they would appear wearing such articles, and were artistic and attractive. The sketches were then grouped, eight or ten together, and printed upon large display sheets. Each sketch was separately deposited with the Register

of Copyrights and copyright claimed thereon; and each sketch when published in the group carried independently the copyright notice. Westermann sent these display sheets, as issued from time to time, to his mailing list of 1,200 retail dealers in women's dress throughout the United States, accompanied by an offer to sell to each dealer electroplates of any desired sketch, with the exclusive right to use it in the dealer's town. This record shows that Westermann published and distributed at least six such display sheets, two on August 15th, three on September 1st, and one on September 19th. He made a contract covering the season with Morehouse, a retail dealer at Columbus, Ohio, somewhat varying the general method of business, and whereby it was agreed that Westermann should furnish Morehouse these style sheets, and that Morehouse, in consideration of a fixed sum, should have the exclusive right in Columbus to reproduce any of these sketches which he desired to use in his Columbus newspaper advertising.

At intervals from September 19th to October 15th the defendant newspaper published six advertisements for five Columbus retailers other than Morehouse, in each one of which six advertisements there was reproduced one of the copyrighted sketches, no one being used twice. November 10th defendant reproduced in its newspaper for still another advertiser the same sketch which it had once published on October 15th. No two of these six sketches were included by plaintiff in any one of his display sheet groups.

In the court below Westermann filed his bill of complaint setting out these facts, alleging that it was impossible to show by proof the actual damages suffered, and that he elected to take and demand the alternative "just" damages given by section 25 of the Copyright Law (Act March 4, 1909, c. 320, 35 Stat. L. 1075 [Comp. St. 1913, § 9546]), asking a judgment for the maximum of $5,000 for each of the seven alleged infringing publications, and asking also an injunction.

Defendant answered; plaintiff replied; proofs were taken in open court; all of the issues were found in favor of plaintiff; and his damages were fixed at $10 for each infringement. The defendant was content; the plaintiff brought the case here on appeal and on writ of error.

[1-3] 1. The case must be treated as an equity case here on appeal. Section 27 provides that all proceedings contemplated by the act, including those for injunction, damages, profits, and for the seizure of infringing copies, etc., may be united in one action. It is easy to see that composite actions might be brought which it would be difficult to classify as between equity and law; but there is no such difficulty here. The prayer for damages, in connection with the injunction, does not at all disparage the dominant equitable character of the proceeding. The awarding of such damages is within the customary powers of a court of equity. Plaintiff adopted, and defendant accepted, all the forms of a proceeding in equity; and the suit must be so considered. It follows that we must decide the questions of fact as well as those of law involved, save that, under familiar rules, the conclusion of the trial court on questions of fact will not be lightly dis-

turbed. Although the testimony is here upon a so-called bill of exceptions, we think the intention is clear enough that it should be treated also as a statement of evidence, under equity rule 75 (198 Fed. xl, 115 C. C. A. xl); and it will be so regarded.

[4] 2. Issues as to the necessity of making Morehouse a party, as to the copyrightable character of the sketches, as to the effectiveness of the registration proceedings, and as to the sufficiency of the notice and defendant's knowledge—all were decided against defendant, and defendant has not appealed. While it would be open to us to consider such issues, because involved in any judgment for plaintiff, yet in this case we see no reason for considering them on our own motion, and in the absence of any complaint. We therefore assume that the court below was correct in these particulars, and that the only question for consideration is the one which alone the parties have presented, viz., the proper measure of damages under section 25, as applied to the facts of this case.

[5] 3. Section 25, so far as pertinent, is quoted in the margin.[1] By the clause "in lieu of" it contemplates an election or discretionary choice between actual damages and profits on the one side, and, on the other side, an assumed or somewhat arbitrary award of such damages as may be just. Plaintiff claims that the copyright proprietor is entitled to make this election, and to plant his action arbitrarily and absolutely upon one theory or the other; defendant insists that the election or the discretionary choice is to be made by the court upon the trial. The plaintiff here made the election, if he had the power

[1] Sec. 25. Infringement—Liability. That if any person shall infringe the copyright in any work protected under the copyright laws of the United States such person shall be liable:

(a) To an injunction restraining such infringement;

(b) To pay to the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement, as well as all the profits which the infringer shall have made from such infringement, and in proving profits the plaintiff shall be required to prove sales only and the defendant shall be required to prove every element of cost which he claims, or in lieu of actual damages and profits such damages as to the court shall appear to be just, and in assessing such damages the court may, in its discretion, allow the amounts as hereinafter stated, but in the case of a newspaper reproduction of a copyrighted photograph such damages shall not exceed the sum of two hundred dollars nor be less than the sum of fifty dollars, and such damages shall in no other case exceed the sum of five thousand dollars nor be less than the sum of two hundred and fifty dollars, and shall not be regarded as a penalty:

First. In the case of a painting, statue, or sculpture, ten dollars for every infringing copy made or sold by or found in the possession of the infringer or his agents or employés;

Second. In the case of any work enumerated in section five of this act, except a painting, statue, or sculpture, one dollar for every infringing copy made or sold by or found in the possession of the infringer or his agents or employés;

Third. In the case of a lecture, sermon, or address, fifty dollars for every infringing delivery;

Fourth. In the case of a dramatic or dramatic-musical or a choral or orchestral composition, one hundred dollars for the first and fifty dollars for every subsequent infringing performance; in the case of other musical compositions, ten dollars for every infringing performance.

to do so; and on the evidence there can be no doubt that this was not a case for actual damages, as distinguished from those damages which might be fair and just, and that the court, if called upon to act, must make the same election as plaintiff did. Defendant made no profits, so far as the proofs indicated; the plaintiff's damages rested in the injury to his Morehouse contract and in the discouragement of and the tendency to destroy his system of business. To make any accurate proof of actual damages was obviously impossible. This case must therefore be treated, from any point of view, as one calling for the application of the "in lieu" portion of the statute.

4. The statute says that "such damages shall" be governed by a maximum and minimum. Whether this phrase, "such damages," and the maximum and minimum limitations, apply to the actual damages which may be proved and established under the first part of this section, or only to the "just" damages given "in lieu of actual damages," cannot be determined from mere arrangement of the language, but must depend upon more indirect interpretation. This question likewise does not directly require decision in this case. The limitations unquestionably apply to the "in lieu" damages, which are the only ones here involved; their application to actual damages may be passed over.

5. The arrangement of section 25 is awkward. In effect, the provisions for maximum and minimum immediately follow the classification, so that the statute must be treated as if it read:

"Or in lieu of actual damages and profits, such damages as to the court shall appear to be just, and in assessing such damages the court may in its discretion allow $10 for every copy of a painting, etc., $1 for every copy of any other work, etc., $50 for every delivery of a lecture, etc., and $10 for every performance of musical compositions, except, etc.—but in the case of a newspaper reproduction of a copyrighted photograph such damages shall not exceed the sum of $200 nor be less than the sum of $50, and such damages shall in no other case exceed the sum of $5,000 nor be less than the sum of $250, and shall not be regarded as a penalty."

6. We see no escape from the application of the $250 minimum in a case like this. It is difficult to think of any reason why a newspaper reproduction of a copyrighted pen and ink drawing of a hat should not be classified with a newspaper reproduction of a copyrighted photograph of similar articles; but it is not, and these sketches here involved are not photographs—though they might as well have been—and unless the word "photograph" is restricted to its established meaning, no line can be drawn; hence the $50 photograph minimum cannot apply.

It seems to us the plain meaning of the language that Congress intended that the plaintiff should not recover less than $250 damages in any copyright infringement suit not based upon a newspaper reproduction of a photograph—at least in any case where the actual damages fail to appear so clearly and so fully as to forbid resort to the "in lieu" clause. The necessary effect of the provision is to prohibit the award of merely nominal damages. This intent implies no undue harshness. Not only does the typical copyright infringement, if not every one, involve indirect damages almost sure to be considerable,

but in few cases would one sum of $250 more than compensate plaintiff for his time, trouble and expense in detecting, following up and prosecuting an infringement. It would seem that the words "shall not be regarded as a penalty" were added out of abundant caution, for under such a situation as usually exists on this subject the awarding of a round sum in damages is no more a penalty when the damages are liquidated by a court than when they are liquidated by a contract.

The act of 1909 is not new in this respect. R. S. § 4964, provided that one who unlawfully reproduced a copyrighted book should pay such damages as may be recovered in a civil action; section 4965 provided redress for infringement of copyrights other than for books, which redress consisted of "forfeiting" (one-half to the proprietor and one-half to the United States) one dollar for each infringing copy; and this section further provides, with reference to the infringement of a print, that "the sum to be recovered in any action brought through the provisions of this section shall be not less than $250"; section 4966 covers infringement of copyrighted dramatic and musical compositions, and says that the infringer "shall be liable for damages therefor, such damages in all cases to be assessed at such sum, not less than $100 for the first and $50 for every subsequent performance, as to the court shall appear to be just." This last provision was under consideration by the Supreme Court in Brady v. Daly, 175 U. S. 148, 20 Sup. Ct. 62, 44 L. Ed. 109. It was held that the minimum provision was not one for a penalty, and that in default of proof of actual damages the plaintiff was at all events entitled to recover this minimum. After this construction of R. S. § 4966, the same language was adopted into section 25 of the act of 1909, although its application was extended to all copyrights; and Brady v. Daly must have the effect of a decision that under the present statute the plaintiff may recover at least the minimum.

[6] 7. When we observe that a single act in reproduction of a single copyrighted print is such an infringement as will support an action and a recovery under section 25, it is natural to assume that each such act calls for the minimum damages, and perhaps this natural assumption tends to persuade that Congress did not intend to abolish merely nominal damages (Woodman v. Lydiard-Peterson Co. [C. C. D. Minn.] 192 Fed. 67, affirmed 204 Fed. 921, 123 C. C. A. 243, 205 Fed. 900, 126 C. C. A. 434); but the conclusion is not inevitable. The "infringement" for which an action will lie is not necessarily the same "infringement" for which the minimum damages are provided. The same word may have different meanings, even in parts of the same statute, if the context and reasonable construction so require. American Co. v. District of Columbia, 224 U. S. 491, 494, 32 Sup. Ct. 553, 56 L. Ed. 856.

The language of the statute is:

"If any person shall infringe the copyright in any work protected under the copyright laws of the United States such person shall be liable * * * to pay * * * the copyright proprietor * * * such damages as to the court shall appear to be just," etc.

What did Congress mean when it referred to the "infringement" for which not less than $250 must be paid? The common instance, such as Congress probably had in mind, is clear. In case of an unauthorized publication of a copyrighted book, or an infringing edition of a copyrighted song, there are clearly one right and one violation, though an infringing edition may contain many copies. The statute has recognized that in some instances acts of infringement, though connected and united, may require separate treatment, and in other instances (newspaper reproduction of photographs) a number, perhaps a vast number, of acts are treated collectively as one infringement; but in still other instances the statute is wholly silent in these respects. The publishing of an edition of a thousand books is an infringement; so is the putting on sale of one of them. Using the analogy of the patent law, the manufacture and sale of one article is an infringement sufficient to support an action; yet all the conduct of the defendant in continuing the manufacture and sale over a period of years may be "the infringement" for which damages will be assessed at the end of the action. There is no corresponding damage statute in the patent law to make the analogy complete; but can it be supposed that the copyright proprietor can take each infringing act out of a series or group, because each one is sufficient to support an action, and then plant a separate action or complaint upon each, and so recover his minimum damages practically as many times as he chooses? These and other considerations convince us that the "infringement" which calls for minimum damages is that conduct of the defendant, whether being one act or many, which constitutes a connected and fairly unitary invasion of the proprietor's rights. Intermittent newspaper publication forms merely an extreme instance of difficulty in applying this definition.

[7] 8. We are on more uncertain ground when we attempt to define that right of the copyright proprietor which is contemplated by the minimum damage provision. What is meant by "the copyright in any work protected," etc.? Here again the case of a book or musical composition is simple; but when the copyright law is used as an aid to business enterprises, other than the printing and sale of books and pictures, we find indefiniteness. Whatever may have been the rule under the former law, section 3 of the act of 1909 (Comp. St. 1913, § 9519) operates to give the proprietor the election between claiming copyright of his "work" as an entirety or by units, and, whichever way it is done, each unit is equally protected. Each one of a number of short stories may be separately copyrighted as it appears from month to month, and then they may go upon the market grouped as a book, or they may be withheld and all first published in book form and copyrighted as an entirety, or they may be copyrighted as they serially appear, and then again in their grouped form. In any event, it is an infringement of the proprietor's rights to republish any one of the stories, and it is an infringement of his rights to republish the whole book. A furniture manufacturer may have a hundred artistic cuts or prints showing his product. He may copyright them separately and then unite them in his published catalogue, or

he may first copyright the whole catalogue, making one registration; in either event, it is an infringement of his rights to republish any one print or to republish the whole catalogue. We cannot believe that the application of the minimum damage law is controlled by that form of copyrighting, by group or by unit, which the proprietor chooses or happens to adopt. If the form of registration determines the nature of the right which is infringed, and so if it must be assumed that each impairment of a separately registered copyright is a separate infringement, it follows in the case of a catalogue that if the proprietor registers the entire at once, and if a defendant has republished the entire, the proprietor's maximum damage (at least under the "in lieu" clause) is $5,000; while if he has separately registered each one of his 100 prints, and put out the same catalogue, and the defendant has republished the same catalogue, we see that plaintiff's right is the same as before and that the defendant's infringement is the same as before, and yet the minimum damage permissible under the statute would be $25,000. While this is the first thought interpretation of the words of the law, yet we know it cannot be the real intent. The damages would have been "irrationally increased. We believe Congress meant no such result." American Co. v. District of Columbia, supra, 224 U. S. at page 495, 32 Sup. Ct. 553, 56 L. Ed. 856. If the language permits, we must find some more reasonable construction even if inconsistent with the letter. Church v. United States, 143 U. S. 457, 12 Sup. Ct. 511, 36 L. Ed. 226. We see no insuperable objection to supposing that the "copyright in any work protected," etc., may refer as well to a composite or grouped right as to each separate item of the group; and we are satisfied to interpret the statute as saying, in effect, that in any case where a party shows that a property right and interest protected by the copyright law have been invaded by the defendant, the damages (under the "in lieu" clause) must not be more or less than the stated amounts; even though the right is composite and the invasion is composite. It will follow that it must be determined by the court as a fact in each case whether one right or more than one has been impaired, and whether the acts of the defendant in taking are to be considered as one infringement or more than one.

We are somewhat fortified in this conclusion, by observing the distinct difference in theory between the old (R. S.) and the new (1909) copyright laws. Under the old law, the statutory monopoly was rested upon registration, which must be initiated on or before publication. The certificate of registration was not only evidence of title but its preliminaries constituted the final step in the otherwise incomplete statutory grant. Under the new law, the exclusive right is fixed at the instant of and by the fact of publication, with notice; the registration is incidental and may be long postponed. The publication of the complete book, with notice, perfects the right; are its character and incidents to be changed by subsequently filing the chapters separately for registry? So, the trade cuts may be put out, one each day, each with notice of copyright claim, but the only thing filed for registry may be the complete catalogue; the rights resulting from

publication would seemingly be neither enlarged nor diminished. As the registration has become more incidental and nonessential, by so far its form must have become less important in fixing substantial rights.

In determining the above-stated question of fact, the power and duty of consolidation may be useful as a test. If a plaintiff copyrights separately ten cuts, and finds each one of the ten infringed on separate days by the same newspaper, and then brings ten separate injunction and damage suits, on application to compel consolidation the court would look into the facts and ascertain whether there were really ten controversies involving ten questions or whether there was just the one dispute involving one question, and probably would consolidate or not, according as it decided this question. If these suits were consolidated upon a finding that there were really only one controversy and one injury to the plaintiff's business, or if the plaintiff in the first place brought one consolidated suit, we think it is evident that the statute may be satisfied by awarding the minimum damages as for one infringement. This construction of the law does not compel the proprietor to register all together items which he wishes to register separately. He may adopt the latter course and derive any direct or indirect advantages properly incidental; but it does not follow that one of these incidental advantages is to give the minimum damage clause an effect which could not have been intended. Nor does this construction imply that the damages for republishing a complete set of separately copyrighted books would be no more than for republishing one volume of the set. A set of books is not a unit in the same sense that one book is. The application of the law to such a case the court would determine according as it determined the facts.

We do not overlook that a proprietor who had such separate copyright registrations as are here involved might bring a suit based upon one item only, and after the first suit was finished bring another based upon another item, or he might be able to bring several simultaneously in different jurisdictions, and thus in one way or the other escape consolidation. However, it will be time to meet such a problem when it arises; situations hard to dispose of can always be imagined; the possibility of such difficulty will not prevent what seems the reasonable construction in the ordinary case.

Applying this principle to the present case, we find first that all the cuts here involved relate to a single subject, viz., fashions for women's wear for a single season; the constituent parts of such a subject are, obviously and necessarily, closely related; they comprise a unitary object and effect; the aim must be to meet the tastes of women collectively as well as separately. We find also that plaintiff had united and tied together all his six separately copyrighted cuts as completely as if he had published them only in one catalogue or one book. He had done this, so far as this case is concerned, by uniting them in a season's service which he had sold exclusively for Columbus to Morehouse. His entire business enterprise protected by copyrights was represented in Columbus by his Morehouse contract. His right, which was involved and which was impaired, was the exclusive right to

publish in Columbus this group of pictures for this season; and this was in substantial effect one right. The defendant newspaper published on several days several items of this group, but these publications were all incidents of one course of conduct; they all occurred within a short time; they ceased as soon as complaint was made. We think it reasonable to say that within the purview of this minimum damage clause they constituted one infringement.

The decree must be reversed, and the cause remanded, with instructions to enter a decree for plaintiff for two hundred and fifty dollars damages and costs and the attorney fee already fixed. The writ of error is dismissed.

We thus definitely direct the precise decree to be entered below in order that no lack of finality in our decree may embarrass any effort to take the opinion of the Supreme Court; we have considered certifying the questions, but we find our doubts hardly sufficient to justify this course.

COOPER v. JEWETT et al.

(Circuit Court of Appeals, Eighth Circuit. May 18, 1916.)

No. 4542.

1. ATTORNEY AND CLIENT ⟸70—APPEARANCE—PRESUMPTION.
   It is presumed that an attorney who appears for a party is authorized to do so.
   [Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 95; Dec. Dig. ⟸70.]

2. PROCESS ⟸149—SERVICE—EVIDENCE—SUFFICIENCY.
   Evidence *held* to show that defendant was served in an Iowa suit in accordance with Code Iowa 1897, § 3516, authorizing service of process by any person not a party to the action.
   [Ed. Note.—For other cases, see Process, Cent. Dig. §§ 202–205; Dec. Dig. ⟸149.]

3. PRINCIPAL AND SURETY ⟸185—RIGHTS OF SURETY—ENFORCEMENT OF REIMBURSEMENT.
   Where, in an action against a principal and his sureties, the petition was amended and other claims included, but notice of amendment was not served on the principal, and his attorneys were then in a hostile attitude, the sureties are, the amount of the claim added by amendment having been satisfied by the sale of collateral delivered by the principal, entitled to reimbursement to the amount of the judgment satisfied by them; that claim having been included in the original notice served on the principal.
   [Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 524–538; Dec. Dig. ⟸185.]

4. COURTS ⟸268—FEDERAL COURTS—JURISDICTION.
   While, broadly speaking, a federal District Court is without jurisdiction of a creditors' suit brought by sureties, who had satisfied a judgment recovered in the state court of another district, the court has jurisdiction of an action at law by the sureties to recover the amount they paid.
   [Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 806, 807, 812; Dec. Dig. ⟸268.]

5. COURTS ⟸268—FEDERAL COURTS—JURISDICTION.
Where sureties, having satisfied a judgment against their principal in a court of a foreign state, were subrogated to the rights of the creditor, a suit in equity to enforce such rights may be maintained in the federal District Court of a district not including the state where judgment was rendered.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 806, 807, 812; Dec. Dig. ⟸268.]

6. PRINCIPAL AND SURETY ⟸187—ACTIONS—JUDGMENT.
Code Iowa 1897, § 3773, provides that, in an action by several plaintiffs against several defendants, the court may render judgment for or against one or more of them when a several judgment is proper, leaving the action to proceed against others; section 3779 provides that, when judgment is rendered against a principal and his surety, it shall recite the order of liability; while sections 3966 and 3967 provide for the issuance of execution as against the party primarily liable and for a surety's subrogation to the rights of creditors. *Held* that, in an action against a principal and surety, though the only notice of claim served upon the principal omitted any reference to a determination of the respective liability of the parties, the Iowa court had jurisdiction to determine the respective liability of the parties, and judgment determining that question is res judicata.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 554-556; Dec. Dig. ⟸187.]

7. SUBROGATION ⟸31(5)—PAYMENT OF OBLIGATION BY SURETY—ASSIGNMENT OF DEBT.
A surety has the right, when paying a creditor, to take an assignment of the evidence of indebtedness, to enforce it against his principal; and, though no assignment is taken, the surety will, under the doctrine of subrogation, be deemed to have received such assignment.

[Ed. Note.—For other cases, see Subrogation, Cent. Dig. § 91; Dec. Dig. ⟸31(5).]

8. APPEAL AND ERROR ⟸878(2)—PRESENTATION OF GROUNDS OF REVIEW—STATUTE.
Where complainants, suing on a judgment designating the rate of interest, failed to appeal from that portion of the decree reducing the rate of interest, they cannot, on defendants' appeal, complain.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3577; Dec. Dig. ⟸878(2).]

9. LIMITATION OF ACTIONS ⟸2(1)—WHAT LAW GOVERNS—CREDITORS' SUIT.
In a suit by surety in the nature of a creditors' suit, wherein it was sought to subject lands subsequently conveyed by the principal to the satisfaction of the surety's claim, the statute of limitations of the state in which the suit was brought governs.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 4, 6; Dec. Dig. ⟸2(1).]

10. LIMITATION OF ACTIONS ⟸87(3)—RUNNING OF STATUTE—NONRESIDENCE.
Code Civ. Proc. S. D. §§ 59, 60, respectively fix a 10-year limitation on actions upon judgments and 6 years upon contracts; while section 69 declares that if, when a cause of action accrues against any person, he shall be out of the state, such action may be commenced within such time after the return of the person into the state, and if, after such cause of action shall have accrued, such person shall depart from and reside outside of the state, the time of his absence shall not be taken as any part of the time limited for the commencement of the action. When judgment was recovered against defendant and his sureties, defendant was not a resident of South Dakota. Thereafter, judgment being satisfied by the sureties, defendant became a resident of the state. *Held*, that

suit on a judgment by the sureties, who were subrogated to the rights of the judgment creditor, was not barred until 10 years from the time defendant became a resident of South Dakota; the suit being one on a judgment, and the running of limitations being tolled during the period of defendant's nonresidence.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 458; Dec. Dig. ⟸87(3).]

11. APPEAL AND ERROR ⟸843(2)—REVIEW—QUESTIONS PRESENTED FOR REVIEW.

Where, in an equity case, testimony complained of by appellant was unnecessary to sustain the decree, the question of its admissibility will not be determined.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3331; Dec. Dig. ⟸843(2).]

12. APPEAL AND ERROR ⟸724(5)—REVIEW—QUESTIONS PRESENTED.

A specification of error which declared that appellant would rely upon an error specified in an assignment at a named page of the record presents nothing for review, where at that page there was nothing in the record referring to the specification.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2999; Dec. Dig. ⟸724(5).]

13. APPEAL AND ERROR ⟸1073(7)—REVIEW—HARMLESS ERROR.

In a suit by a surety to obtain reimbursement for sums paid to satisfy a judgment against himself and his principal, the principal cannot complain that the court improperly allowed the surety to recover costs expended in such suit, where the surety was denied a larger sum to which he was entitled.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4245; Dec. Dig. ⟸1073(7).]

14. APPEAL AND ERROR ⟸1073(1)—REVIEW—HARMLESS ERROR.

Where, under Code Civ. Proc. S. D. § 321, and Laws S. D. 1903, c. 117, a judgment of the federal District Court of South Dakota could be made a lien by filing a copy with the clerk of the state circuit court, the error of the District Court in declaring its judgment a lien is harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4240; Dec. Dig. ⟸1073(1).]

Appeal from the District Court of the United States for the District of South Dakota; James D. Elliott, Judge.

Bills by George A. Jewett and by A. H. McVey against John Cooper, who filed cross-bills; the suits being consolidated. From a decree for complainants, defendant and cross-complainant appeals. Affirmed.

T. H. Null, of Huron, S. D. (Null & Royhl, of Huron, S. D., on the brief), for appellant.

A. B. Fairbank, of Sioux Falls, S. D. (Edmund H. McVey, of Kansas City, Mo., and Boyce, Warren & Fairbank, of Sioux Falls, S. D., on the brief), for appellees.

Before HOOK and SMITH, Circuit Judges, and REED, District Judge.

SMITH, Circuit Judge. The appellees were the plaintiffs and the appellant was the defendant in the District Court, and they will be styled here as in the court below. For some time prior to August,

1898, all the parties to this suit were residents of Des Moines, Iowa. Dr. Cooper was a practicing physician and surgeon and a considerable property owner there. He was a stockholder and director of the German Savings Bank of that city, and owned about 450 shares out of a total of 1,000 of the stock of the Fidelity Insurance Company of that city. Mr. George A. Jewett was a lumber dealer, and interested in the Brick Mutual, an insurance company of Des Moines. A. H. McVey was a practicing lawyer, and became District Judge about December, 1901. Negotiations were started in the summer of 1898 to buy the body of the stock not held by Cooper in the Fidelity Insurance Company, and 513 of the total of 1,000 shares were bought of Mr. Coffin and others. Out of this 60 shares were issued to Dr. Cooper, thus giving him individually a majority of all the stock in the company. The balance of the purchased stock, 453 shares, was issued to John Cooper, George A. Jewett, A. H. McVey, R. J. McKee, and S. G. Lee, jointly, referred to throughout this case as the syndicate. The money to pay for this stock was originally borrowed of the German Savings Bank, and the parties named signed a note for about $19,000 to that bank. Right here arises the first controversy of a material character in this case. Dr. Cooper claims the syndicate bought the stock in their own right and gave their note for the amount to the German Savings Bank, while Judge McVey and Mr. Jewett claim that it was bought by them and the other members of the syndicate as trustees for Dr. Cooper, and that they signed his note as sureties, and the stock was issued in the name of the syndicate as security to them for signing the note for the purchase money and another note for 75 per cent. of the face value to the Fidelity Company. The loan was transferred from the German Savings Bank to the Des Moines National Bank, and from there to the Iowa National Bank. It was reduced from time to time, doubtless by sales of syndicate stock, until it, at the time of the last note to the Iowa National Bank, December 8, 1900, amounted to $10,267, due in 6 months from date, with 8 per cent. interest from maturity. The stock then held by the syndicate had been reduced to 318 shares, and this was deposited as collateral security for the new note. At some time before the last note was given Lee had in some way passed out of the syndicate. Dr. Cooper became involved in many difficulties. The Fidelity Insurance Company, which had bought the Brick Mutual, was in financial difficulties, and domestic troubles had come to aid his embarrassments. He left Des Moines, and went to Lincoln, Neb. Suit was brought on the note in question against him, McVey, Jewett, and McKee in the district court of Polk County, Iowa. This court is a court of superior general jurisdiction.

[1, 2] The first question is as to whether the doctor was properly served with the original notice in this suit, that being the means by which jurisdiction is obtained in the courts of Iowa. Such a notice was issued, and a return shows it was personally served upon Dr. Cooper by G. D. Perry, a constable of Des Moines, Polk county, Iowa, in that city. Mr. Perry is now dead. The Iowa law provides that this notice may be served, by any person not a party to the action.

Code Iowa 1897, § 3516. The district court of Polk county, Iowa, expressly found that Dr. Cooper had been personally served within the county, and McVey, McVey & Graham appeared in this suit for him.

The presumption is that an attorney who appears for a party is authorized to do so. Potter v. Parsons, 14 Iowa, 286; Harshey v. Blackmarr, 20 Iowa, 161, 89 Am. Dec. 520. The burden is upon one who claims that an appearance for him has been unauthorized to show that fact (Bond v. Epley, 48 Iowa, 600), and where there is no service, but a lawful appearance (Fanning v. Minnesota Railroad Co., 37 Iowa, 379), or when there is service and an unauthorized appearance (Woodward v. Willard, 33 Iowa, 542), the court has jurisdiction. Testifying in this case more than 13 years after the alleged service, Dr. Cooper swore:

"I cannot recall the service of an original notice upon me by a constable named Perry in April, 1902. I have tried to recall that, but I don't believe it was ever served. I can't recall it. I don't believe I ever had any notice of that. I know I wasn't in Des Moines on the 9th of April. I was in Lincoln. I don't remember handing an original notice to Mr. McVey subsequent to that time. I don't remember that I had any talk with A. H. McVey about a defense to this action brought by the Iowa National Bank against me. I never authorized him to make a defense for me. I did not feel that I had any defense to make."

He also testified that he never employed the junior McVey, but only the senior one, who it seems was on the bench of the state of Iowa at the time in question. One of the principal reasons given by Dr. Cooper for thinking he was not served was that he was in Lincoln, Neb., and not in Des Moines, on the date of the alleged service, April 9, 1902; but it appears that the sheriff of Polk county, Iowa, returned that he personally served him in Des Moines, Iowa, on that day in a suit by B. F. Loose against John Cooper. Dr. Cooper was also a witness in this very case of Iowa National Bank v. John Cooper et al. on behalf of the plaintiff. As to numerous letters he testified he did not remember receiving them. As to one letter he testified:

"I don't recall receiving that letter. I don't deny receiving it. I don't remember that I did. I don't recollect the letter in the letter press copy book dated June 19, 1902, marked 'Plaintiff's Exhibit N.' There was a lot of such stuff pouring in on me, and I never paid much attention to it. I don't know whether I received it or not."

And he testified similarly as to numerous other letters written about the same time as the alleged service. We cannot find there was no service in the Iowa court in that case. We have no doubt that he was served, and that he authorized the appearance by McVey, McVey & Graham. We may add that we have examined Jamison v. Weaver, 84 Iowa, 611, 51 N. W. 65, Squires v. Jeffrey, 101 Iowa, 676, 70 N. W. 730, Shehan v. Stuart, 117 Iowa, 207, 90 N. W. 614, and Buck v. Hawley & Hoops, 129 Iowa, 406, 105 N. W. 688, and there is nothing in any of those which conflicts with our conclusion.

[3] Subsequently the Iowa National Bank filed an amendment to its petition, in which it claimed the additional sum of $9,540 and interest, less a credit of $1,950 for advances made to pay an assessment of

30 per cent. upon the 318 shares of stock which was held as collateral upon the note for $10,267, which had been voted by the board of directors, and asked judgment against all of the defendants, John Cooper, A. H. McVey, George A. Jewett, and R. J. McKee, for that amount. No notice was ever given of this amendment, which nearly doubled the amount claimed. Jewett, McVey, and McKee filed answer to this amended petition. On June 16, 1902, the district court of Polk county, Iowa, rendered judgment in favor of the Iowa National Bank and against Dr. Cooper for $18,930.55, and $229.30 attorney's fees and costs. These attorney's fees were taxed upon the whole amount of the judgment at the rates fixed by Code Iowa, § 3869. This judgment was valid to the extent of the amount of the note for $10,267 and interest, attorney's fee, and costs; but there having been no notice of the balance, and only evidence of doubtful admissibility that Dr. Cooper's attorneys, who had by that time assumed a hostile attitude, had any authority to waive notice and appear for him without notice, we would be loath to hold that the judgment in excess of the amount of the note was valid, but for reasons which will hereafter appear that does not affect this case.

The Iowa National Bank had two claims against the four defendants, one for $10,267 and interest and attorney's fees on the note, and one for $9,540 and interest upon the assessment paid by the bank on the syndicate stock and good as against the same persons. Dr. Cooper had deposited as collateral security for these debts 407 of his individual shares of stock in the Fidelity Company and deeds for certain real estate in and about Des Moines. This property was so deposited that, while a court of equity could have aided in extinguishing the equity of redemption, it was not necessary to resort to such court to convert the property into money. The district court of Polk county rendered a decree against R. J. McKee, A. H. McVey, and George A. Jewett on June 6, 1903. By this decree it held that they were not liable upon the claim for any part of the assessment advanced of $9,540 upon 318 shares of stock, but were liable for the $10,267 and interest and attorney's fees on the note for the balance due then as sureties for Dr. Cooper, and that after crediting thereon the $1,950 realized from the sale of the Cooper stock there was due thereon $9,690.94, with 8 per cent. interest from the 13th day of April, 1903, $136.91 attorney's fees, with 6 per cent. from April 13, 1903, and costs. The plaintiff appealed from said decree to the Supreme Court of Iowa, which at first affirmed it on November 18, 1904 (Iowa National Bank v. Cooper, 101 N. W. 459); but subsequently the opinion was withdrawn and a new opinion was filed May 19, 1906 (Iowa National Bank v. Cooper, 131 Iowa, 556, 107 N. W. 625), in which the court held that the members of the syndicate were all liable for the amount of the loan to pay advances, $9,540, and ordered that the case be remanded for a decree in harmony with that opinion. On October 25, 1906, an application for a rehearing was denied. On March 9, 1907, the district court of Polk county entered a new decree against Jewett, McVey, and McKee for $6,609, with interest at 8 per cent. from March 2, 1907, and attorney's fees of $169.31, and costs, after applying the credits, and in the decree it was expressly

provided that the proceeds of the Cooper real estate and of the 318 shares of syndicate stock should be applied to the payment of the $9,540 advanced on February 2, 1902, upon the syndicate stock, *with interest thereon at 6 per cent.*

It will be remembered the bank held 318 shares deposited as collateral by the syndicate, but this was worth more than an equal amount of Dr. Cooper's shares, because the assessment of $30 a share on it had been paid, while upon his it had not been so paid. The 407 shares of Dr. Cooper were sold, and produced net $1,950 as of February 1, 1902, and under all the decrees in Iowa this was to be credited upon the note for $10,267. The real estate produced net $4,923.18 as of August 19, 1903. The 318 shares of syndicate stock produced net $6,153.72 as of January 31, 1905. These two latter amounts were ordered applied on the charges for advances of $9,540, and as they were credited $4,923.18 upon August 19, 1903, and $6,153.72 on January 31, 1905, they slightly more than paid the entire sum of $9,540 and interest at 6 per cent., the rate fixed by the court. This left only the note for $10,267, upon which the final judgment in Iowa National Bank v. Cooper et al. was rendered, and of that suit the court undoubtedly had jurisdiction. The court in this decree found there was due on this note, after crediting the $1,950 derived from the sale of the Cooper stock, $9,690.94, with 8 per cent. interest from April 13, 1903.

It is agreed between the parties that Jewett and McVey paid the following sums upon the decree in the Polk county district court: March 10, 1906, $5,000; March 15, 1906, $443.89; March 15, 1906, $85.18; December 13, 1906, $19.81; March 26, 1907, $6,814.19; March 26, 1907, $201.10—total, $12,564.17. In December, 1912, and January, 1913, Jewett and McVey filed separate bills in equity in the District Court of the United States for the District of South Dakota against Cooper and one Osbun J. Marshall. These were in the nature of creditors' bills, in which the complainants sought to be subrogated to the rights of the Iowa National Bank as to the sums paid on the decree in the district court of Polk county, Iowa, and to set aside a conveyance of 320 acres of land in South Dakota made by Cooper to Marshall. The defendants answered, and Cooper filed a counterclaim, and the plaintiffs filed replications and answers to the counterclaim. Subsequently the cases were consolidated by consent of parties and upon a trial a decree was entered for the plaintiffs, and defendant Cooper appeals.

[4, 5] It is contended that, as neither the Iowa National Bank nor the plaintiffs had ever obtained judgment in South Dakota, a creditors' bill could not be maintained upon the decree in Iowa. Broadly speaking this is true, but the United States District Court undoubtedly had jurisdiction of a law action for the amount paid by Jewett and McVey. The new rules in equity became effective February 1, 1913, and provided:

"22. If at any time it appear that a suit commenced in equity should have been brought as an action on the law side of the court, it shall be forthwith transferred to the law side and be there proceeded with, with only such alteration in the pleadings as shall be essential.

"23. If in a suit in equity a matter ordinarily determinable at law arises,

such matter shall be determined in that suit according to the principles applicable, without sending the case or question to the law side of the court."

No point seems to have been made on this question in the court below. No demurrer was filed, nor was there any suggestion in the answer on the subject. No motion to transfer to the law docket was made, but, on the contrary, so far as it goes the parties, as shown by the decree in this case, which was rendered December 18, 1914, expressly waived a trial by jury; but if the plaintiffs were entitled to subrogation, as we shall see they were, this itself was a purely equitable right. Ketchum v. Duncan, 96 U. S. 659, 667, 24 L. Ed. 868; 37 Cyc. 363 et seq. We therefore think the District Court as a court of equity had jurisdiction to proceed in this case.

[6] The district court of Polk county, Iowa; expressly decreed that Jewett and McVey were liable only as sureties upon this note, and there is nothing in either of the opinions of the Supreme Court of Iowa which even tends to weaken that holding. It is strenuously contended that the court in Polk county had no jurisdiction to determine such a question as between the defendants. This would ordinarily be true. The defendant correctly contends that ordinarily a notice of the plaintiff's claim does not vest in the court, without additional notice, any right to adjudicate any matters as between the defendants. He cites cases to sustain the proposition that a judgment against a plaintiff in favor of a defendant determines nothing between the latter and a codefendant, because, although both are parties to the action, they are not "adversary parties," as that phrase is applied to the subject of former adjudication. This point could be sustained, but for the provisions of the Iowa Code of 1897, which contained the following sections:

"Sec. 3773. In an action by several plaintiffs, or against several defendants, the court may, in its discretion, render judgment for or against one or more of them when a several judgment is proper, leaving the action to proceed as to the others."

"Sec. 3779. When a judgment is rendered against a principal and his surety, it shall recite the order of their liability therefor, and the term 'surety' includes all persons whose liability on the claim is posterior to that of another."

"Sec. 3966. The clerk issuing an execution on a judgment against principal and surety shall state in the execution the order of liability recited in the judgment, and the officer serving it shall exhaust the property of the principal first, and of the other defendants in the order of liability thus stated; but each person subsequently liable shall, if requested by the officer, point out property owned by the party liable, before him, to obtain the benefits of this provision. To obtain the benefits of this section, the order of liability must be recited in the execution, and the officer holding it must separately return thereon the amount collected from the principal debtor and surety.

"Sec. 3967. When the principal and surety are liable for any claim, such surety may pay the same, and recover thereon against all liable to him. If a judgment against principal and surety has been paid by the surety, he shall be subrogated to all the rights of the creditor, and may take an assignment thereof, and enforce the same by execution or otherwise, as the creditor could have done. All questions between the parties thereto may be heard and determined on motion by the court, or a judge thereof, upon such notice as may be prescribed by it or him."

Under these sections the proceedings in Polk county, Iowa, as between the defendants, "were adversary," notwithstanding the com-

mon-law rule to the contrary, and the question as to whether the defendants were all principals, or a principal and his sureties, is res adjudicata.

[7, 8] The District Court seems to have determined the question anew, and reached the same conclusion as the Iowa courts, and with its finding there seems to have been no cause for complaint. The plaintiffs have not appealed, and no more relief can be granted them than was given by the District Court; but the adjudication was that Dr. Cooper was the principal, and these plaintiffs were only sureties, while the District Court below seems to have thought that as to 15 shares out of 318 the plaintiffs should be charged as principals. We would have no criticism of such a finding, but for the fact that, right or wrong, it had been adjudicated otherwise by the Iowa court. The court allowed only 7 per cent. interest upon the claim from March 26, 1907. The note upon which the right of subrogation is based provided for 8 per cent. and the decree in Iowa provided for the same rate. It is provided by section 3039 of the Iowa Code that:

"The judgment or decree shall draw interest at the rate expressed in the contract, not exceeding eight cents on the hundred by the year, which rate must be expressed in the judgment or decree."

In 37 Cyc. page 412, it is said:

"A surety has the right, when paying the creditor, to take an assignment of the evidence of indebtedness, and can enforce it against his principal; and upon the doctrine that equity considers that as done which ought to be done, although no actual assignment is made, the debt is considered the payer's, payment by the surety being equivalent to a purchase from the creditor, and operating as an equitable assignment of the debt, and all its incidents, to the former."

If the plaintiffs were only entitled to legal interest upon the amount paid by them, we see no reason why this should not be governed by the legal rate in Iowa, which is 6 per cent.; but we see no reason, if they are subrogated to the rights of the Iowa National Bank, why they are not entitled to the contract rate, which is 8 per cent., notwithstanding the holding in Waldrip v. Black et al., 74 Cal. 409, 16 Pac. 226. But there is no assignment of errors upon this subject by the appellant, and, the plaintiffs not having appealed from the allowance of 7 instead of 8 per cent., we need give this question no further consideration.

[9, 10] The defendants pleaded the statute of limitations. There is no doubt that this question is to be determined by the law of South Dakota. Quinette v. Pullman Co. et al., 229 Fed. 333, —— C. C. A. ——. The statutes of limitations of South Dakota provide:

"Sec. 39. Civil actions can only be commenced within the periods prescribed in this Code, after the cause of action shall have accrued, except where, in special cases, a different limitation is prescribed by statute. But the objection that the action was not commenced within the time limited, can only be taken by answer."

"Sec. 57. The periods prescribed in section 39 of this Code for the commencement of actions other than for the recovery of real property, shall be as follows:"

"Sec. 59. Within ten years: 1. An action upon a judgment or decree of any court of the United States, or any state or territory other than this state

within the United States, shall be commenced within ten years from the date thereof.

"Sec. 60. Within six years: 1. An action upon a contract, obligation or liability, express or implied, excepting those mentioned in sections 58 and 59 of this Code."

"Sec. 69. If, when the cause of action shall accrue against any person, he shall be out of the state, such action may be commenced within the terms herein respectively limited, after the return of such person into this state; and if, after such cause of action shall have accrued, such person shall depart from and reside out of the state, the time of his absence shall not be deemed or taken as any part of the time limited for the commencement of such action."

As before stated, the bill of Jewett appears to have been filed December 31, 1912, and the bill of McVey on January 2, 1913. There is nothing to show when subpœna was issued or served on the defendants in either case, but an answer in both cases was sworn to February 25, 1913, and they are marked filed in the District Court on February 26, 1913. This suit was commenced not later than the last named date. Dr. Cooper was never a resident of South Dakota until April, 1903. We see no reason why the tolling statute of South Dakota does not apply to this case, and we so construe it. If, then, the 6-year statute applied, the first four items were barred when the action was brought; but, if the 10-year statute applied, then none of them were barred. The plaintiffs shall, as already indicated, be deemed to hold an equitable assignment of the judgment in favor of the Iowa National Bank by reason of having paid it, and this suit is upon that judgment, and as to it the statute of limitations is 10 years and whatever time is allowed under the tolling statute. We conclude that no part of the cause of action was barred.

[11] We have said nothing as to the testimony of Edmund H. McVey, because we have not found it necessary to consider it. In an equity case it is not necessary to pass upon all questions upon the admissibility of evidence which the court below admits, but this court finds it unnecessary to consider. If this court deemed it essential to make out the plaintiffs' case to consider this evidence, it would then, and not until then, become essential to consider whether the evidence was admissible or not. Until such question arises the question as to whether he testified to matters at all confidential as between attorney and client is interesting, but not material.

[12, 13] Some question seems to be raised as to whether the decree below included costs made in the Iowa courts in litigating the question as to whether the plaintiffs in this case were principals or sureties on the note sued on. So far as the attorney's fees taxed as part of the costs under the Iowa law are concerned, defendant is liable therefor. The judgments are all blank as to any other costs. This question is vaguely raised by the third assignment of errors and by the third specification of errors, which is:

"III. Appellant will rely upon the error specified in assignment III (Record, pages 179) relating to appellees recovering the full amount expended by them including costs of litigation."

We have examined pages 179 of both the written and printed record, and are unable to find that at either place there is any reference to

this subject. Upon this ground alone this question of costs can receive no further attention. City of Lincoln v. Sun Vapor Street Light Co., of Canton, 8 C. C. A. 253, 59 Fed. 756; Orr & Lindsley Shoe Co. et al., v. Needles et al., 15 C. C. A. 142, 147, 67 Fed. 990, 994; Chicago Great Western Ry. Co. v. Egan, 86 C. C. A. 230, 159 Fed. 40, 46; Northwestern Steam Boiler & Mfg. Co. v. Great Lakes Engineering Works, 104 C. C. A. 52, 181 Fed. 38, 44; Illinois Central R. Co. v. Nelson, 128 C. C. A. 525, 531, 212 Fed. 69, 75; Whitfield v. Krawza, 130 C. C. A. 523, 214 Fed. 83; Colorado Yule Marble Co. v. Collins, 230 Fed. 78, — C. C. A. —; William C. Kinser v. United States, 231 Fed. 856, — C. C. A. —.

There are two other reasons why this question cannot be considered: In the first place, it is a matter of common knowledge that the Iowa Supreme Court renders final judgment against the defeated party in that court, without reference to the subsequent decision in the main case. It is therefore evident that judgment has already been rendered against Jewett and McVey in the Supreme Court of Iowa for all the costs of the case appealed to that court. Second. We have carefully examined the entire record, and cannot find anything definite as to what costs were made in the defense by Jewett and McVey which could not properly be charged to this defendant. Third. The action of the trial court in charging $^{15}/_{318}$ of the proceeds of the syndicate stock, or $282.25, is in conflict, as we interpret it, with the adjudication in Iowa, and its failure to allow 8 per cent. in place of 7 upon the payments made by the plaintiffs far and away exceeds the entire costs as far as we can ascertain, including both those which the defendant was liable for and those he was not. No relief can therefore be granted to the defendant upon this assignment of error.

[14] We have grave doubt about the validity of the portion of the decree which adjudicates that the sum due the plaintiffs is a lien upon what we shall call the Osbun J. Marshall land, when at the time of the commencement of this action no judgment had been obtained in South Dakota; but the statutes of South Dakota provide (section 321, Code of Civil Procedure) that a judgment in the circuit court of South Dakota should be a lien on the real property of the judgment defendant in the county, and section 2 of chapter 117 of the Laws of 1903 provided that a judgment in the federal court should be a lien to the same extent as the judgments of the circuit court of the state after being filed and docketed with the clerk of the circuit court. To secure a specific lien upon what we have called the Marshall land, all that was necessary was for the plaintiffs to file their judgment with the clerk of the circuit court of Jerauld county, S. D.

In view of these statutes, the decree was without prejudice to the rights of the defendant, and this whole question seems to be argued with a view to the dismissal of the case, rather than criticism of this particular portion of the decree. We do not understand that this point is assigned as error by the defendant.

It is ordered that the decree of the District Court be affirmed.

GREENWOOD et al. v. FRICK, Immigrant Inspector, et al.

(Circuit Court of Appeals, Sixth Circuit. June 30, 1916.)

No. 2779.

1. ALIENS ⟸49—DEPORTATION—PUBLIC CHARGES.

In a proceeding for the deportation of an alien woman and her minor son, where there was uncertainty of continuing support of the son by the father alone, who was a resident of the United States, the son must be ordered deported, as one likely to become a public charge, if the mother be deported.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 107; Dec. Dig. ⟸49.]

2. ALIENS ⟸46—DEATH ⟸2(2)—PRESUMPTIONS—REMARRIAGE.

Where a female subject of Great Britain, who had not heard from her husband for over 2 years, and believed him to be dead, contracted a second marriage and thereafter had not heard of the first husband for over 11 years, there was a presumption of his death and the legality of the second marriage, and her conduct cannot be said to involve moral turpitude, warranting her deportation from the United States on that ground.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 105; Dec. Dig. ⟸46; Death, Cent. Dig. § 3; Dec. Dig. ⟸2(2).]

3. ALIENS ⟸49—DEPORTATION—PUBLIC CHARGES.

Where an alien woman entered the United States for an immoral purpose, making her subject to possible prosecution and imprisonment at public expense, or naturally tending to a life not supported by honest work, she may be deported on the ground that she is likely to become a public charge.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 107; Dec. Dig. ⟸49.]

4. ALIENS ⟸54—DEPORTATION—PROCEEDINGS.

Where, after a hearing on the charge whether she was entering the United States for an immoral purpose, an alien woman was ordered admitted by the Secretary of Labor, the Secretary on a subsequent hearing may order her deportation on the testimony at the first hearing, provided it was properly brought into the second deportation proceedings.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 112; Dec. Dig. ⟸54.]

5. ALIENS ⟸54—DEPORTATION PROCEEDINGS—TESTIMONY.

An alien woman and her son, who returned to this country, were held for examination as persons likely to become public charges and suspected of entering for immoral purposes. At the hearing the woman's husband appeared and promised to provide for her support and that of her child. On such showing an order of exclusion was set aside and she was admitted. Thereafter the woman acquired lucrative employment in the United States, and with the aid of her husband furnished a suitable home for her minor child, but separated from her husband, intending to procure a divorce on the ground that the first marriage might have been illegal, and to subsequently remarry. Thereafter deportation proceedings were instituted, and the woman was ordered deported on the ground that she had committed a crime or misdemeanor involving moral turpitude, had entered the United States for immoral purposes, and was at that time likely to become a public charge. In the second deportation proceedings, the evidence considered in the first proceeding was not introduced, and there was nothing in the record to show that the Secretary of Labor's order of deportation was based on such evi-

dence; the order reciting that it was based on the evidence taken at the second hearing. On petition for habeas corpus, the evidence at the first hearing was put into the record, and the woman was asked if her testimony on such proceeding, which also involved the matters in issue in the second proceeding, were true. This she answered in the affirmative. *Held* that, though in the second proceeding an alias given the woman was the name of the man with whom she was charged in the first proceeding with intending to assume immoral relations, there was nothing to show that the Secretary of Labor intended to base his order on such evidence; it appearing that the second proceeding was instituted when the immigration authorities discovered that the woman had not been frank about her marital relations.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 112; Dec. Dig. ⊂⊃54.]

6. ALIENS ⊂⊃54—DEPORTATION PROCEEDINGS—TESTIMONY.

In such case the evidence heard at the first proceeding was not made part of the record, so that it could be considered against the woman in the second proceeding.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 112; Dec. Dig. ⊂⊃54.]

Appeal from the District Court of the United States for the Eastern District of Michigan; Arthur J. Tuttle, Judge.

Application by Clara Bramley Greenwood and son, Norman Greenwood, for a writ of habeas corpus against G. Oliver Frick, United States Immigrant Inspector, and others. From an order discharging the writ, petitioners appeal. Order reversed, and discharge of petitioners directed.

Mr. and Mrs. Greenwood and their son, then 2 years old, came from England to the United States in 1908. They remained here (except for one short visit to England) until April, 1914. In that month the mother and son went to England, and on their return, in May, 1914, they were held for examination before being allowed to enter at New York, being held as persons likely to become public charges and suspected of entering for immoral purposes. By proofs before a board of special inquiry it developed that Mr. and Mrs. Greenwood had been living more or less apart; that Mr. Greenwood had contributed to the support of the son, but Mrs. Greenwood had been supporting herself for some time, receiving a fair salary as a clerk; that complaints had arisen regarding her relations with one Cuthbert; and that, in the course of avoiding these complaints, Cuthbert had paid the expense of her visit abroad. The proofs also had some tendency to show that her return to the United States was for the purpose of assuming, if not resuming, immoral relations with Cuthbert—though this was firmly denied. The board found that Mrs. Greenwood and her son were likely to become public charges, because she was handicapped by the child, and because she had not sufficiently proved either the existence of her husband or his willingness or ability to support them. No finding was made re Cuthbert. The board ordered the aliens to be excluded and deported.

The subsequent proceedings do not clearly appear, but it seems to be taken for granted by all that, before the deportation, Mr. Greenwood appeared and promised to provide for their support as far as necessary, and that, upon an appeal and this additional showing, the Secretary of Labor, later in May, set aside the order of exclusion and deportation and directed that they be allowed to enter. There have been no direct proceedings for the vacation or annulment of this order of the Secretary. Mr. and Mrs. Greenwood went to live at Detroit. They remained together for a short time and then separated on account of the uncertain nature of their relationship. This had commenced in England, in 1905, in a common-law marriage, which was appar-

ently valid, provided that Mrs. Greenwood's former husband, one Griffin, to whom she had been duly married in 1903, was not living in 1905. Apparently in view of the imminent disclosure of these facts, it was agreed at Detroit that they should separate; that Mrs. Greenwood should acquire a residence and procure a divorce from Griffin, and then that she and Greenwood should be regularly married. Thereafter Greenwood, a rather peripatetic theatrical man, continued to contribute to the son's support, and Mrs. Greenwood found remunerative employment at Detroit, and maintained a comfortable and respectable home for herself and son. Evidence as to her then good conduct and ability to provide well for herself and child was undisputed.

On October 1, 1914, the Secretary of Labor issued a warrant for the arrest of Mrs. Greenwood, requiring her to show cause why she should not be deported because she (a) "has been convicted of, or admits having committed, a crime or other misdemeanor involving moral turpitude prior to her entry into the United States"; (b) "entered the United States for an immoral purpose"; (c) "was, at the time of her entry, a person likely to become a public charge." The warrant also required the arrest of the boy as a person "likely to become a public charge at the time of his entry." A hearing was held at Detroit before Immigrant Inspector Short, consisting of, first, an oral examination of Mrs. Greenwood, without counsel; and, second, her further testimony in the presence of counsel and the affidavits of those acquainted with her at Detroit. Inspector Short reported: "I find the alien is working in a very good place, is living in a very respectable neighborhood, has her rooms nicely furnished, and everybody who has known her since coming to Detroit speaks of her highly, both of her industry and character. She is apparently living a very respectable life." On November 23d the Secretary of Labor issued his warrant of deportation, reciting and finding: "Whereas, from proofs submitted to me after due hearing before Immigrant Inspector John J. Short, held at Detroit, Michigan, I have become satisfied that the aliens, Clara Bramley Griffin, alias Greenwood, alias Cuthbert, and son Norman, * * * have been found in the United States in violation of the act of Congress, * * * to wit, that the said Clara Bramley Griffin, alias Greenwood, alias Cuthbert, admits having committed a felony or other crime or misdemeanor involving moral turpitude prior to her entry into the United States, that she entered the United States for an immoral purpose, and that she was, at the time of her entry, a person likely to become a public charge, and that her son Norman was a person likely to become a public charge," etc.

Thereupon she and her son procured from the court below a writ of habeas corpus, in return to which Mr. Frick, immigrant inspector in charge, justified their detention by setting up those proceedings above recited which commenced with the warrant of deportation October 2, 1914. This recital stated that after their arrest the respondents were "given a full and complete hearing" at Detroit, and that thereafter "a finding upon the evidence taken in said cause by John J. Short, immigration inspector in charge of said hearing, recommended the deportation of said aliens, and thereafter a further finding upon the aforesaid evidence submitted to the Acting Secretary of Labor, Hon. J. P. Densmore, was had, by which said finding" Mrs. Greenwood was adjudged to be a member of the excluded class upon grounds (a), (b) and (c), and the son was adjudged likely to become a public charge at the time of his entry. Neither the warrant of arrest, the warrant of deportation, the petition for the writ of habeas corpus, or the return thereto made any reference to the May proceedings, except that the petition said that upon the entry of the petitioners they "were detained at Ellis Island for a period of about 10 days, at said landing, in May, 1914, but after a hearing before a board of special inquiry, your petitioners were allowed to proceed to Detroit, Michigan, in May, 1914." The petition alleged that at the hearing at Detroit no evidence whatever was introduced tending to support the charges in the warrant. Upon this record the matter came on for hearing before the District Judge, and was argued and submitted. Thereafter, and after a substitution of attorneys for petitioners, they filed an amendment to the petition to which they attached a copy of the testimony and affidavits put in before Inspector

Short, at Detroit, and a copy of the testimony taken before the board, at New York, in May, and which amendment said "that the attached testimony, papers, and exhibits contains all the testimony taken before the Commissioner of Immigration, inspectors of immigration and the Acting Secretary of Labor of the United States upon which the warrant and order for deportation is based." After further hearing before the District Judge, he discharged the writ and remanded the petitioners; and they bring this appeal.

F. C. Sibley, of Detroit, Mich., for appellants.

J. E. Bland, Ass't. U. S. Atty., of Detroit, Mich., for appellees.

Before KNAPPEN and DENISON, Circuit Judges, and SATER, District Judge.

DENISON, Circuit Judge (after stating the facts as above). [1] 1. The son has always been properly supported by his parents; but if his mother is deported, there is sufficient uncertainty of continuing support by the father alone to justify the finding that the son was, at his entry, likely to become a public charge. It follows that his right to remain in this country must depend upon his mother's similar right; if she is deported, he should be.

[2] 2. There is nothing whatever to support finding (a). It is not suggested, in the evidence, that she has ever been convicted of any offense. The finding that she has admitted committing an offense involving moral turpitude can refer to nothing except to her relations with Greenwood. Instead of admitting an offense, she has constantly insisted that, when she entered into the common-law marriage with Greenwood, Griffin had disappeared, and had been gone for more than 2 years, and that she believed he was dead. Her belief has now been confirmed by the lapse of 11 years, during which she has not been able to learn of Griffin's existence. Lacking proof that the first husband was living at the time of the marriage to the second, it cannot be said that she was guilty of bigamy; nor, in the presence of her belief that Griffin was dead, can it be said that her conduct involved moral turpitude.[1] Support for the deportation must be found elsewhere than in ground (a).

[3] 3. There is nothing to support the finding that she was directly liable to become a public charge. For some time before her departure in April, 1914, she had successfully supported herself in this country. There was no reason to suspect that she could not continue to do so. After her re-entry, she had no difficulty in finding remunerative work. The conclusion that she was likely to become a public charge is merely arbitrary—unless her entry was for an immoral purpose, thereby making her subject to possible prosecution and imprisonment at public expense or naturally tending to a life not supported by honest work, in either of which events there would be a basis for concluding that she was likely to become a public charge. Lam Fung Yen v. Frick, 233

[1] NOTE.—See Vreeland v. Vreeland, 78 N. J. Eq. 256, 79 Atl. 336, reviewing English cases; and see also cases cited in note in 34 L. R. A. (N. S.) 940. It seems well established that the presumption of the legality of a marriage and the legitimacy of children merges and destroys the presumption that a former spouse had continued alive; and that the second marriage was not ceremonial would not seem to affect the reason of the rule. At any rate, in 1910, a presumption of law had arisen that Griffin was dead.

Fed. 393, — C. C. A. — (C. C. A. 6, June 16, 1916). It follows that if her entry was of this character, the proofs did tend to support charge (c); otherwise, not; and so charge (c) merges in charge (b).

[4-6] 4. It was clearly the substantial theory of the deportation proceedings upon charge (b) that since she was not the lawful wife of Greenwood and since she had been allowed to enter for the purpose of living with him as his wife, her entry was for an immoral purpose. The proofs taken at Detroit were directed (except as hereafter stated) to this issue, and we think this is the substantial ground upon which the Secretary of Labor was intending to act when he ordered deportation. As we have seen that there was no evidence even tending to show that she was not Greenwood's lawful wife, but that the tendency of all the evidence is to the contrary, charge (b) is without support and the deportation cannot rest upon it—except upon the one theory now to be considered and which presents, to our minds, the only close question in the case.

The May New York proofs probably had enough tendency to indicate an entry for the purpose of immoral relations with Cuthbert to furnish legal support for an order by the Secretary to deport her upon that ground. The proofs at Detroit, considered separately, had no such tendency (re Cuthbert). The order of admission made in May, although necessarily involving the finding that she was not entering for this purpose, was not such an adjudication as to bar the Secretary's subsequent inconsistent action (Pearson v. Williams, 202 U. S. 281, 26 Sup. Ct. 608, 50 L. Ed. 1029); and the Secretary had the lawful right to base his deportation order of October upon the charges re Cuthbert, as disclosed in the New York testimony of May, provided the New York testimony was properly brought into the deportation proceedings. The decisive questions, therefore, are two, and the answer to each bears upon the other: (1) Did the Secretary really intend this finding (b) to rest upon the Cuthbert affair? (2) If so, did the New York testimony so far come into the record in the deportation case as to justify the Secretary in acting thereon?

We have already indicated what we think the right answer to the first question. The deportation warrant and order made no reference to the May proceedings; they made no identifiable reference to the Cuthbert matter; of course, charge (b) and finding (b) must refer to something, but this reference is sufficiently satisfied by petitioner's relations to Greenwood; the reasonable inference from the whole record is that the immigration officials had learned that she had not been frank with them regarding her marriage to Greenwood, and that this marriage was not regular and that they proposed to deport her upon that ground and for that reason. They charged this ground directly as the first accusation, charge (a); and charges (b) and (c) were incidental thereto. The Secretary of Labor had considered the Cuthbert affair in May; he had thought it not sufficient to justify exclusion; nothing had intervened tending to persuade him to change his mind; and we think it strongly to be presumed that he did not intend, in October, to order Mrs. Greenwood deported for the same reason and upon the same proofs which in May he had held insufficient to exclude her. We could be satisfied to find such an intent by the Sec-

retary only if the record made that intent necessary to support his finding; but, as we have seen, upon his theory of the Greenwood matter his finding (b) was amply supported otherwise. In addition to this natural inference, we find that the warrant of deportation is expressly declared to rest upon "proofs submitted to me after due hearing * * * held at Detroit." While this language does not necessarily exclude the existence of other supporting proofs, it seems to do so. That there had been any other hearing except at Detroit would not be supposed by the reader of this warrant; but, if there is ambiguity in the warrant, there is none in the government's answer, by Inspector Frick, which again declares that the finding of the Secretary was made "upon the aforesaid evidence" (that taken at Detroit); and the answer of the inspector summarizes and concludes by again stating that the process upon which petitioners are detained "is based upon hearing in said cause." This must mean the same hearing before referred to, the only one mentioned, and the only hearing there had been "in said cause," viz., in the deportation proceedings.

As to the second question: The New York testimony was in fact never offered in evidence in the deportation proceeding; Mrs. Greenwood never was notified that it was to be used against her or that it was to become a part of the deportation record; and, obviously, unless she was chargeable with notice that it was to be used against her, it formed no part of the "hearing." The atmosphere of the case lends support to the idea that the new proceeding was intended by everybody to be distinct; the old proceeding was ended; it was not charged that she had procured her entry by fraud, nor was she otherwise notified that it was proposed to review or reverse the former finding upon the old record. So far as Cuthbert was concerned, no new facts had come to light; and there apparently was no reason why the government should wish, or why she should suppose that the government wished, to review or change its conclusion that the Cuthbert affair did not call for her exclusion. She knew that the case made against her on admission upon this ground had been held insufficient; she knew that the proof for deportation after admission ought to be stronger than the proof for nonadmission; she knew that there was no direct reason why the government should change its position about the Cuthbert affair; and she knew, after the proofs were closed, that the government had made no claim that its conclusion re Cuthbert had been erroneous. On the other hand, it had been newly discovered that the existence of any valid marriage to Greenwood was challenged. This subject-matter was brought new into the warrant, the Detroit testimony was directed mainly to this new subject, and we think she and her counsel were justified in regarding it and its appurtenant (b) and (c) as presenting the only issue made by the record.

There is a possible inference that the new warrant intended to renew the charge re Cuthbert, from the fact that she is named therein as "alias Cuthbert"; but this inference is remote and is not clear enough to justify disregarding the natural theory of the whole situation. This reference to her is meaningless, unless for an implication wholly unjustified. If it should be taken as implying a charge that she had assumed Cuthbert's name—which would amount to having

lived openly as Cuthbert's mistress—it was a charge which could have been suggested only through reckless indifference.

Against the conclusions that the deportation warrant was not intended to rest on the old charge and proofs in re Cuthbert, and that the old proofs were not considered as being in the deportation record, are three things: First, that at the Detroit examination she was asked if her former testimony was true; second, that she put the old testimony into the habeas corpus record; and, third, that in the new testimony she was asked questions concerning Cuthbert. As to the first: Her former testimony related also to her relations with Greenwood—the precise subject of the new charge. It was therefore natural to ask her if her former testimony was true; but the questions developed nothing; her old testimony neither adds to nor detracts from her new testimony re Greenwood.

As to the second: The reason why she did this is not apparent; perhaps counsel thought it might be necessary. So doing in the habeas corpus proceeding is not inconsistent with the idea that they were trying in the deportation proceeding only the new charge, since the old testimony related to that also; but the more natural thought is that counsel took this course without any deliberate thought or purpose, or out of abundant caution. Their statement in the amended petition that the copies attached constitute "all the testimony * * * upon which the order for deportation is based" should not fairly be held to mean more than they comprised everything upon which it could be claimed that the order was based.

As to the third: The questions asked at Detroit re Cuthbert did not bring out anything even giving a different color to that matter; and so would not naturally lead to a belief that there was any thought of revising the decision re Cuthbert.

Upon the whole, we conclude that the New York proofs were neither properly brought into the deportation hearing, nor did the Secretary intend to rely upon them, and that the order cannot stand on the Cuthbert charge. Other objections to the order do not require notice.

The order of the District Court is reversed, without costs, and the case remanded, with instructions that petitioners be discharged from custody. The government asks for no further hearing before the Secretary.

KELLY v. DOLAN et al.

(Circuit Court of Appeals, Third Circuit. May 22, 1916.)

No. 2096.

1. CORPORATIONS ⇐310(2)—INJURIES—RIGHT OF ACTION.

Where a corporation is injured through the negligence of its directors, the right to recover for such negligence is a legal right vested in the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1353–1357, 1359–1361; Dec. Dig. ⇐310(2).]

⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

2. CORPORATIONS ⟸563(1)—RIGHT OF ACTION—RECEIVERS.
Under general principles of receivership and General Corporation Law N. Y. (Consol. Laws, c. 23) §§ 232, 239, as amended by Laws 1913, c. 766, declaring that receivers shall be vested with all the property of the corporation and shall have the right to sue in their own names to recover debts due the corporation, a receiver is vested with the right of a corporation to sue for injuries occasioned by the negligence of the directors, and therefore a stockholder cannot sue in his own name.
[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2280; Dec. Dig. ⟸563(1).]

3. CORPORATIONS ⟸206(1)—STOCKHOLDER'S BILL—ENFORCEMENT.
Where, through the fraud of those controlling a corporation, the corporation will not sue a director for injuries occasioned by his negligence, a stockholder may maintain his bill to recover therefor.
[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 791; Dec. Dig. ⟸206(1).]

4. CORPORATIONS ⟸207—STOCKHOLDERS—STOCKHOLDER'S BILL.
Where a receiver of a corporation was appointed, and the court appointing the receiver refused to allow him to sue for injuries occasioned by the negligence of directors, a stockholder, though given permission to sue for such wrongs, cannot, no assignment of the right of action having been made to him, maintain a stockholder's bill, for the right of action is vested in the receiver.
[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 797-805; Dec. Dig. ⟸207.]

5. EQUITY ⟸87—LIMITATIONS—APPLICATION OF STATUTE.
As a receiver of a corporation, injured by its directors' negligence, might sue in a court of law, the statute of limitations of the forum applies to a suit by a stockholder to recover for the same injuries, for the court of equity has only concurrent jurisdiction with courts of law; and therefore, under the Pennsylvania Statute (Act March 28, 1867 [P. L. 48]), such suit cannot be maintained after six years.
[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 242-244, 395; Dec. Dig. ⟸87.]

6. CORPORATIONS ⟸209—STOCKHOLDER'S BILL—LACHES.
A stockholder's delay of 12 years before instituting a stockholder's bill to recover for injuries from the negligence of directors constituted laches, preventing recovery.
[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 806, 807; Dec. Dig. ⟸209.]

Appeal from the District Court of the United States for the Eastern District of Pennsylvania; Oliver B. Dickinson, Judge.

Bill by Richard B. Kelly against Thomas J. Dolan and others. From a decree (218 Fed. 966) dismissing the bill, complainant appeals. Affirmed.

Strong & Mellen, of New York City (Alfred J. Niles, of Philadelphia, Pa., of counsel), for appellant.

Morgan, Lewis & Bockius, of Philadelphia, Pa., Samuel F. Moran, of New York City, and Ellis Ames Ballard and John G. Johnson, both of Philadelphia, Pa., for appellees.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

BUFFINGTON, Circuit Judge. In the court below, Richard B. Kelly, a citizen of New York, filed a bill in equity against the execu-

tors of Thomas Dolan, the executors of Peter A. B. Widener, and George W. Elkins, all of whom were citizens of Pennsylvania and were the real defendants. The bill also named the receiver of the Central Park North & East River Railroad Company as a formal defendant. On final hearing, the court below entered a decree dismissing the bill, whereupon the plaintiff took this appeal.

The suit is a stockholder's bill; the plaintiff being a stockholder, and the defendant Elkins and the decedents, Dolan and Widener, having been directors, of the Central Park North & East River Railroad Company, a street railway company of New York City, hereafter called the Central Company, and for which company a statutory receiver by a New York state court was appointed. The Central was an underlying company of the Metropolitan Street Railway system in the city of New York, under a lease made in 1892. Messrs. Dolan and Widener were directors of the Central Company from 1893 to 1905, both inclusive. Elkins was a director in 1905 and 1906. The bill was brought eight years after Elkins, and nine years after Dolan and Widener, had ceased to be directors of the Central Company.

The action is not for an accounting or discovery, and there is no charge that the defendants profited in any way as directors. In substance, it charges that they neglected to require the lessee to perform all the covenants of the lease, in that they failed, on the maturity in 1902 of a mortgage bond issue of the Central Company, to have the lessee renew the same, in consequence of which the same was subsequently foreclosed; that they failed to compel the lessee to pay certain taxes assumed against the Central Company, and that they did not compel the lessee to keep up the rolling stock, etc., of the Central Company. The answer, which we need not quote, denied the charges. After the plaintiff's proofs were taken on final hearing, the defendants moved the court to dismiss the bill. This motion was granted, and the plaintiff not having, within the 30 days allowed by the court, amended his bill by allegations which would have removed the bar of the statute of limitations, the court entered a decree dismissing the bill. Thereupon the plaintiff took this appeal.

To our mind, three principal questions arise on this appeal: First, has the plaintiff shown his right to maintain this bill? Second, is the Pennsylvania statute of limitations a bar to his recovery? And, third, is the action barred by laches? An answer adverse to the plaintiff on any one of these questions justifies an affirmance of the decree entered below.

[1] Turning to the first question, it is clear that the gravamen of the plaintiff's complaint is the negligence of the three defendant directors. That the negligence of a director is an injury to his corporation, and that the right to recover for such negligence is a legal as contrasted with an equitable right, and that the corporation is vested with the right to recover for such injury, is established by authority. In some cases this right is asserted in equity; in some at law, according to circumstances; but in whatever form it is litigated the right to recover for negligence is a legal right. Loan Society v. Eavenson, 241 Pa. 65, 88 Atl. 295; National Bank v. Wade (C. C.) 84 Fed. 10; Cockrill v. Cooper, 86 Fed. 7, 29 C. C. A. 529; Horn S. M. Co. v. Ryan,

42 Minn. 196, 44 N. W. 56; Emerson v. Gaither, 103 Md. 564, 64 Atl. 26, 8 L. R. A. (N. S.) 738, 7 Ann. Cas. 1114.

[2] In this case, under the general principles of receiverships, and specifically by virtue of sections 232 and 239 of the General Corporation Law of New York, as amended by chapter 766 of the Laws of 1913, viz.:

"Sec. 232. Such receivers shall, from the time of their having filed the security required by law, be vested with all the property, real or personal, vested or contingent, of the corporation."

"Sec. 239. *General Powers of Receivers.* The said receivers shall have power: (1) To sue in their own names or otherwise, and recover all the property, debts and things in action, belonging or due or to become due to such corporation, whether accruing or maturing before or after the dissolution thereof and whether vested or contingent at the time of such dissolution, in the same manner and with the like effect as such corporation might or could have done if no receivers had been appointed."

—this legal right of action against the directors for negligence was vested in the receiver on his appointment. Such being the case, the corporation originally, and the receiver on his appointment, being possessed of such legal right, and of the right to sue for its redress, how has this right been vested in the plaintiff so as to enable him to maintain this action? Manifestly, he could not maintain a suit at law to assert a legal right vested in the receiver. If so, what gives him a right to resort to equity?

[3, 4] Of course, where a corporation, through the fraud of those controlling it, refuses to bring suit against a director and redress a wrong, this calls into being an equitable right which equity will enforce on a stockholder's bill. Foss v. Harbottle, 2 Hare, 461. But, as said in that case:

"It was not, nor could it successfully be, argued that it was a matter of course for any individual members of a corporation thus to assume to themselves the right of suing in the name of the corporation. In law, the corporation, and the aggregate members of the corporation, are not the same thing for purposes like this; and the only question can be whether the facts alleged in this case justify a departure from the rule which prima facie would require that the corporation should sue in its own name and in its corporate character, or in the name of some one whom the law has appointed to be its representative."

No such state of facts here exists. The Central Company is not under the domination of its directors; there is no allegation of mala fide control on their part. On the contrary, the corporation has passed from their control into that of a court of competent jurisdiction, and that court has on application declined to allow the receiver of such company to bring suit against the directors. Such being the case, it is manifest that the right of action of the corporation still remains in the corporation and its receiver, and forms part of the estate which that court is administering. To the present situation we may apply the language of the Supreme Court in Porter v. Sabin, 149 U. S. 480, 13 Sup. Ct. 1008, 37 L. Ed. 815, namely:

"The right of action remains part of the estate of the corporation within the exclusive custody and jurisdiction of the state court."

It is contended, however, that such court, while refusing to allow the receiver to sue, granted leave to the plaintiff stockholder to sue.

But leave to sue went no further than permission to sue, and no order was made, even if such a thing were possible, purporting to assign to the stockholder the claim vested in the receiver, or to confer on the stockholder a right to enforce the legal right vested in the receiver.

Such being the facts, the gist of the present controversy is: First, whether the plaintiff is vested with the legal right which he is attempting to enforce; and, second, if he is not vested with such legal right, has he shown such facts or circumstances as give him standing in a court of equity to enforce the legal right vested in the receiver? The answer to the first question is clear. The legal right, an action for damages for negligence, is vested in the receiver. It has never been assigned to the plaintiff, and the law courts are open to the receiver to prosecute such claim. But the reasons which led the court to decline allowing its receiver to prosecute are that it is satisfied a suit at law was futile, because it would be met by a complete defense. This appears in the answer to a petition praying for such direction, wherein the receiver said:

"I do not believe it is to be to the interest of the Central Park Company or its stockholders that I maintain this action, for several additional reasons, among them the fact, as I understand it, that if I were to maintain the action it would have to be one at law, and more than six years have elapsed since either of the three gentlemen you mention ceased to be a director of the Central Park Company."

Indeed, no such facts, as under the principle of Foss v. Harbottle, 2 Hare, 461, and Hawes v. Oakland, 104 U. S. 455, 26 L. Ed. 827, lead a court of equity to entertain a stockholder's bill and thus enforce rights of his corporation which would otherwise be lost, exist in the present instance. The simple fact is that the court administering the affairs of the Central Company has declined to prosecute this claim by its receiver. Such being the case, it is quite clear that that court, declining to have its receiver pursue a remedy open to it in a court of law, cannot, by allowing a stockholder to pursue such claim, call into exercise the powers of a court of equity whose exercise of jurisdiction in such cases is because the law is powerless to afford a remedy. It is manifest, therefore, that this stockholder's bill is without equitable foundation and the decree below is justified on that ground.

[5] But, assuming for the present purpose that equity had jurisdiction to litigate this claim at the instance of a stockholder, it is manifest that such jurisdiction is concurrent with that of a court of law to litigate the claim at the instance of the receiver, and, being concurrent, the claim is barred in equity by the statute of limitations. The claim, as we have seen, being by a corporation for the negligence of a director is a legal as distinguished from an equitable one, and the jurisdiction of this court, if it exists, being concurrent, the case falls within a line of decisions such as M'Cluny v. Silliman, 3 Pet. 270, 7 L. Ed. 676, which hold that the statute of limitation of the forum controls, and that other line of cases, such as Baker v. Cummings, 169 U. S. 189, 18 Sup. Ct. 367, 42 L. Ed. 711, which hold that a court of equity exercising concurrent jurisdiction is equally bound with a court of

law to apply the statute of limitation. To hold otherwise would be to aid a plaintiff to evade a statute by going on the equity instead of the law side of a court. Applying the Pennsylvania state statute of March 28, 1867 (P. L. 48), quoted on the margin,[1] with its six-year limit, it is conceded this suit was barred.

[6] Assuming, however, the state statute of limitation was not a bar, the decree below was justified on account of the laches of the plaintiff. The facts in this case are that, if there was negligence by the directors of the Central Company in failing to have that company's lessee refund the mortgage, such nonfeasance occurred in 1902, 12 years before this bill was filed. There was no concealment, bad faith, or even allegation of the plaintiff's ignorance. The steps the Metropolitan Company took to retire the outstanding securities of the Central and other underlying companies were matters of public financial knowledge. There was no protest, objection, or demand by the plaintiff or other stockholders, nor does the bill contain any sufficient explanation, excuse, or justification of the long delay in bringing this bill, and until two of these directors were dead. Without entering into a present discussion of the many things which evidence gross procrastination, we may sum it all up by saying this case is a stale demand, and repeat what was said by this court in Hemmick v. Standard Oil Company, 91 Fed. 334, 33 C. C. A. 547:

"Stale claims are not regarded with favor by courts. Statutes of limitation are for the general good, and their wholesome application in most cases best subserves the ends of justice. The application by a court of equity of analogous principles, even when the statute of limitations does not apply, is one of the beneficent powers lodged in the hands of a chancellor."

Applying these principles, we are of opinion the delay in bringing this suit is a barrier to its prosecution in a court of equity, and, coupled to the other sufficient grounds of objection, we hold the decree of the court below, dismissing this bill, involved no error.

[1] "Whereas, doubts have been raised as to the proper construction of the statutes of limitation:

"And whereas, it is just that suits for supposed claims should be speedily brought before the lapse of time destroys the evidence of defense, or impairs the recollection of witnesses; therefore:

"Section 1. Be it enacted by the Senate and House of Representatives of the commonwealth of Pennsylvania in General Assembly met, and it is hereby enacted by the authority of the same that it is hereby declared to be the true intent and meaning of the statutes of limitation, that no suit at law, or in equity, shall be brought, or maintained, against any stockholder, or director, in any corporation, or association to charge him with any claim for materials, or moneys, for which said corporation, or association, could be sued, or with any neglect of duty as such stockholder or director, except within six years after the delivery of the materials, or merchandise, or the lending to, or deposit of money with said corporation, or association, or the commission of such act of negligence by such stockholder or director."

ARKANSAS GRAND PRAIRIE OIL & GAS CO. v. DAVIDSON et al.

(Circuit Court of Appeals, Third Circuit. May 23, 1916.)

No. 2104.

1. APPEAL AND ERROR ⊂⊃236(2)—REVIEW—HARMLESS ERROR.
The function of pleadings being to give notice and prevent surprise, plaintiff cannot complain of the introduction of evidence that defendant was incompetent to contract, where, though the pleadings did not clearly raise that defense, no claim of surprise or application for postponement was made.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1385; Dec. Dig. ⊂⊃236(2).]

2. CONTRACTS ⊂⊃346(9)—PLEA—NON ASSUMPSIT—MENTAL CAPACITY.
Mental incapacity to contract may be shown under the defense of non assumpsit.
[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1726; Dec. Dig. ⊂⊃346(9).]

3. CONTRACTS ⊂⊃338(3)—PLEA—DEFENSES—PLEADING RULES OF COURT.
In assumpsit on a contract, plaintiff, while filing its affidavit of claim, served no copy on defendant, so as to attempt to lay the foundation for a judgment for want of an affidavit of defense. Under a rule on defendants to plead and to furnish a bill of particulars of the defense, defendants filed a plea of non assumpsit and one of set-off, and also denied the several averments of the complaint. Plaintiff made the guardian of the principal defendant a party defendant. The rules of the district court provide for verification of plaintiff's statement in assumpsit, and that no evidence shall be admitted save as set forth in defendant's affidavit in traverse of the statement of claim. *Held* that, as defendant's counterclaim for moneys paid under the contract asserted the defendant's incapacity, there was a substantial compliance with the rules, entitling defendants to assert the defense of want of capacity.
[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1704; Dec. Dig. ⊂⊃338(3).]

4. APPEAL AND ERROR ⊂⊃1046(5)—HARMLESS ERROR—COMMENTS OF JUDGE.
Where defendant's mental incapacity was not contradicted, and there was no conflict of medical testimony, a remark by the trial judge in his charge that an alienist called by defendant was one of the ablest in the locality is no ground for reversal though the jury found want of capacity to contract.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4134; Dec. Dig. ⊂⊃1046(5).]

In Error to the District Court of the United States for the Western District of Pennsylvania.

Action by the Arkansas Grand Prairie Oil & Gas Company against Frederick Davidson, with notice to Eleanor Hibbert Davidson, his guardian. There was a judgment for defendant, and plaintiff brings error. Affirmed.

M. H. Stevenson, of Pittsburgh, Pa., for plaintiff in error.

Harvey A. Miller and Miller, Vogan & Nesbitt, all of Pittsburgh, Pa., for defendants in error.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

BUFFINGTON, Circuit Judge. In the court below the plaintiff, a corporate citizen of Delaware, brought an action of assumpsit against Frederick Davidson, with notice to Eleanor Hibbert Davidson, his guardian, both of whom were citizens of Pennsylvania, to recover an unpaid balance of a stock subscription to its stock. On the trial the issue, as submitted by the court, turned on whether the defendant Davidson was sane when the subscription was made, and, if sane, whether he had authorized the signing of his name to the subscription by a third person. The jury having found a verdict for the defendant, the plaintiff sued out this writ.

As shown by its prospectus in evidence, the plaintiff company, with an authorized capital stock of 100,000 shares of $10 each, was formed to develop oil and gas territory, and to that end leased some 80,000 acres in Prairie county, Ark., in "what they considered a great unexplored field for oil and gas." On February 20, 1913, Miss M. M. Ackley, who resided in Pittsburgh and was selling the company's stock on commission, wrote Mr. Davidson a letter at Beaver Falls, Pa., inclosing a prospectus of the company and a stock subscription blank, and requested him to subscribe for some stock. To this letter he replied on February 25th, stating that he would not be able to consider it for two or three days, as he had to go to Buffalo, and stating, "I will write you fully on my return." This he did not do, nor did he reply to a second letter she wrote him, in which she stated:

"If the well comes in good, the stock will go up, and you can't purchase it at the price quoted you."

No discussion took place between them as to the stock, but Miss Ackley testified: That on March 22d following she was called on the telephone at Pittsburgh by Mr. Davidson from Atlantic City, who requested she get him 1,000 shares. Having subsequently ascertained she could get it, she called him up later at the Waldorf-Astoria Hotel at New York, and told him she could get it, but that he would have to pay $1,000 down on the subscription. That he thereupon told her he would telephone the first of the week, that she should sign it for him and hold it until he came home, and that she should call up his brother George at Beaver Falls to send her the $1,000. That she then signed the subscription sued upon, dated March 22d, in behalf of Mr. Davidson, and gave the company her check for $1,000. Having telephoned Mr. George Davidson, who in the absence of any advices from his brother declined to advance any money, she telegraphed Frederick in New York:

"Gave my check $1,000 account 1,000 shares. George wants telegram from you. Check goes to bank Monday. Answer."

To this telegram no answer was received, but on Monday she received a letter from George, inclosing "my check for $1,000, at request of my brother Frederick." The plaintiff further proved that some 10 days before a witness, who was leasing land for the company, talked with Frederick Davidson about the general prospects of the company, and that there was nothing abnormal in his talk or actions.

On the part of the defendant there was testimony tending to show the defendant was a man of large affairs, that he was under severe mental strain, that before, on, and shortly after, March 22d he exhibited signs that his mind was unsettled, that by the fifth day following the ordering of this stock he had become so violently insane that he was placed in confinement, and his wife, Mrs. Eleanor Hibbert Davidson, was subsequently appointed his guardian. Indeed, the proof of the mental condition of Davidson was such that under the proofs there could be no substantial dispute as to his insanity. We are therefore satisfied, from a study of this record, that the jury did substantial justice by their verdict.

Such being the case, the inquiry arises: Is the court constrained to set aside this result by reason of some error committed in reaching it? Such alleged errors group themselves into three branches: The restrictions of the pleadings; the character of the proofs; the court's charge and answers to points.

[1] Turning first to the pleadings, it is contended they gave no notice of the defense of Davidson's mental incapacity, and consequently that all evidence thereof was improperly admitted. The purpose of requiring notice in advance of trial to be given by pleadings is to prevent surprise to one's opponent and enable him to provide proofs to meet the disclosed issue. In the present case no suggestion was made by the plaintiff that it was surprised, no application was made by the plaintiff to the court at the trial for a postponement to allow it to furnish any such testimony, nor is any contention now made that on a retrial such testimony would be forthcoming. It is evident, therefore, that even if the pleadings did not give notice of such testimony being given, no injury was done the plaintiff thereby. But, apart from that, we are of opinion the court in admitting this testimony committed no error.

[2] There could be no question but that the plaintiff, in invoking the jurisdiction of the court, knew it was litigating with a mental incompetent, for it named the committee of Davidson as a party defendant. Having made such committee a defendant, the case fell within the well-recognized rule that a person sued in a representative capacity is not required to file an affidavit of defense, and the conduct of the suit by the plaintiff shows it was not contemplated that any affidavit of defense to prevent judgment would be filed. For the plaintiff, while it filed its affidavit of claim, served no copy on the defendant, as required by rule 16, § 2, and section 4 of the Pennsylvania Practice Act of May 25, 1887 (P. L. 271), and so did not attempt to lay the ground for a judgment for want of an affidavit of defense. Counsel for the defendants having appeared, plaintiff thereupon entered a rule on the defendants to plead and another to furnish a bill of particulars of his defense. In answer to the rule to plead, the defendants filed a plea of non assumpsit and one of set-off, with leave to give in evidence the special matter set forth in the defense filed. They also, on the same day, filed a paper, entitled "Defense and Counterclaim," wherein the allegations of the plaintiff's statement showing alleged liability were quoted and denied, as follows:

She denies the allegations of the plaintiff as follows:

"On the 22d of March, 1913, the said Frederick Davidson, by a subscription in writing, duly signed by the said Frederick Davidson by his agent in that behalf, M. M. Ackley, the said M. M. Ackley being thereto fully authorized by the said Davidson as his agent for that purpose, and the said Davidson subsequently ratifying and approving of her said act, subscribed for and agreed to pay for 1,000 shares of the capital stock of the said Arkansas Grand Prairie Oil & Gas Company, at par, that is to say, at $10 per share, the amount of said subscription, to wit, $10,000, being payable as follows:

25 per cent. on date of subscription, March 22, 1913.
25 per cent. in 30 days thereafter.
25 per cent. in 60 days thereafter.
25 per cent. in 90 days thereafter.

"A true and correct copy of the said subscription is hereto attached and made a part hereof, marked Exhibit 'A'."

She denies the allegations of the plaintiff as follows:

"On or about the date of the said subscription, the said defendant paid to the plaintiff the sum of $1,000, leaving due and payable the sum of $9,000, with interest thereon as follows:

On $1,500 from March 22, 1913.
On $2,500 from April 22, 1913.
On $2,500 from May 22, 1913, and
On $2,500 from June 22, 1913."

This was followed by statements that:

"Eleanor H. Davidson, guardian, alleges: That through mental incapacity on the part of Frederick Davidson, the defendant, and mistake on the part of one George Davidson, the said George Davidson, on March 25, 1913, paid to Minnie Ackley, the solicitor for the sale of stock for the plaintiff, the sum of $1,000, which was charged to the account of Frederick Davidson. That Eleanor H. Davidson, guardian, therefore denies that the defendant is indebted to the plaintiff in the sum of $9,000, or in any sum of money whatever, but that by means of the premises as herein set forth the defendant is entitled to recover the sum of $1,000 from the plaintiff, with interest from March 25, 1913, being the amount paid as above stated and charged against the funds of Frederick Davidson. A certificate will be demanded in favor of the defendant and against the plaintiff for the said sum of $1,000, with interest as aforesaid."

Apart from the rules of the District Court, it is clear that in the courts of the United States the defense of mental incapacity here made was admissible under the plea of nonassumpsit. In Craig v. Missouri, 4 Pet. 426, 7 L. Ed. 903, it is said:

"Everything which disaffirms the contract, everything which shows it to be void, may be given in evidence on the general issue in an action of assumpsit."

In Mason v. Eldred, 73 U. S. (6 Wall.) 234, 18 L. Ed. 783:

"It has long been settled that under the plea of the general issue in assumpsit evidence may be received to show, not merely that the alleged course of action never existed, but also to show that it did not subsist at the commencement of the suit."

And in Young v. Black, 7 Cranch, 565, 3 L. Ed. 440:

"It has been long since established that under non assumpsit the defendant may give in evidence anything which shows that no debt was due at the time when the action was commenced, whether it arise from an inherent defect in the original promise or a subsequent discharge and satisfaction."

[3] Notwithstanding the competence of testimony of insanity under the plea of non assumpsit, it is contended it was in this case inadmis-

sible, by reason of the rule of the court below, set forth in the margin,[1] which provides that no evidence shall be admitted save as set forth in the defendant's affidavit in traverse of the statement of claim. But to our mind we think there was a substantial compliance with the rule, and that, under all the circumstances of the case and the atmosphere of the trial, the court committed no error in exercising that wide range of discretion which a trial court has in applying its own rules. Assuming for the present purposes that notice had not been given by the pleadings, it was clear that the question of sanity was the gist of the case, and even if an amendment was required to permit its introduction the fact remained that ultimately it must be heard. If an amendment were made, the plaintiff would of course have had a right to a continuance on the ground of surprise. So that, if the court below or this court on review were to hold the pleadings did not give notice, the defendant could amend, and have the question of insanity put in issue. But we are clear, as we have said, that the pleadings gave the plaintiff substantial notice of that defense. In the first place, the plaintiff made Davidson's committee a party to the suit, and in point of fact did know of his insanity. Recognizing that insanity, plaintiff made no attempt to require an affidavit of defense. In its statement of claim, quoted above, it will be noted the plaintiff made the two acts, namely, making the subscription and paying the hand money, joint parts of the single contract sued on, and by its proofs—"he would have to pay at least $1,000 down to hold it"—had made that payment of $1,000 the consummation of the contract. When, therefore, the defendant, in its defense and counterclaim, supra, had quoted and traversed the plaintiff's averments of a contract, and then proceeded to claim she was entitled to receive back the $1,000 of hand money on the ground that through the mental incapacity of Frederick Davidson it was paid by mistake of George Davidson, it is clear that the plaintiff was fully apprised that to sustain its case it must be prepared to meet the issue of Davidson's mental incapacity when he closed the contract. The work-

[1] "Section 1. In all actions by writ of scire facias for the collection of moneys secured by recognizance, judgment, mortgage, or other record or quasi record, also in all actions of assumpsit, the plaintiff's statement of claim may be verified by affidavit; and if so verified, the defendant's affidavit of defense, or his affidavit in traverse thereof, shall be deemed and taken to be a pleading in the case, and upon trial no evidence on the part of the defendant shall be admitted in defense except such as may be alleged in his affidavit; and such items of claim and material averments of fact of the plaintiff's statement as are not directly and specifically traversed and denied by the defendant's affidavit, shall be taken as admitted. In cases where an affidavit of defense is not required, but the defendant desires to file an affidavit in traverse, it must be so filed within fifteen days after the return of the writ.

"Sec. 2. This rule shall apply to a specification of set-off or statement of counterclaim on the part of the defendant, who shall, within fifteen days after filing an averment of such set-off or counterclaim give notice thereof in writing to the plaintiff, who shall, within a like period of fifteen days after such notice, file his reply thereto, verified by affidavit. If the defendant fail to give notice, he shall not be permitted to offer evidence in support of his averment of set-off or counterclaim upon the trial; and if the plaintiff, having been duly notified of the defendant's specification of set-off, or statement of counterclaim, fail to make answer thereto, his failure shall, upon the trial of the cause, be construed as an admission of all the facts essential to the support of the defendant's averment of set-off or counterclaim."

ing object of the rule is to give notice and prevent surprise. We think the pleadings gave notice and the plaintiff was not surprised. The court below said that, while the exact literalism was not complied with, yet its spirit and substance were fulfilled. In that regard, in refusing a new trial, the trial judge said:

"The guardian made express denial of material averments of the plaintiff's statement of claim, and then set forth her claim to the $1,000 by allegations 'that through mental incapacity on the part of Frederick Davidson, the defendant, and mistake on the part of one George Davidson, the said George Davidson, on March 25, 1913, paid to M. M. Ackley, the solicitor for the sale of the stock for the plaintiff, the sum of $1,000, which was charged to the account of Frederick Davidson.' The plaintiff filed a reply to the claim of the defendant, and denied 'that the $1,000 mentioned in the affidavit of defense was paid through mental weakness on the part of said Frederick Davidson, or by mistake on the part of George Davidson.' The plea of the defendant included non assumpsit and a set-off."

[4] Finding no error in the admission of the testimony bearing on Davidson's mental capacity, there remains little else of substance to consider. The use of certain language of the court in its charge is objected to. It may be conceded that the judge's remark in the charge that a witness was "one of the ablest alienists that we have in our locality" might better have been omitted; but we cannot regard this statement as a matter of such substance as, standing alone, would warrant a reversal. It was not a case where rival views of alienists were in question, for no physician was called by the plaintiff to challenge the views expressed by this witness and another physician.

Without, therefore, discussing the assignments seriatim, we may say we find they involve no error, and the judgment below is affirmed.

TRI-BULLION SMELTING & DEVELOPMENT CO. v. JACOBSEN.

(Circuit Court of Appeals, Second Circuit. May 9, 1916.)

No. 101.

1. TRIAL ⟸177—DIRECTION OF VERDICT—MOTION—EFFECT.
Where the only question of fact was whether defendant had breached its contract, and both parties moved for the direction of a verdict, the direction of a verdict for plaintiff is a finding that the contract was breached, so that it is immaterial whether the breach was actual or anticipatory.
[Ed. Note.—For other cases, see Trial, Cent. Dig. § 400; Dec. Dig. ⟸177.]

2. SALES ⟸176(1)—BREACH—EFFECT.
Where the seller notified the buyer that it would refuse to carry out the contract, and the buyer replied, requesting performance, stating that, if the seller failed, he would purchase in the open market and hold the seller for the difference between the contract price and the market price, the seller's breach was not waived by the buyer.
[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 436, 438, 443, 444; Dec. Dig. ⟸176(1).]

3. SALES ⟸194—BREACH—ANTICIPATORY BREACH.
Where it had been the custom for the parties to a contract for the sale of zinc to make settlements when convenient, and the buyer was entirely

responsible, the buyer's failure to make a small payment, falling due after the seller had given notice it would breach the contract, did not render the buyer first in default, where it was apparent that the anticipatory breach would result in substantial damages to the buyer.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 508; Dec. Dig. ⟸194.]

4. SALES ⟸418(4)—CONTRACTS—DAMAGES.

Where, by reason of defendant's breach of its contract to deliver ore, plaintiff was unable to procure the same ore, there being none in the market, plaintiff's measure of damages will be determined by the price of the best substitute available.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1182, 1183; Dec. Dig. ⟸418(4).]

In Error to the District Court of the United States for the Southern District of New York.

Action by Ernest O. Jacobsen, doing business as E. O. Jacobsen & Co., against the Tri-Bullion Smelting & Development Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

Writ of error to the District Court for the Southern District of New York to review a judgment in favor of defendant in error (plaintiff below) for $5,847.31 after a verdict by direction of the court. Plaintiff below will be referred to as "Jacobsen" and defendant as "Tri-Bullion."

Milne, Blake & McAneny, of New York City (L. G. McAneny and Richard T. Greene, both of New York City, of counsel), for plaintiff in error.

Sullivan & Cromwell, of New York City (Royall Victor and E. H. Green, both of New York City, of counsel), for defendant in error.

Before WARD and ROGERS, Circuit Judges, and MAYER, District Judge.

MAYER, District Judge. The action was brought by Jacobsen against Tri-Bullion to recover damages in the sum of $25,000 for breach of contract by Tri-Bullion. The essential features of the written agreement, expressing the contract between the parties, were as follows:

(1) Tri-Bullion was to sell and Jacobsen to buy the output of zinc concentrates produced at Tri-Bullion's plant at Kelly, N. M., for a period of two years from November 22, 1911, to November 22, 1913, concentrates to be delivered in as nearly as possible equal monthly quantities, with the agreement by Tri-Bullion that the minimum should not be less than 600 tons per month.

(2) The price was to be arrived at by a method carefully set forth in the agreement.

(3) Delivery was to be made f. o. b. cars at different points.

(4) Payment was to be made by Jacobsen as soon as weights and assays were agreed upon.

(5) Average quotation of the Engineering and Mining Journal for spelter at East St. Louis during the month of arrival at buyer's works was to be taken as basis of final settlement.

The agreement also contained the following clause:

"*Force Majeure.*—Sellers will be relieved from delivering, and buyers from taking the concentrates in case of strikes, fires, wars, revolutions, accidents to machinery, etc., etc., and in case of events of superior force of nature over which they have no control. * * *"

After a year and a half Tri-Bullion closed its mine, ceased delivering, and notified Jacobsen that it would not make any further deliveries to him; its reasons for this course being that because of the fall in the market price of spelter it could no longer mine the ore at a profit. Prior to July 7, 1913, Jacobsen had heard rumors that Tri-Bullion intended to cease producing and close its mine, and some time around June 20, 1913, Tri-Bullion, on a post card on which it gave advice of shipments of ore, wrote the words, "This is our final shipment."

Jacobsen, after some endeavor, succeeded in obtaining an interview on July 7, 1913, with Paschal, the president of Tri-Bullion, E. P. Earle, its agent (to whom under the contract all payments were to be made), and David Earle, another representative of Tri-Bullion. The position of the Tri-Bullion officials and representatives was that, as the contract had become unprofitable, the company was released from its obligations under the force majeure clause. None of the contingencies contemplated under that clause had happened. Jacobsen protested against this extraordinary attitude and stated that he would hold the company responsible for its breach.

On July 8, 1913, Jacobsen addressed a letter to Tri-Bullion stating that, if it did not immediately resume shipment, he would enter the market for monthly tonnage, charging the defendant with whatever difference he might be compelled to pay as between the contract price and the market price. On the same day Jacobsen wrote E. P. Earle substantially to the same effect and demanding that Tri-Bullion fulfill its contract. On July 9, 1913, Earle wrote Jacobsen, still insisting on the efficacy of the force majeure clause. To this Jacobsen replied on July 10, 1913, repeating that he would enter the market for the quantities still due and charge Tri-Bullion with the difference in price, if any. Jacobsen again asserted that the force majeure clause was not applicable. On July 11, 1913, Earle wrote Jacobsen to the effect that Tri-Bullion did not agree with Jacobsen's contention. Further correspondence ensued at a later date, which did not, however, change the relations of the parties.

The theory of Tri-Bullion seems to be that because, in the letter of July 8th, Jacobsen urged Tri-Bullion to proceed to fulfill the contract, he was thereby precluded from bringing action for an anticipatory breach, but must perform all of the provisions of the contract called for on his part, one of which was to pay the amount thereafter due for ore theretofore delivered and that Jacobsen could sue only for failure to deliver any installment as the installment became due month by month.

[1] The question of fact in the trial court was whether Tri-Bullion had breached its contract. Both parties having moved for the direction of a verdict, and the court having directed a verdict in favor of

plaintiff, that question is disposed of by the verdict, and what the verdict amounts to is a finding that Tri-Bullion broke its contract, and it matters not whether the breach was actual or anticipatory. Wilson v. Knowles, 213 Fed. 782, 130 C. C. A. 440; Reis v. Rosenfeld, 204 Fed. 282, 122 C. C. A. 480; United States v. Two Baskets, 205 Fed. 37, 123 C. C. A. 310; Allegheny Valley Brick Co. v. C. W. Raymond Co., 219 Fed. 477, 135 C. C. A. 189.

[2] Viewed, however, as an anticipatory breach, the action of Jacobsen in writing the letter of July 8, 1913, insisting that Tri-Bullion should carry out his contract, did not, in any manner, cure such anticipatory breach by Tri-Bullion. The persistent position of Tri-Bullion was that it was excused by the force majeure clause—an obvious pretense to avoid the obligations of a contract which had become unprofitable. Jacobsen's letter of July 8th, as the District Judge said, "was an ordinary business letter in which the plaintiff said in substance: 'You ought to perform your contract, and I request you to do so; but, if you do not, I will enter the market, buy zinc concentrates, and hold you for the difference between the cost to me and the contract price.' "

Where a party to a contract insists that he is not under legal obligation to perform the contract, and that insistence is coupled with a continuance of his original stand and refusal to perform, the breach is plain, and he cannot successfully take refuge in the plea that he must be excused because the other party urges that the contract be carried out, failing which such other party states he will be compelled to purchase goods in a rising market. Roehm v. Horst, 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953; Marks v. Van Eeghen, 85 Fed. 853, 30 C. C. A. 208.

[3] It is claimed by Tri-Bullion that Jacobsen was first in default, for the reason that, several days after July 7th, Jacobsen, in the ordinary conduct of the contract, would have been indebted to Tri-Bullion in an amount of, in round numbers, less than $2,000 (or about $1,871.35), representing the price of five cars of zinc concentrates shipments. We think the question as to who was first in default was settled by the verdict; but, in any event, this claim was clearly an afterthought.

Jacobsen's responsibility was not questioned; he had already paid Tri-Bullion over $250,000 under the contract during a period when it was unprofitable to him; no demand was ever made for this—to them—trifling sum of less than $2,000, and the practice of the parties was that payment was made when convenient, and that was usually several days after the price had been fixed by the rather elaborate method for determining price provided for in the contract. If Tri-Bullion was guilty of anticipatory breach on July 7th, there was no obligation on Jacobsen's part to pay over this small amount of money to Tri-Bullion, and especially in the face of every reasonable expectation that Tri-Bullion would be called upon to respond in substantial damages to Jacobsen because of loss suffered by Jacobsen in a rising market. Sperry & Hutchinson Co. v. O'Neill-Adams Co., 185 Fed.

231, 107 C. C. A. 337; Whitcomb v. Shultz, 215 Fed. 75, 131 C. C. A. 383.

[4] The only other question in the case relates to the rule of damages which the District Judge applied. There was no market value for Kelly ore because the mine was closed, and the only substitute in the market was ore from the Joplin mines in Missouri. This ore was purchased by National Zinc Company under a business arrangement between it and Jacobsen. It is well settled that, where there is no market, the value may be otherwise determined by the price of the best substitute procurable. Benjamin on Sales (5th Ed.) page 987; Sedgwick on Damages (9th Ed.) § 734; Williston on Sales, § 599; Hinde v. Liddell, L. R. 10 Q. B. Div., 265; Gruen v. Ohl, 81 N. J. Law, 626, 80 Atl. 547; E. W. Bliss Co. v. Buffalo Tin Can Co., 131 Fed. 51, 65 C. C. A. 289. A proper rule of damages having been applied, the amount of the damages was a question of fact, disposed of by the verdict, and not reviewable in this court.

The judgment is affirmed, with costs.

RICHMOND GUANO CO. v. LONG et al.

(Circuit Court of Appeals, Fourth Circuit. May 2, 1916.)

No. 1416.

1. SALES ⟸52(6)—ACTIONS—EVIDENCE—SUFFICIENCY.
   In a suit for the purchase price of fertilizers delivered to defendant corporation, evidence *held* insufficient to show that the individual defendants became individually liable, or liable as copartners.
   [Ed. Note.—For other cases, see Sales, Cent. Dig. § 138; Dec. Dig. ⟸52(6).]

2. TRUSTS ⟸30½(1)—CREATION—MODE OF CREATION.
   Where the individual defendants, after the corporate purchaser of fertilizers was in failing circumstances, took over collateral delivered to plaintiff, which the corporation had agreed to collect, agreeing to collect it themselves, the individual defendants became trustees, and therefore are liable for the proceeds of collateral for which they did not account.
   [Ed. Note.—For other cases, see Trusts, Cent. Dig. § 41; Dec. Dig. ⟸30½(1).]

3. SALES ⟸17—PERSONS BOUND.
   Except in case of fraud or mistake, the courts will rarely infer from circumstances that the obligation of a contract of sale was assumed by one not a party to it, when the question of liability of such person could have been settled at the inception of the contract by an execution thereof.
   [Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 26–30; Dec. Dig. ⟸17.]

Appeal from the District Court of the United States for the Eastern District of South Carolina, at Charleston; Henry A. Middleton Smith, Judge.

Suit by the Richmond Guano Company, a corporation, against J. M. Long and W. S. Mauldin, each individually and as partners doing business as Long & Mauldin, the W. D. Spearman Company, a corpora-

tion, and another. From a judgment denying part of the relief sought, complainant appeals. Affirmed.

The opinion of Smith, District Judge, referred to, is as follows:

On July 25, 1914, the bill was filed in this cause against the defendants for an accounting, and to hold them liable for the failure to account for certain fertilizers shipped by the complainants to the defendant W. D. Spearman Company. The defendants answered, and the case was referred to J. J. McSwain, Esq., as special master, to take the testimony and accounting and report to the court, with leave to report his conclusions of fact upon the testimony. The special master has taken the testimony and reported, and exceptions have been filed to his report by both complainant and defendants. The cause has now come on to be heard upon the pleadings, the testimony, the report of the special master, and the exception thereto, and has been duly heard; counsel on both sides having been heard.

It appears that in December, 1908, the corporation known as the W. D. Spearman Company was engaged in a general mercantile and fertilizer business, in which corporation the defendants W. D. Spearman, W. S. Mauldin, and J. M. Long were all stockholders, and W. D. Spearman and W. S. Mauldin were directors; W. D. Spearman being the president, and W. S. Mauldin secretary of the company. Prior to that time the defendants W. S. Mauldin and J. M. Long appear to have been engaged in the business of buying and selling fertilizers under the firm of Long & Mauldin, but there is no evidence that they were so doing after their connection with the W. D. Spearman Company. On December 28, 1908, the complainant, through one of its agents, proposed to W. D. Spearman Company to furnish fertilizers at the prices named in the proposal; the said proposal containing the provision that the proposal, when accepted by the W. D. Spearman Company, should not become a binding contract between the plaintiff and W. D. Spearman Company until the complainant had accepted the same. The W. D. Spearman Company on December 28, 1908, accepted the said offer in writing, but the complainant appeared to be unwilling to accept the offer, apparently from an unwillingness to rely upon the financial responsibility of the W. D. Spearman Company, and some correspondence ensued, and on January 19, 1909, the defendant W. S. Mauldin, who was the secretary of the W. D. Spearman Company, wrote a personal letter to the complainant, in which he stated that they were mailing under a separate cover an official statement of W. D. Spearman Company, adding: "I will say for your information that the store and fertilizer will have separate account. They will not take any joint notes. You will get the collateral notes that your guano is sold for. Mr. Spearman has management of the store and I have management of the fertilizer business. We will have separate bank account. We propose to furnish you with the collateral that we sell your fertilizers for. And under our conservative way of putting out fertilizers I don't see as you could possibly sustain a loss under this contract."

To this letter the complainant answered on January 21, 1909, in a letter to W. S. Mauldin individually, saying that they had his letter "in reference to the W. D. Spearman Company's contract, and as you are going to handle this fertilizer business separately and distinctly yourself, and give us the collateral notes properly, beg to say it gives me pleasure to accept the contract, which I have just done." The contract, however, was made with W. D. Spearman Company alone. W. S. Mauldin was the secretary of that company, and while the correspondence would appear to indicate that he appealed to the complainant to confirm the contract with W. D. Spearman Company, suggesting as a persuasive reason that he (Mauldin, with whom the complainant apparently had had previous business transactions) was going to handle the fertilizer part of the business of W. D. Spearman Company, and that, as the complainant would receive as collateral notes of the purchasers of the fertilizers from W. D. Spearman Company, properly indorsed by W. D. Spearman Company, he thought they would not lose. This, however, was no undertaking personally to guarantee the payment of the debts of W. D. Spearman Company. It was simply a statement offered by way of persuasion that he (Mauldin, who was the secretary of the Company) would have the personal looking after of the fertilizer part of the business, and that as complainant

would receive, as collateral for the amounts due it on the shipment of fertilizers, the collateral notes given by the purchasers of fertilizers, he did not see how they could lose.

[1] The complainant shipped the fertilizers to the W. D. Spearman Company. It charged the W. D. Spearman on its own books with the cost of the fertilizers. It made no entry showing it gave credit to or relied upon Mauldin, and when later, on the 15th of May, 1909, notes were given to the complainant in payment for the fertilizers at the agreed prices, the notes given were the notes of W. D. Spearman Company, and no indorsement by Long or Mauldin was either demanded or received. It is found, therefore, as a conclusion of law, that there was no promise or guaranty or undertaking on the part of W. S. Mauldin or J. M. Long, defendants, personally to pay for the fertilizers shipped to the W. D. Spearman Company, but that the complainant sold its fertilizers upon the credit of W. D. Spearman Company alone, trusting to the active management for that company of its fertilizer business by W. S. Mauldin, in addition to the collateral notes it would receive.

Nor does it appear, as argued for complainant, that the agreement for compensation between the W. D. Spearman Company and the defendants Long and Mauldin constituted the two latter copartners with W. D. Spearman Company in the fertilizer business, so as to render them liable as copartners with W. D. Spearman Company for the debts of that concern. The testimony is not clear, but it appears that for looking after the fertilizer business of W. D. Spearman Company the defendants J. M. Long and W. S. Mauldin were each to receive $100 per month, to be paid out of the profits of the fertilizer business, and then the balance of such profits was to be a part of the general assets of W. D. Spearman Company. Any share in the balance of the profits outside of their fixed monthly compensation could only be had by Long and Mauldin in like manner as other stockholders in W. D. Spearman Company, by a dividend on their stock. The testimony is not even clear that their monthly compensation was to come out of the "profits" of the fertilizer business. It seems to have been considered that profits were certain, and that really what was meant was that the fertilizer side or department of the business of W. D. Spearman Company was to bear as part of its expenses the payment of the monthly compensation of the two defendants, J. M. Long and W. S. Mauldin. In this light the compensation to Mauldin and Long was a fixed compensation to them as employés of W. D. Spearman Company for looking after the fertilizer business. It is accordingly held that there was no copartnership existing such as would make the defendants Mauldin and Long liable to the complainant for the debts due by W. D. Spearman Company for the fertilizers shipped under the contract.

[2] The next and main question is as to the liability of the defendants for the collections made from the collaterals of the complainant in their hands. The total amount of fertilizers shipped aggregated, according to the agreed prices under the proposal, the sum of $13,020.53, and on or about the 15th day of May, 1909, a settlement was had between the plaintiff and the defendant W. D. Spearman Company, whereby the plaintiff accepted from W. D. Spearman Company, as representing the amount due by W. D. Spearman Company on the shipment of fertilizers, four notes, all dated May 15, 1909, and aggregating the sum of $13,020.53. To secure these notes W. D. Spearman Company delivered and assigned to the complainant notes, mortgages, and open accounts of purchasers of fertilizers from W. D. Spearman Company to the aggregate of $13,040.09, as being the collateral to be transferred to the complainant under the contract as representing the obligations given by the purchasers of the fertilizers from W. D. Spearman Company. This amount was accepted upon the settlement in May by the complainant as being the collateral to which it was entitled under the agreement, and the court holds that on the facts as a conclusion of law that the complainant, in the absence of fraud, is bound by that settlement as showing its acceptance of the amount of collateral that it was entitled to receive under its agreement with W. D. Spearman Company. All this collateral was returned to W. D. Spearman Company for the purpose of collection; the proceeds of this collateral, and the collateral, to be held by W. D. Spearman Company in trust for the complainant,

to which the proceeds of all collections were to be paid, W. D. Spearman Company having undertaken that collection.

W. D. Spearman Company becoming financially embarrassed, and it being apparently desired by all parties that the fertilizer accounts should not become involved in the mercantile business, the defendants J. M. Long and W. S. Mauldin, on November 6, 1909, gave an acknowledgment to the plaintiff that all the collateral notes and accounts were in the hands of said Long and Mauldin to be collected for the account of the plaintiff. This substituted the defendants J. M. Long and W. S. Mauldin as the trustees to collect these accounts for the complainant, and to turn the same over to the complainant; they assuming in that respect the obligations that had theretofore rested upon W. D. Spearman Company under the agreement to collect these collateral obligations as trustees for the complainant. On this total amount of $13,040.09 it appears that there has been paid out of the collections $10,321.83. It appears further from the testimony that the defendants Long and Mauldin, have produced as ready to deliver to the complainant and accounted for of these collaterals, which they have been unable to collect, $1,640.03, making a total of $11,961.86 so accounted for. The difference between this amount of $11,961.86 and the total collateral in the hands of W. D. Spearman Company and Long and Mauldin for collection of $13,040.09 is $1,078.23, for which the defendants Long and Mauldin have wholly failed to account in this case.

It is thereupon adjudged and decreed that the defendants J. M. Long and W. S. Mauldin are indebted to the complainant in the sum of $1,078.23, with interest at the rate of 7 per cent. per annum from the 6th of November, 1909, and that upon failure of the said defendants J. M. Long and W. S. Mauldin jointly or severally to pay the same, together with the costs of these proceedings, within 30 days from the date of this order, the complainant may enter up judgment against the said defendants for the amount thereof, and issue execution thereon or enforce the same as it may be otherwise entitled to do under the rules and practice of this court. Nothing herein to be construed however to affect the liability of the defendant W. D. Spearman Company upon its note referred to and set out in the bill of complaint, as to which application may be made at the foot of this decree for any order in regard thereto to which the complainant may be entitled.

Ernest F. Cochran, of Anderson, S. C., and Julius H. Heyward, of Greenville, S. C. (J. W. Quattlebaum, of Anderson, S. C., on the brief), for appellant.

H. H. Watkins, of Anderson, S. C. (M. L. Bonham and T. Allen, both of Anderson, S. C., and J. P. Carey, of Pickens, S. C., on the brief), for appellees.

Before KNAPP and WOODS, Circuit Judges, and BOYD, District Judge.

WOODS, Circuit Judge. The material facts are set out in the opinion of the District Judge, and the principles of law applicable to them are well settled. Little need be added to the clear and convincing reasoning of the District Judge. It cannot be denied that there is both direct and positive evidence strongly supporting the conclusion of the court (1) that the contract to purchase fertilizer from complainant was made with W. D. Spearman Company, and not with defendants individually; (2) that the defendants were not partners, and did not hold themselves out as partners, with W. D. Spearman Company, but were employés or agents, whose compensation was fixed at $100 a month, payable from the anticipated profits of the business; and (3) that the defendants did not afterwards in the course of the business in any way assume the obligations of the Spearman Company.

[3] The complainant is a large wholesale dealer in fertilizer. Had its officers intended to hold the defendants, either as principals, or guarantors, or sureties, on its contract to sell fertilizer to Spearman Company, it is hardly conceivable that they would have left the obligation to be inferred from circumstances, when they could have made it perfectly plain in the beginning by written contract. Except in cases of fraud or mistake, the courts will rarely infer from circumstances that the obligations of a contract of sale were assumed by one not a party to it, when the question of liability of such person could have been settled at the inception of the contract by a demand that he sign it.

Affirmed.

MINERS' & MERCHANTS' BANK v. UNITED STATES FIDELITY & GUARANTY CO.

(Circuit Court of Appeals, Ninth Circuit. July 3, 1916.)

INSURANCE ⟸508½, New, vol. 4 Key-No. Series—LIABILITY INSURANCE—POLICY—CONSTRUCTION.

In 1906 defendant insured plaintiff bank from any and all loss or damage on account of wrongful acts of the cashier of a branch, by reason of fraud or dishonesty of such employé in connection with the duties of his office or position amounting to embezzlement or larceny committed during the continuance of the term or any renewal thereof, and discovered within such continuance or six months thereafter. As an inducement to be allowed to write the bond, defendant agreed to from time to time renew it without any additional cost, expense, trouble, or annoyance, and to save plaintiff bank harmless during the whole period. In 1913 a new bond insured the bank against any pecuniary loss growing out of any act of fraud, dishonesty, forgery, theft, larceny, embezzlement, wrongful abstraction, or misappropriation, or any criminal act, of the cashier of the branch bank. Defalcations and embezzlement by such cashier were not discovered until more than six months after the expiration of the last renewal of the 1906 bond. *Held*, that the bond of 1913 was not a renewal of the 1906 bond, the two bonds containing different conditions, and so no recovery for defalcations occurring prior to such bond could be had, on the theory that it renewed the original bond.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. ⟸508½.]

In Error to the District Court of the United States for the Northern Division of the Western District of Washington; Jeremiah Neterer, Judge.

Action by the Miners' & Merchants' Bank, a corporation, against the United States Fidelity & Guaranty Company, a corporation. There was a judgment denying part of the relief sought, and plaintiff brings error. Affirmed.

John W. Roberts and George L. Spirk, both of Seattle, Wash., and William H. Metson, of San Francisco, Cal. (Metson, Drew & MacKenzie, of San Francisco, Cal., of counsel), for plaintiff in error.

Henry F. McClure and W. T. Dovell, both of Seattle, Wash. (McClure & McClure, of Seattle, Wash., and Hughes, McMicken, Dovell & Ramsey, all of Seattle, Wash., of counsel), for defendant in error.

Before GILBERT and ROSS, Circuit Judges, and RUDKIN, District Judge.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

ROSS, Circuit Judge. This action was brought upon a policy of insurance issued by the defendant in error to the plaintiff in error on the 1st day of April, 1906, and which insurance the plaintiff alleged in its complaint was continued to April 1, 1914, by certain instruments in writing that are set out; the losses insured against being alleged to have been sustained by the plaintiff in the years 1911, 1912, and 1913, and not to have been discovered by the plaintiff until December 9th of the latter year. At the times in question the plaintiff in the action was a corporation of the state of Washington, and the defendant thereto a corporation of the state of Maryland; the principal place of business of the plaintiff being at Seattle, its president and directors residing in that city, and doing a general banking business at Ketchikan, Alaska—one Mack A. Mitchell being its cashier there. The bond was executed by the defendant company at the request of the plaintiff, the employer of Mitchell, to secure the faithful performance of his duties. The amount of it was $25,000, by its terms it was to expire April 1, 1907, and it was given in consideration of a premium of $100, which was paid by the plaintiff. The loss insured against was:

"Such pecuniary loss as may be sustained by the employer by reason of the fraud or dishonesty of the said employé in connection with the duties of his office or position, amounting to embezzlement or larceny, and which shall have been committed during the continuance of said term, or of any renewal thereof, and discovered during said continuance, or of any renewal thereof, or within six months thereafter, or within six months from the death or dismissal or retirement of said employé from the service of the employer within the period of this bond, whichever of these events shall first happen."

Among the various provisions and conditions of the bond are the following:

"Provided that, on the discovery of any act capable of giving rise to a claim hereunder, the employer shall, at the earliest practical moment, give notice thereof to the company, and any claim made under this bond shall be in writing addressed to the company at its head office in the city of Baltimore, and shall within three months after the discovery thereof, at the employer's expense, furnish to the company reasonable particulars and proofs of the correctness of said claim, and such particulars, if required, shall be verified by affidavit. * * * And provided, lastly, that this bond is also subject to the following conditions: That any misstatement or suppression of fact in any claim made hereunder renders this bond void from the beginning. This bond will become void as to any claim for which this company would otherwise be liable, if the employer shall fail to notify the company of the occurrence of the act or commission out of which said claim shall arise immediately after it shall come to the knowledge of the employer; and the knowledge of a president, vice president, director, secretary, treasurer, manager, cashier, or other like executive officer shall be deemed under this contract the knowledge of the employer. * * * That no one of the above conditions, or of the provisions contained in this bond, shall be deemed to have been waived by or on behalf of the company, unless the waiver be clearly expressed in writing over the signature of its president and secretary, and its seal thereto affixed. That the company, upon the execution of this bond, shall not thereafter be responsible to the employer, under any bond previously issued to the employer on behalf of said employé, and upon the issuance of any bond subsequent hereto upon said employé in favor of said employer, all responsibility hereunder shall cease and determine; it being mutually understood that it is the intention of this provision that but one (the last) bond shall be in force at one time, unless otherwise stipulated between the employer and the company. * * *"

The complaint alleges, among other things, that as an inducement to be allowed to write the said bond of April 1, 1906, the defendant agreed:

"That it would, at all times until such time as said bond should be canceled or terminated, keep the plaintiff bank wholly and fully insured and indemnified against any and all loss or damage on account of the wrongful acts of said defendant Mack A. Mitchell, and represented to the plaintiff and did agree to and with the plaintiff that it would from time to time and from year to year cause said bond to be renewed, continued, and extended without any additional cost, expense, trouble, or annoyance to the plaintiff or its officers, except the payment of the annual premium, and would keep said bond in force and renewed, continued, and extended, and would keep the plaintiff fully insured and indemnified against loss or damage in connection with or on account of the wrongful act or conduct of said Mack A. Mitchell, its cashier."

It alleges, and it was conceded by the counsel of the respective parties at the trial, that the bond of April 1, 1906, was, without any formal application therefor, renewed six successive years by the defendant, and the annual premium of $100 paid to it by the plaintiff; the certificate in each instance being similar, except as to the dates, to the following one, issued April 1, 1910:

"Continuation Certificate No. T–450.

"Amount $25,000.00 Premium, $100.00.

"Fidelity Department.

"The United States Fidelity & Guaranty Company.

"Home Office, Baltimore, Maryland.

"In consideration of the sum of one hundred ($100.00) dollars, the United States Fidelity & Guaranty Company hereby continues in force bond T–450 in the sum of twenty-five thousand ($25,000) dollars, on behalf of Mack A. Mitchell, in favor of Miners' & Merchants' Bank of Ketchikan, Alaska, for the period beginning the 1st day of April, 1910, and ending on the 1st day of April, 1912 (1911), subject to all the covenants and conditions of said original bond heretofore issued, dating from the 1st day of April, 1906.

"Witness the signature of its attorney in fact under corporate seal this 1st day of April, 1910.

"Douglas R. Tate, Attorney in Fact."

While the complaint contains the further allegation that the defendant continued to renew the said insurance from year to year until the 1st day of April, 1914, and that the plaintiff continued to pay the annual premium of $100 until April 1, 1913, "when the premium was reduced to the sum of $62.50," it alleges that on the last-mentioned day the defendant company executed to the plaintiff another bond in the same amount, on which the annual premium was $62.50, by which latter bond the defendant guaranteed to pay to the plaintiff such pecuniary loss, subject to certain specified conditions, as it should sustain—

"by any act or acts of fraud, dishonesty, forgery, theft, larceny, embezzlement, wrongful abstraction, or misapplication, or misappropriation, or any criminal act by Mack A. Mitchell, directly or through connivance in any position and at any location in the employer's employ, and during the period commencing upon the date hereof and continuing in the sum of twenty-five thousand ($25,000.00) dollars until the termination of this insurance."

Among its conditions are the following:

"3. This insurance shall only terminate by: (1) The employer giving notice in writing to the insurer specifying the date of termination. (2) The insurer

giving thirty (30) days' notice in writing to the employer. (The insurer to refund unearned premium in the above cases.) (3) The nonpayment of premium for a period of three (3) months beyond date due; all premiums being due in advance.

"4. The discovery of any loss through the employé."

Payment of the premium of $62.50 on the last-mentioned bond is alleged in the complaint, which further alleges that it extended and continued in force the insurance theretofore existing to the 1st day of April, 1914. The complaint further alleges that on or about December 9, 1913, the plaintiff discovered certain facts in relation to the conduct of Mitchell which led it to believe that he had been guilty of acts which would give rise to a claim under the alleged contract of insurance, of which it immediately notified the defendant, and subsequently, to wit, on the 17th day of the same month of December, 1913, notified the defendant that Mitchell had been guilty of fraudulently abstracting from the plaintiff a sum of money in excess of $25,000, and that said wrongful acts on the part of Mitchell began on or about May 15, 1913, and continued to and including August 14, 1913.

By its answer the defendant admitted the execution and delivery of all the documents as alleged in the complaint and the receipt by it of all of the premiums therein alleged, and set up, among other defenses, that the bond executed by it on the 1st day of April, 1906, and annually renewed to and including April 1, 1912, finally expired and terminated April 1, 1913; that the plaintiff did not, within six months after April 1, 1913, or at any time prior to December 9, 1913, give notice to the defendant of the discovery of any act capable of giving rise to a claim under the bond of April 1, 1906, or under any renewal thereof, and did not at any time prior to December 9, 1913, make any claim in writing or otherwise against the defendant because of any of the alleged fraudulent or dishonest acts of the said Mitchell. The answer also alleges that at the time of the execution of the bond of April 1, 1906, and of its various continuations, the plaintiff agreed that it would from time to time make proper examination of the books of the bank to the end that any misconduct on the part of Mitchell might be seasonably discovered, and that the bank failed to make such examination. The answer further pleaded in defense that the bond of April 1, 1913, was actually executed on or about November 25th of that year, when it was for the first time applied for by the plaintiff, and was dated back as of April 1, 1913, at the request of the plaintiff, and by means of false and fraudulent representations on its part.

To the latter allegation of the defendant the plaintiff replied to the effect:

That the last-mentioned bond was executed "as and of the 1st day of April, 1913, in pursuance of the agreement and arrangement between the parties hereto for the continuance in force of said fidelity insurance. * * * That the same was written and delivered by the defendant to the plaintiff as a part of and in pursuance of the agreement and arrangement existing between the parties hereto, * * * and for the consideration of the premium paid, and without any further or additional application having been made therefor. * * * That there was a slight delay in the execution and delivery

of said bond, but that said delay was caused by the neglect of defendant, and without notice or knowledge on the part of plaintiff. That the same was caused through no fault or neglect of plaintiff, but was caused wholly through the fault, carelessness, and neglect of the defendant."

On the coming on of the case for trial a jury was impaneled, and opening statements made by the counsel of the respective parties, in which were stated the facts each expected to prove and an admission made by them of the fact that Mitchell wrongfully appropriated of the plaintiff's money during the year 1913, and after April 1st of that year, the amount for which the court below gave the plaintiff judgment; but the trial court refused to allow the plaintiff to make proof of any fraudulent appropriation by Mitchell prior to April 1, 1913, on the ground that the policy issued April 1, 1906, was finally terminated April 1, 1913, and that no notice was given by the plaintiff to the defendant of any wrongful act on the part of Mitchell during the life of that policy, nor within six months after it expired, nor, indeed, was there any discovery by the plaintiff of any such act on the part of Mitchell within either of those periods.

The ground of the court's action was that the policy of date April 1, 1913, was a new and independent contract, and not a continuance of the pre-existing insurance. If correct in that conclusion, undoubtedly its judgment should be affirmed. But it is strenuously insisted by the plaintiff in error that the last policy was but a continuance of the pre-existing insurance, which the complaint alleges the defendant agreed to renew annually as an inducement to be permitted to write the original insurance, and that that question, as well as that respecting the fraudulent representations alleged by the defendant to have been made by the plaintiff in the matter of procuring the policy issued in November, 1913, as of date April 1st of that year, were questions for the determination of the jury, and that the court below therefore erred in taking the case from the jury, and awarding the plaintiff judgment only for the amount the parties agreed Mitchell misappropriated subsequent to April 1, 1913. If those issues could be held to be material matters of fact under the pleadings and admissions of the parties, beyond doubt the contention on behalf of the plaintiff in error would be well founded and the judgment should be reversed; for in that view they would plainly be questions for the determination of the jury. But the present action is based on written instruments, and unless the bond executed in November, 1913, as of date April 1st of that year, can be properly held to be a continuation of the policy of April 1, 1906, it manifestly was, as the trial court held, a new and independent contract of insurance. Comparing the two, it is readily seen that they are essentially different. Not only does the later policy make no reference to the former insurance, which by its terms expired April 1, 1913, but the subject-matter of the two is essentially distinct. By the policy of April 1, 1906, the defendant company made itself liable only for such acts of Mitchell as amounted to "embezzlement or larceny," whereas, under the policy issued as of date April 1, 1913, it became liable to the plaintiff for such pecuniary loss sustained by it growing out of "any act or acts of fraud, dis-

honesty, forgery, theft, larceny, embezzlement, wrongful abstraction or misapplication, or misappropriation, or any criminal act by Mack A. Mitchell, directly or through connivance, in any position and at any location in the" plaintiff's employ, which insurance was made to continue, not for one year only, or for any definite time, as the former policy did, but until terminated in the method therein specified.

The judgment is affirmed.

WONG BACK SUE v. CONNELL, Immigration Inspector.

(Circuit Court of Appeals, Ninth Circuit. July 3, 1916.)

No. 2611.

1. ALIENS ⟸32(9)—DEPORTATION—DENIAL OF RIGHTS.

While rule 22, subd. 4, par. "b," of the Bureau of Immigration, relating to the examination of aliens for deportation, and providing that they shall be advised of their rights to be represented by counsel, to procure witnesses, and to inspect the warrant of arrest, may be so arbitrarily enforced as to infringe the alien's fundamental rights, a Chinese person, whose deportation was sought, cannot, where he was, after his preliminary examination was practically concluded, advised of his right to counsel, to procure witnesses, to admission to bail, and to inspect the warrant of arrest, and the proceeding was delayed twice for the purpose of securing counsel, complain that before he was advised of his rights he was examined as to material matters; it appearing that no catch questions were asked.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 94; Dec. Dig. ⟸ 32(9).]

2. ALIENS ⟸32(6)—DEPORTATION—EVIDENCE.

In a proceeding for the deportation of a Chinese person, a train inspection card attached to the application for warrant of arrest, appearing on its face to have been made out by an immigration inspector and to have been part of the files of the Bureau of Immigration, which was shown and read to the alien at his hearing, is admissible over an objection of lack of identification.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 94; Dec. Dig. ⟸32(6).]

3. ALIENS ⟸32(6)—DEPORTATION—EVIDENCE.

In such case a photograph, identified by the alien as a picture of himself, which was also identified by persons who had claimed to have seen him in Mexico, was admissible.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 94; Dec. Dig. ⟸32(6).]

4. ALIENS ⟸27—ADMISSION TO UNITED STATES—DEPORTATION.

Under the rules of the Secretary of Labor, made for the enforcement of the Chinese Exclusion Laws, which prohibit Chinese persons other than diplomatic or consular officers from entering the United States elsewhere than at the ports of San Francisco and San Diego, Cal., except where the Chinese are seeking admission or readmission from the Orient through Canada, and provide that any Chinese laborer claiming the right to leave and return to the United States shall make written application to the immigration officer located nearest to his place of business for preinvestigation of his claim, and requiring the alien to name

the port at which he expects to depart from the United States, which shall be one of those designated, a Chinese person having a certificate of residence is not entitled to leave the United States for Mexico, or to return therefrom, save through the ports specified in the rules, though other ports were open for ordinary immigrants.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 85–87; Dec. Dig. ⟸27.]

5. ALIENS ⟸27—CHINESE PERSONS—RETURN.

A Chinese person, though he obtained a certificate of residence in the United States, is not, having departed from the country, entitled to return, unless he secured a return certificate.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 85–87; Dec. Dig. ⟸27.]

6. ALIENS ⟸32(10)—CHINESE PERSONS—DEPORTATION.

Where a Chinese person unlawfully entered the United States from Mexico, he will be deported, not to Mexico, but to China.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 92; Dec. Dig. ⟸32(10).]

Appeal from the District Court of the United States for the Southern Division of the Southern District of California; Benj. F. Bledsoe, Judge.

Petition by Wong Back Sue for writ of habeas corpus against Charles T. Connell, as Immigration Inspector in Charge. From an order denying the writ, petitioner appeals. Affirmed.

The petitioner was ordered deported to China, and was held pursuant to a warrant issued by the Secretary of Labor, which charged that appellant had entered the United States, landing near Calexico, Cal., on or about December 18, 1914, and in violation of section 7, Chinese Exclusion Act of September 13, 1888 (25 Stat. 477, c. 1015 [Comp. St. 1913, § 4308]), being a Chinese laborer who failed to produce to the proper officer the return certificate required by the aforesaid section.

The appellant makes these contentions: (1) That there was no fair hearing accorded petitioner by the immigration officials; (2) that there was no evidence that petitioner entered the United States near Calexico, Cal., on or about December 18, 1914, as charged, or at any other time or place, without inspection; (3) that there was no evidence that petitioner entered the United States at any time or place in violation of the act of Congress heretofore referred to; and (4) that, if petitioner was properly ordered deported, the order should have required deportation to Mexico, and not to China.

The record shows that at a warrant hearing before the immigration inspector at Yuma, Ariz., on January 24, 1915, warrant was "presented, read, and explained to the alien, who is advised of the nature of the proceedings and that he may be released from custody during the pendency of the case upon furnishing a satisfactory bond in the sum of $2,500." The testimony before the immigration official was substantially as follows: The alien testified that he was 66 years old, a subject of China, and that he came to San Francisco many years ago; that he had been a cook, and that he had a certificate of residence, issued in the name of Wong Back Sue, dated at Los Angeles, March 31, 1894; that he never had been back to China, never had been to Mexico, and knew no one in Mexicali, Mexico; and denied that he had come from El Centro, Cal., to Los Angeles, on the train on the 19th of December, 1914. He was shown the train inspection card, reciting that he had been inspected by Inspector Palmer on a train from El Centro, Cal., to Los Angeles, Cal., at El Centro on December 19, 1914, and also the card of Inspector Ellis on the same date and train at Indio, Cal.; but he denied that he took a train from El Centro to Los Angeles, and said it was a mis-

take, as he was in Los Angeles all the time; denied that he had met certain persons, who had made sworn statements that they had seen him in Mexicali, Mexico, during part of the years 1913 and 1914. He identified a photograph of himself, attached to an exhibit certification of the inspector, and said that he had left Yuma, Ariz., to go to Los Angeles, about 1910, and that in a previous statement to the officials he had made a mistake as to the time when he left Yuma. He said that he had received a certificate of residence in 1894; and that he had been treated at Los Angeles by a Chinese doctor, Dr. Wong, for a bad leg. The record further shows that at the hearing before the inspector, and as soon as the alien had made these statements, he was advised by the immigration inspector that he was now afforded an opportunity to inspect the warrant of arrest and all the evidence upon which the same was issued, and that he had a right to be represented by counsel at the hearing, and was asked if he wished to avail himself of the right. After stating that he desired to talk with his countrymen, adjournment was had for three days. When the three days had expired and the hearing was resumed, he said he had tried to secure a lawyer, but the one he wished was too busy, and he asked for another day in which to secure an attorney and to talk with him. Again the hearing was adjourned for a day, and, when resumed, petitioner stated that he had no money, and his countrymen were not able, or did not care, to help him, and that he could do nothing more. He was then asked if he waived all right to be represented by counsel at the hearing. His answer was, "Yes; I can't help it." He was also asked whether he had any other evidence to offer. He replied, "No; I have told you everything I know."

Among the exhibits attached to the application for the warrant of arrest was a statement made by the alien on January 16, 1915, before C. B. Franklin, inspector, in which the petitioner said that he had gone direct from Yuma, Ariz., to Los Angeles, three years before the date of the examination, which would be January, 1912; that he had been in Los Angeles ever since; that he left Yuma because, blood poisoning in his leg having developed, he went to Los Angeles for medical treatment for his leg, and that he had remained in Los Angeles continually thereafter until about January 8, 1915, when he went to Yuma, Ariz.; that he had been treated at Los Angeles by Dr. Wong Leng Woon, doctor for the Yick Sang Tong drug store. Petitioner produced a certificate of residence issued to him in California in March, 1904.

Appended also to the application for warrant of arrest were several sworn statements. William H. Tomkins, a stenographer living at Calexico, Cal., was shown the photograph which had been identified by the alien as a photograph of himself, and said that he had seen the Chinaman represented by the photograph about February, 1914, on the Loftus ranch in Mexico. George Henry, a Chinese merchant residing in Mexicali, Mexico, also recognized the photograph, and said that he had seen the Chinaman it represented in Mexicali, Mexico, about October, 1914. O. L. Hockenberry stated that he had seen the Chinaman represented by the photograph in Mexico during 1914, and that the Chinaman had worked on the Davis ranch. Jim Lee, a Chinaman, in his statement said that he lived in Mexicali, Mexico; that he recognized the Chinaman represented by the photograph, and that he had seen him in Mexicali, Mexico, about December, 1914. Wong Yut, a Chinese merchant in Los Angeles, Cal., said he knew the man represented by the photograph, and that he had left Los Angeles, saying he was going to Yuma, Ariz. Dr. Wong Sai Gin recognized the photograph of the petitioner, and said that he had met the man in 1906 at Los Angeles, and that just a few days before January 15, 1915, he had treated him for a cough, and that nothing was said about an injury to the leg, and that the man had told him he had come from some country town and was going to Yuma, Ariz.

Duke Stone, of Los Angeles, Cal., for appellant.

Albert Schoonover, U. S. Atty., and Clyde Moody, Asst. U. S. Atty., both of Los Angeles, Cal., for appellee.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge (after stating the facts as above). [1] Rule 22, promulgated by the Bureau of Immigration of the Department of Labor, provides in part (subdivision 4, paragraph "b") as follows:

"During the course of the hearing the alien shall be allowed to inspect the warrant of arrest and all the evidence on which it was issued; and at such stage thereof as the officer before whom the hearing is held shall deem proper, he shall be apprised that he may thereafter be represented by counsel and shall be required then and there to state whether he desires counsel or waives the same, and his reply shall be entered on the record. If counsel be selected, he shall be permitted to be present during the further conduct of the hearing, to inspect and make a copy of the minutes of the hearing, so far as it has proceeded, and to offer evidence to meet any evidence theretofore or thereafter presented by the government. Objections and exceptions of counsel shall not be entered on the record, but may be dealt with in an accompanying brief. If during the hearing new facts are proved which constitute a reason additional to those stated in the warrant of arrest why the alien is in the country in violation of law, the alien's attention shall be directed to such facts and reason, and he shall be given an opportunity to show cause why he should not be deported therefor."

While this rule may be so arbitrarily applied by immigration officials as to deprive an alien of a full and fair hearing and violate his fundamental rights, as shown in Ong Chew Lung v. Burnett, 232 Fed. 853, — C. C. A. —, in our opinion the rights of the petitioner herein have not been transgressed. His examination appears to have been simply and fairly conducted. The questions asked were confined to material matters, and were expressed in very direct language, apparently used with no desire on the part of the inspector to entrap or oppress or "catch" the alien.

The question, therefore, is whether the fundamental rights of the alien were infringed by the action of the immigration officer in not telling the alien that he could inspect the warrant of arrest and that he had a right to counsel, and inquiring if he wished to avail himself of the right, until after direct preliminary examination of the alien by the inspector had been practically ended. If there were nothing in the record to counteract the injustice of such a course of procedure, we would be very strongly disposed to hold that the alien was not given a fair hearing, as required by law. But it expressly appears that, before any testimony was heard by the inspector, the warrant was read and explained to the alien, and that he was advised of the nature of the proceedings, and that he could be released on bail during their pendency. And while it would seem to be just that prior to a hearing before the immigration officials an alien should also be told of his right to have counsel at the hearing, yet, considering the information given to this petitioner, we cannot say that omission to tell him of his right until after material questions were put and answered invalidated the whole proceeding.

The case of Low Wah Suey v. Backus, 225 U. S. 460, 32 Sup. Ct. 734, 56 L. Ed. 1165, is determinative of the point under consideration. The court there states the settled rule of decision that hearings before executive departments or subordinate officials with respect to aliens found to be in the United States unlawfully may be made conclusive when fairly conducted, and that no successful attack by judicial proceedings upon the conclusions and orders made upon such hearings can be

made, unless it be shown that the proceedings were manifestly unfair, that the actions of the executive officers were such as to prevent a fair investigation, or that there was a manifest abuse of the discretion committed to them by the statute. The court was there considering a case where an order of deportation had been made, and the contention of the petitioner was that the Chinese person ordered deported was refused the right to be represented by counsel during all stages of the preliminary proceedings, and was examined without the presence of her counsel and against her will by the immigration officer and before she had been advised of her right to counsel, and before she was given an opportunity of securing bail, and that afterwards she was examined by the immigration officer against her will and without the presence of her counsel, who was refused permission to be present, and that at certain stages of the proceedings she was refused the right to consult with counsel. The court said:

"This objection, in substance, is that under examination before the inspection officer at first she had no counsel. Such an examination is within the authority of the statute, and it is not denied that at subsequent stages of the proceedings and before the hearing was closed or the orders were made she had the assistance and advice of counsel."

The court, mindful of the summary character of the hearing provided by statute, did not regard the actions of the immigration officials as having deprived the alien of a fair hearing. The immediate case can rest upon a much surer basis than that did, because, as already said, the nature of the proceedings was first explained to the alien, who was told of his right to have bail pending investigation, and who, before the hearing was closed, was not only told of his right to have counsel, but at his request was granted two adjournments that he might consult with his friends and obtain professional aid and advice; and it was not until after he had stated that he could not get counsel and told all that he knew that findings were made which led to the order of deportation by the Assistant Secretary of Labor.

[2] Objection to the admissibility of the train inspection card because of lack of identification is not well taken. The card was attached to the application for warrant of arrest; it was shown and read to the alien at his hearing before the immigration inspector. On its face it appeared to have been made out by an immigration inspector and appeared to be a part of the files of the Bureau of Immigration.

[3] The photograph which was also introduced at the hearing was shown to the alien and identified as a picture of himself.

[4] It is urged that the petitioner, if he was out of the United States, holding a certificate of residence as he did in the United States, had a right to re-enter the United States at Calexico, that being a designated port of entry under Rule 13, Immigration Rules of November 15, 1911. But the record shows that this petitioner was, and is, a subject of China, of the Chinese race, and a native of China, and by occupation a laborer. Exercising the authority conferred upon him by law, on January 24, 1914, the Secretary of Labor issued rules governing the admission of Chinese, and these rules superseded all previously issued rules and regulations and circulars of instruction re-

garding the enforcement of the Chinese Exclusion Laws inconsistent therewith. Rule 1 of the rules provides that:

"No Chinese person, other than a Chinese diplomatic or consular officer and attendants, shall be permitted to enter the United States elsewhere than at the ports of San Francisco, Cal.; * * * San Diego, Cal."

—except where the Chinese are seeking admission or readmission to the United States from the Orient through Canada, when special provision is made to apply. Further, by rule 13 of the rules approved January 24, 1914, it is provided that any Chinese laborer claiming the right to leave and return to the United States in accordance with sections 5 to 7 of the act of September 13, 1888, shall make written application to the immigration officer located nearest to his place of residence for preinvestigation of his claim as is specifically provided for in subdivision "a" of the rule. He is also required by the rule (subdivision "b"), to give a full description of himself, and to name "the port at which he expects to depart from the United States, which shall be one of those designated in rule 1." Thereafter investigation of the allegations made by the applicant is had, and the applicant is required to present duplicate of the application to the officers at the port of his departure. On the return of the applicant, it is provided by subdivision "i" of the rules, the original application is compared with the duplicate on file, and, after proof of identity, readmission is granted.

The only conclusion to be reached from an examination of these several rules is that the petitioner, being an alien laborer, had no right to leave the United States through any California port other than San Diego or San Francisco, and had no right to return to the United States except through the port from which he departed. United States v. Tuck Lee (D. C.) 120 Fed. 989.

[5] Petitioner argues that there is no proof of his entering into the United States. But the sworn statements of witnesses attached to the record filed by the petitioner clearly show that the alien was seen in Mexico shortly before he was found in the United States. The certificate of residence held by the alien became of no avail to him after he left the United States without procuring a return certificate. This would seem to be so because of the prohibition against leaving without first procuring a return certificate and without a proper re-entry through the port of the alien's departure. When, therefore, the question of his right to remain in the United States became involved, and the evidence showed that he had been in Mexico, it devolved upon the alien to show that his departure was lawful. Bun Chew v. Connell, 233 Fed. 220, —— C. C. A. ——. And inasmuch as the alien in this case took the ground that he never had been out of the United States, he ought not to be heard to say that his entry into the United States from Mexico was lawful.

[6] The last point made by the appellant is that even if the government's position is sound, and that the petitioner came into the United States from Mexico, then he should be deported to Mexico. This question was presented in Bun Chew v. Connell, as Inspector, supra, where we held that, under circumstances analogous to those herein, China was the country whence the alien came, and cited to sustain our

ruling Lewis v. Frick, 233 U. S. 291, 34 Sup. Ct. 488, 58 L. Ed. 967, Lee Sim v. United States, 218 Fed. 432, 134 C. C. A. 232, and Ex parte Chin Him (D. C.) 227 Fed. 131.

Affirmed.

HAINES v. BUCKEYE WHEEL CO. et al.

(Circuit Court of Appeals, Sixth Circuit. May 10, 1916.)

No. 2746.

On petition for rehearing. Petition denied, and former opinion (224 Fed. 289, 139 C. C. A. 525) affirmed.

PER CURIAM. The addition to the record of the memorandum opinion of the District Judge and the order made pursuant thereto, allowing fees to the receiver and to his counsel, and the further addition of the record of the action of the District Court relative to the receiver's bond and the waiver of a supersedeas bond, in no wise change the situation or affect the question of his personal and official liability.

The petition for rehearing is based primarily upon the claim that this court, in its opinion heretofore rendered, has neither stated nor adopted a correct legal theory upon which to fasten liability upon the receiver, or to determine the character and to measure the extent of such liability.

This claim is without foundation. So far as the opinion implies an official duty, as distinguished from mere personal liability, on the part of Haines to pay the debts owing to his merchandise creditors, that result does not necessarily rest upon any theory of contract or warranty that he was authorized to make the purchases, and so lead to an inquiry as to the amount the vendors of merchandise could have collected if the purchases had been authorized. It may rest as well upon the theory of deceit, because of the false, though implied, representation of authority; and in an action of deceit the measure of damages is the value of the property with which the deceived vendor has parted, less what he has received. In view of the limited authority under which the receiver was acting, it does not cure the effect of this false representation to say that he did not intend to use the merchandise for himself, but only for his trust.

The petition for rehearing will be denied.

KENNEDY et al. v. HILLS.

In re KENNEDY et al.

(Circuit Court of Appeals, Ninth Circuit. July 3, 1916.)

No. 2762.

EXEMPTIONS ⊂=44—STATUTES—CONSTRUCTION—"WORK CATTLE."

Under Rem. & Bal. Code Wash. § 563, exempting to a farmer one span of horses or mules, with harness, or two yoke of oxen, to a physician one horse, with harness and buggy, to a teamster one team, consisting of one span of horses or mules, or two yoke of oxen, or a horse and mule, and in paragraph 13, three yoke of work cattle and their yokes, etc., to a person engaged in the business of logging, one engaged in the business of logging is not, in view of the other portions of the statutes specifically naming horses and mules, entitled to a team of horses as exempt on the ground that the expression "work cattle" was not confined to bovines, but included all domestic animals used as beasts of burden.

[Ed. Note.—For other cases, see Exemptions, Cent. Dig. §§ 51–55; Dec. Dig. ⊂=44.

For other definitions, see Words and Phrases, Working Cattle.]

Petition to Revise an Order of the District Court of the United States for the Southern Division of the Eastern District of Washington, in Bankruptcy; Frank H. Rudkin, Judge.

In the matter of the bankruptcy of J. C. Kennedy and A. J. Kennedy, doing business as J. C. Kennedy & Son. The bankrupts applied to have S. T. Hills, as trustee, set aside to them as exempt two horses and harness, and, an order of the referee refusing to allow the exemption being affirmed, they petition to revise. Petition denied, and order affirmed.

Fabian B. Dodds, of Spokane, Wash., for petitioners.

Trefethen, Grinstead & Laube, of Seattle, Wash., for respondent.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge. The bankrupts were loggers engaged in the business of logging, and had families living with and dependent upon them. By petition for revision they present the question whether, under paragraph 13, section 563, Remington & Ballinger's Annotated Codes and Statutes of Washington, they were entitled to certain horses as exempt.

The state statute referred to exempts from execution and attachment, except as specially provided, certain property, for instance: "To a farmer, one span of horses or mules, with harness, or two yoke of oxen," and certain other things; to a mechanic, "the tools and instruments used to carry on his trade for the support of himself and family"; to a physician, "his library, * * * one horse, with harness

and buggy"; to a teamster or drayman, engaged in that business for the support of himself or his family, "his team, consisting of one span of horses, or mules, or two yoke of oxen, or a horse and mule"; and—

(13) "To a person engaged in the business of logging for his support or that of his family, three yoke of work cattle and their yokes, and axes, chains, implements for the business, and camp equipments, not exceeding three hundred dollars, coin, in value."

Petitioners ask us to include within the meaning of "work cattle," used in paragraph 13 just quoted, the horses claimed herein. Their argument is that, when the statute was passed more than 50 years ago, both oxen and horses were used in logging, and that the word "cattle," being generic, should include not only neat cattle, but horses, mules, asses, and practically all domestic quadrupeds used as beasts of burden. But, when the various sections of section 563 referred to above are considered, the argument cannot prevail. By using the words "mules," "oxen," and "work cattle" in other sections of the statute, the Legislature showed that in employing the specific words "work cattle," found in paragraph 13, they intended to use them in the limited sense in which they are generally used, and therefore as only including animals of the bovine genus.

The liberality of construction of exemption statutes meant for the benefit of poor debtors is well defined by Judge Redfield in Carty v. Drew, 46 Vt. 346, where the court said:

"When a class of property is exempt, such as 'suitable apparel, bedding, tools, arms, and articles of household furniture; such as may be necessary for upholding life,' the courts take care that the beneficial purposes of the Legislature are carried into execution, and give the statute the most liberal construction. But when a specific article is exempt, the court cannot extend the statute by construction to another and different article."

"Three yoke of work cattle and their yokes" by all common understanding means bovines and their yokes, and not equines and their harness.

We affirm the view of the District Court, and must deny the petition.

RECTIGRAPH CO. v. CAMERAGRAPH CO.

(Circuit Court of Appeals, Eighth Circuit. May 8, 1916.)

No. 4513.

PATENTS ⟸328—VALIDITY AND INFRINGEMENT—COPY-HOLDER.

The Beidler patent, No. 793,978, for a copy-holder, especially adapted for the holding of record books, claims 1, 2, 3, and 8, are void for anticipation; claims 5 and 9, conceding their validity, *held* not infringed.

Appeal from the District Court of the United States for the Western District of Missouri; Arba S. Van Valkenburgh, Judge.

Suit in equity by the Rectigraph Company against the Cameragraph Company. Decree for defendant, and complainant appeals. Affirmed.

Frank S. Appleman, of Washington, D. C., for appellant.

James L. Norris, Jr., of Washington, D. C. (John S. Powers, of Washington, D. C., on the brief), for appellee.

Before ADAMS and CARLAND, Circuit Judges, and TRIEBER, District Judge.

ADAMS, Circuit Judge. This was a suit in equity to restrain infringement of United States letters patent No. 793,978, issued to George C. Beidler, July 4, 1905, for alleged new and useful improvements in copy-holders. The object of the invention, as stated in the specification, is this:

"To afford a more convenient and satisfactory means of holding documents from which copies are to be made, and while the improvements herein shown may be used for general copying, the invention is made more especially adaptable to the copying of deeds, mortgages, and other documents which are filed in and have to be copied from record books. The improved holder is made adaptable to the use of the camera in copying. * * *"

The patent has 16 claims, but only the first, second, third, fifth, eighth, and ninth are now involved. These are as follows:

(1) "In a copy-holder, a suitable base, a case hinged to the base, means for holding the copy, and adjustable means for permitting the copy to lie on a given plane."

(2) "In a copy-holder, a suitable base, a movable case supported by the base, and yieldable copy-supports in the case whereby the copy is exposed on a predetermined plane."

(3) "In a copy-holder, a base, a case supported thereby, copy-supports in the case, means for permitting the yielding of the copy-supports and means for holding the copy in engagement with the supports."

(5) "In a copy-holder, a case, copy-holders movable in the case, whereby the copy is permitted to be exposed on a predetermined plane, clamping members coacting with the copy-holders and means for operating the clamping members."

(8) "In a copy-holder, a case, means in the case for supporting a book in its open position, means for holding the book on the supports and means for permitting the exposed leaves of the book to lie on the same plane."

(9) "In a copy-holder, a case, book-supporting means in the case, clamping

members acting in conjunction with the supports, and means for operating the clamping members whereby the copy engaged by each set of clamping members is pressed to line on the same plane."

The defense was want of patentable novelty and non-infringement. The court below held claims 1, 2, 3, and 8 to be invalid, and claims 5 and 9 to be valid, but not infringed, and rendered a decree dismissing the bill. From this decree the complainant below (appellant here) appeals.

Claims 1, 2, 3, and 8 are concerned solely with a substantial base or stand upon which a case, so equipped and disposed as to properly and firmly hold large record books while being copied and coacting means for their successful operation. The case is a shallow box of about the length, width, and thickness of a large open record book standing normally in an upright or vertical position with no frontal covering.

The case is hinged upon the back edge of the base or stand in such way as to permit the case to be tilted backwards from its normal vertical position as and when required for preparing the device for operation. Extending vertically across the front or face of this case are two thin strips of wood, called "copy-supports" or "follow-blocks," each supported underneath by a flat bow spring.

Neither of these claims, 1, 2, 3, or 8, call for any special or definite *means* to be employed for the operation of the device, but call generally for means for holding the copy and permitting it to lie on a given plane, and for means for permitting the yielding of the copy-supports and holding the copy in engagement with the supports, and means for supporting the book in its open position and holding it on the supports. Claims 5 and 9 call for the foregoing elements and in addition thereto the following:

"Clamping members coacting with the copy-holders and means for operating the clamping members" and "clamping members acting in conjunction with the supports, and means for operating the clamping members whereby the copy engaged by each set of clamping members is pressed to line on the same plane."

The *"means"* described in the specification or shown in the drawings of the patent for accomplishing the object of the invention, to which all the claims, without specifically calling for them, in a general way refer, are a revolvable vertical shaft firmly secured upon the outside of and at each end of the case, extending from its top to its bottom, pivotally mounted at each end by lugs firmly secured to the ends of the case. A series of short steel rods, called "fingers," are rigidly mounted upon these shafts so as to rise and fall with their revolution. The upper end of the shafts are provided with rigid crank arms, the free ends of which are operatively connected by rods or links to a hand lever mounted upon the back of the case. The operation of the device is practically this:

The hand lever on the back of the case, connected with the shafts as just stated, when pushed forward, revolves the shafts and raises the fingers so as to clear the front of the case for the reception of a book or document which is desired to be copied. After the front

of the case is thus made clear, the book is put into it, the back of each cover resting upon one of the "copy-supports" or "follow-blocks." The hand lever is then pushed forward, and the fingers, by the resulting revolution of the shafts, are brought firmly down upon the open pages of the book, thereby pressing them firmly against the yielding copy-supports and presenting a flattened smooth plane to the copyist.

So it appears that the device shown in the first group of claims, 1, 2, 3, and 8, consists simply of a case or box, hinge-mounted on a supporting pedestal, having an open front through which the leaves of a book desired to be copied are exposed to view, devices projecting over and engaging the exposed leaves when the book is in place, so as to hold them in a predetermined plane, and spring-pressed copy-supports which engage the covers of the book and press them up against the clamping members, these supports being arranged between the book and the rear wall of the case.

By reason of the use of these words in the specification:

"The improved holder is made adaptable to the use of the camera in copying. * * *"

Counsel for appellant make an argument that there should be read into the claims of this patent a camera or other photographic instrument so disposed in front of the exposed pages of the book as to permit of a quick photographic reproduction of them. In other words, they argue that the court should interpose in their behalf and permit them now to make a claim for a combination which the patentee never made or never secured a patent for. This, most obviously, cannot be done. With the camera left out, the combination of the claims is for the few simple elements already pointed out only, with means, already specified, for their operation. Does such a combination disclose a new and useful invention within the meaning of the patent law, or had it been anticipated?

The prior art relied upon by the defendant discloses patents covering, as the trial court found and as we find, reading desks, writing desks, book-supports and copy-holders, which involve and include, in one form or another, all the elements (or their substantial equivalents) enumerated in the first group of claims under consideration. The purpose disclosed in the patents of the prior art was to so dispose the copy-holder that the book or document might be conveniently written upon, read or copied from. They disclosed means for holding the book or copy vertically, horizontally, or otherwise, best suited to the needs of the reader or copyist. In them are found a base, and a case, supported by, attached to and specifically hinged to the base, all disclosing means for holding the copy (in most cases books and in some cases record books) so that the pages exposed for copying lie in a given plane, this result being attained by cams or springs, or their equivalents, whereby the book supports were made movable and yieldable. The prior art, therefore, disclosed combinations of elements, or their equivalents, substantially like those involved in the Beidler pat-

ent in suit, and performing the same function in substantially the same way.

In the Moessinger patent, No. 95,369, dated September 28, 1869, and in the Rogers patent, No. 640,226, dated January 2, 1900, are found elements, and combinations of elements, and "means" strongly suggestive, if not quite anticipatory, of the claims of this patent; and in the Nevius patent, No. 742,347, dated October 27, 1903, is found a further development of this art in the shape of a device which, in our opinion, fully anticipates the claims and combination of claims of this patent. The claims, specification, and drawings of that patent disclosed a book-holding device, consisting of a base, a book-holding case hinged upon the base, adjustable book supports inside the case, with connections and means for raising and lowering the supports, corresponding to the follow blocks of the Beidler patent, and leaf engaging rods or fingers corresponding or equivalent to the fingers of the Beidler patent, all in connection with means disclosed in the specification designed to furnish an adjustable provision for making the book lie in a given or predetermined plane while being copied. Other patents and devices are relied upon by counsel for the parties in support of their respective contentions concerning the prior art; but in view of the consideration of the prior art already had, and the necessary conclusion therefrom that the Beidler patent had been anticipated, we refrain from further exploitation of it.

We now pass to a consideration of claims 5 and 9. The device of these claims consists essentially of clamping members and means for operating them in connection with a copy-holder. These clamping members, as already described, consist of the revolvable vertical shafts secured to the ends of the case, extending from its top to its bottom, and the steel rods or fingers mounted upon them, in such way as to rise and fall with their revolution, and operated by means of the hand lever at the back of the case connected with crank arms operating upon the upper ends of the shaft in such way that by pushing the lever back the fingers, constituting the clamping members, are raised so as to open up the case for the reception of a book to be copied and by pulling the lever forward the fingers, by the resulting revolution of the shaft, are brought down upon the pages of the book, thereby pressing them firmly against the copy-supports, thus presenting an even, flat and smooth surface for the copyist.

This device, it may be conceded (but not decided), constitutes a new and useful improvement or method of putting the book in place and holding it in place for effective copying, and it may be conceded for the present purpose that it involves patentable novelty; but the important question, in view of the judgment below, is whether the defendant infringed this device. The defendant's device, charged to be an infringement of claims 5 and 9, consists of a pedestal supporting a shallow case, having an open front and spring-supported plates or cross-pieces, extending vertically up and down its front, serving practically the same purpose in a copy-holder as the copy-supports of the Beidler patent. But there are no revolvable vertical shafts to which

fingers are so attached as to rise or fall with their revolution, like the Beidler patent, or subject to be operated mechanically in the way and manner already pointed out. Instead of the fingers of the Beidler patent, susceptible of quick application to the leaves of the book by the mechanical means disclosed in the Beidler patent, the defendant employs the device of the Ellis patent, No. 978,719, dated December 13, 1910, which, instead of the clamping members and their means of operation as claimed and described in the Beidler patent, employs a hand operated skeleton door, hinged to one end of the case, with means for locking or firmly closing it at the other end. This door is made up of an upper and lower cross-piece or member; between these members is an open space which permits free and unobstructed vision of the pages of the book interposed there to be copied. When the book is placed in position upon the spring-supported plates the natural operation of the springs forces the leaves of the book up against the transverse cross-pieces of the skeleton door, when locked, and in this way the cross-pieces hold the leaves of the book in a given or predetermined plane so as to be conveniently copied.

It is unnecessary for our present purpose to institute any critical comparison between these devices for the purpose of determining their respective merits. It is sufficient to consider their construction so far, and so far only, as to determine whether the defendant's structure employs the clamping members of the 5 and 9 claims of the Beidler patent or their mechanical equivalents in connection with the copy-supports of that patent, for the purpose of keeping the two pages of a book while being copied pressed to line on the same plane. We are clearly of opinion that the defendant's structure does not employ these elements or their mechanical equivalents for any purpose.

The trial court was right in holding that the defendant structure did not infringe claims 5 and 9 of plaintiff's patent. Its decree is accordingly affirmed.

RAUCH & LANG CARRIAGE CO. v. HANLON et al.

NATIONAL AUTOMOBILE CHAMBER OF COMMERCE v. SAME.

(Circuit Court of Appeals, Sixth Circuit. June 6, 1916.)

Nos. 2830, 2831.

1. PATENTS ⇐328—INVENTION—SHIELD FOR CAR WINDOWS.

The Hanlon reissue patent, No. 13,653 (original No. 993,061), for a shield for car windows, consisting of a supplementary window or sheet of glass hinged at the top of the front window of a street car or closed automobile, which swings outwardly and can be fixed and held at any angle, forming a shield to protect the upper part of the inner window from rain or snow and to have a clear span through which the driver can see, is void for lack of invention in view of the prior automobile art.

2. PATENTS ⇐27(1)—DOUBLE USE.

The application to a closed car of the form of wind shield known on open cars *held* double use.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 31; Dec. Dig. ⇐27(1).]

Appeals from the District Court of the United States for the Eastern Division of the Northern District of Ohio; John H. Clarke, Judge.

Suits in equity by William B. Hanlon, the Anderson Electric Car Company, and others against the Rauch & Lang Carriage Company, and against the National Automobile Chamber of Commerce. Decrees for complainants, and defendants appeal. Reversed.

F. P. Fish, of Boston, Mass., for appellants.

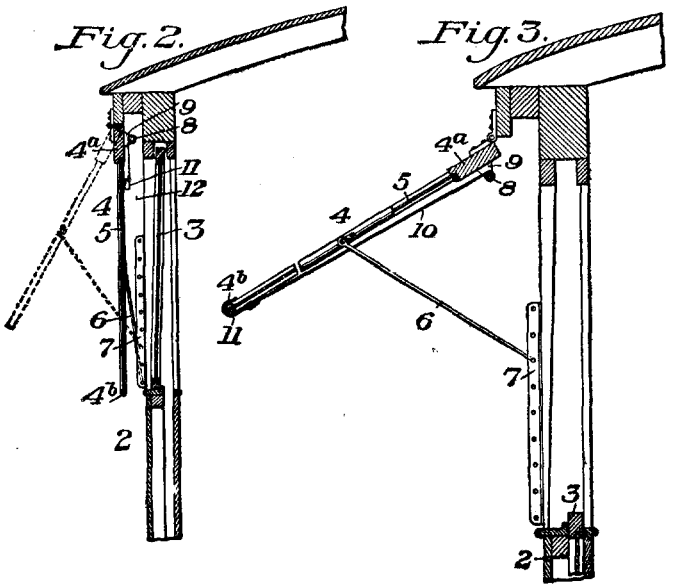
C. P. Byrnes, of Pittsburgh, Pa., for appellees.

Before KNAPPEN and DENISON, Circuit Judges, and EVANS, District Judge.

[1] DENISON, Circuit Judge. Infringement suit on patent to Hanlon, reissue No. 13,653, December 2, 1913, original No. 993,061, May 23, 1911, application filed April 11, 1910, for "shields for car windows." Claims 1 and 2 are involved; claim 1 is given in the margin.[1] The court below held the patent valid and infringed, and the original defendant below, the Rauch & Lang Company, and the Cham-

[1] Claim 1. The combination with a vehicle having an observation window at its forward end, of a frame hinged at its upper edge to the vehicle above and in front of said window and having a transparent pane or panel arranged to extend in a forwardly and downwardly inclined position in front of the upper part of said window, said angular pane or panel being positioned so that the line of vision of the driver is below its lower edge, the frame and its pane when in vertical position being separated from the observation window by a dead air space tending to prevent the formation of frost on said window, and when in an angular position forming a storm shield to prevent the weather from beating against the window, said frame being movable on its hinged connection to its different positions, substantially as described.

ber of Commerce, later brought in to defend, prosecute these appeals. Figures 2 and 3 of the patent are herewith reproduced.



The device shown comprises an ordinary sliding window (3) at the front end of a street car vestibule, which may be raised to close the entire opening or may be dropped into the casing below to let air enter. In front of this first window, and hinged at its upper edge, depends a supplementary window, or sheet of glass. This swings outwardly upon its hinge, and may be fixed and held at any desired angle. When in a projecting or angular position, it acts like the eaves of a house or the visor of a cap, and, as the car moves forward, protects the space behind and for a short distance beneath it from falling rain or snow. The angle will be so adjusted that there will be a clear line of vision from the driver's eye, extending beneath the lower edge of the visor to the ground in front of the car. The driver thus escapes the obscuration which would result if the window or shield were vertical and became covered with rain or snow. When the first or rear window is closed, it is protected from such rain or snow over a zone extending from the top to a point approximately horizontal with the lower edge of the shield, and thus the driver's same line of clear vision is left unobstructed and yet the storm is wholly excluded from the car.

This controversy is concerning the use of such a shield upon closed bodies for automobiles, and the claims cover such a use. It follows that the state of the art in automobiles is as pertinent as that in street cars. The state of this former art, prior to the original application, may be easily understood. Automobile closed bodies with a glass front, either in permanent form or in the shape of a window which could be raised or lowered, were well known. The now familiar "clear vision" wind shield for open cars was also in common use. This com-

prised a glass front held in a supporting frame and divided horizontally into two sections. The upper section was hinged at the top and could be swung outwardly and adjusted at any desired angle. It was structurally the same thing, it was operated in the same way, and it gave the same result as the shield of the patented device, excepting that, when looking out under the edge of the shield to the ground, the driver looked through an open space instead of through a pane of glass. The patentee must be thought of as seeing before him, on a salesroom floor, an automobile with a limousine body inclosed on all four sides, the front consisting of a glass window which could be lowered part of its height or all of its height to admit fresh air, and also as seeing, by its side, an open automobile having a glass front, the upper part of which could be swung out forwardly so as to be a shield or visor and so as to give the clear vision function. This situation presents sharply the question of invention which is to be decided.

Analyzing the advance made by Hanlon, we see that, from one point of view, when the user of the open car found that if he had the upper part of the wind shield swung out, the storm beat in under it because this adjustment left an opening through which rain and snow could get in, he put in a pane of glass or a window, fixed or sliding, to close the opening and keep the storm out. From the other point of view, when the user of the closed car observed that the front window, when shut, would become blurred with rain or snow, he added the projecting, swinging shield or visor found in the open car, and so insured a line of clear vision through the inner glass. From neither point of view can we see invention. To put a glass in an opening, or to shelter an existing glass window by the same means common for sheltering an existing open window, seems obviously within the intelligence of the ordinary person—to say nothing of one who is "skilled in the art." Each is, at the best, as applied to closed automobile bodies, only a new use of an existing structure, not requiring mechanical adaptation, save in the form or shape of the supporting hinges or guides—indeed, no mechanical adaptation whatever is necessary, unless it happens that the two places of application are of different size or shape. See illustrative double use cases collected in note to Weir Frog Co. v. Porter, 206 Fed. 670, 674, 124 C. C. A. 470.

The absence of invention is emphasized by the fact that when the patentee lowers his sliding window in his street car vestibule, as he does in pleasant weather, his structure no longer embodies his patented structure, because he has no closed glass window protected by swinging glass in front. When the question of infringement depends upon opening or closing a window it is not easy to understand how the patent can be the embodiment of an inventive step. The same conclusion is somewhat fortified by the conduct of defendants' officers. A user complained that the front window of a closed electric automobile gave trouble through fogging by rain or snow, and suggested that defendant add the familiar swinging wind shield. This was done; and although it was at once apparent that the idea had commercial value, no one thought of applying for a patent.

Undoubtedly, the device has gone and is going into very general

use. Its utility is marked. In some cases, this adoption and utility might be persuasive that invention exists; but we think this case is too clear for the application of that criterion. Very likely the true explanation why the device was not thought of and given this application earlier is because prior to 1910 the use of closed automobile bodies had not been general enough to challenge attention to this trouble, and because the art was developing so rapidly that attention was centered on other more serious matters; at any rate, these considerations partly explain the absence of direct and clear anticipation. We pass by without consideration some approximations which are claimed to anticipate.

[2] It is said that when the outer window is not projected as a storm shield, but is allowed to hang vertically just in front of the inner window, there is produced a quasi dead air space between the two which causes a two-step instead of a one-step difference in temperature between the warmer air inside the car and the cold outside, and which, therefore, prevents or minimizes condensation of moisture on the inner surface—which condensation or "frosting" is troublesome under some conditions. Whether this beneficial result actually follows in substance rather than in theory is not very sure, but, if we assume that it does, it is only an additional advantage coming from a new use which is, inherently, a mere double use; and if, as we hold, there is no invention in adding this angularly projecting and adjustable glass shield in front of a window and in carrying it in an extended position of adjustment, there cannot be invention in carrying it in any other position of adjustment. If the outer window, dropped into this vertical position, has any aspect not already considered, it is that of the familiar double window in residences whereby heat radiation from the room is lessened. For these reasons, we cannot find in this function any more validity for the claims than we find in the angular position of the shield.

We conclude that both decrees must be reversed and the cases remanded, with instructions to dismiss the bill.

BROWN PERFECTION TUBE CO. v. BROWN et al.

(Circuit Court of Appeals, Second Circuit. May 9, 1916.)

No. 263.

PATENTS ⊂=93—OWNERSHIP—AGREEMENT TO ASSIGN.

Defendant assigned patents to complainant, and entered its employment on a salary for the purpose of perfecting and improving the patented article; any invention or patent therefor made during the employment to be the property of complainant. His salary was not paid, but, having made patentable improvements on the device, complainant paid the arrears, and a new contract was made, by which the employment was continued on the same terms, except that defendant was to receive a royalty, instead of a salary, and was given the right to terminate the contract for any default of complainant, which he subsequently did by giving notice of rescission. *Held*, that by accepting the salary under the first contract he waived the prior default, and any invention made dur-

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

ing its term belonged to complainant; that the notice of rescission was only effective from the time of complainant's default under the second contract; and that any invention made prior thereto, or patent therefor, was the property of complainant, but that any made after that time belonged to defendant.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 125; Dec. Dig. ⊂=93.]

Appeal from the District Court of the United States for the Southern District of New York.

Suit in equity by the Brown Perfection Tube Company against John H. Brown, Horace R. Wemple, and A. Grover Fitzgerald. Decree for complainant, and defendants appeal. Affirmed.

The following is the opinion of Sheppard, District Judge, in the lower court:

It appears from the material portions of the record that the defendant Brown and his partner in the venture, Herman D. Selleck, entered into a contract with the Brown Perfection Tube Company, under which they transferred all right, title, and interest in and to certain patents for pneumatic rubber tubes then in existence, or for which applications had been filed or were to be filed in the future for improvements or betterments, receiving as a consideration therefor the greater portion of the stock issued by the Brown Perfection Tube Company. Because of apparent imperfections in the tube as then manufactured, it was further agreed that Brown was to give the company the benefit of his services in perfecting this tube, and all patents applied for or to be obtained in the future covering improvements made during the time that he was connected with the company under the agreement, in consideration for which Brown was to receive a salary of about $125 per month. The Brown Tube Company was unable to pay this salary to Brown after the first month. During the time that this contract was in force, and after the company had failed to carry out its part of the contract, Brown in the latter part of the year 1911 perfected a tube, the patent and applications for patent on which is the important subject-matter of this suit.

On May 21, 1912, Brown entered into a further agreement with the company, but as a condition precedent to his entering into it required full payment of the back salary claimed to be due him. The company acceded to this demand and paid him the full amount claimed to be due under the old contract. In accepting this payment Brown waived the prior defaults of the company and left the first contract proprio vigore, and the company was thereafter entitled to all of Brown's improvements and betterments on the inventions assigned to the company. Whatever the terms and conditions of the new contract of 1912, the improvements on the tube and its process of manufacture which Brown had worked out during the life of the old contract belonged to the company, regardless of whether or not applications had been actually filed for patents.

Now as to the contract of May 21, 1912, it recites the transfer by Brown to the company of the older patents and a covenant for the transfer of all applications and patents made or obtained in the future. It also provided that Brown was to remain with the company and give it the benefit of all improvements and betterments, both in the tube and its process of manufacture, and for this service he was to receive, "in lieu of the salary heretofore paid," compensation by way of royalties, with the further provision that Brown could, upon default by the company, cancel, annul, and terminate the contract. These provisions, when taken together with the obvious intention of the parties under the old contract, would hardly leave any room for doubt as to the company's rights, had it complied with its agreement and paid the royalties. Upon this breach of the second contract, Brown served notice on the company of his intention to rescind the contract; and the company, failing to redeem itself under the provision made, will not, of course, be entitled to any benefits from whatever improvements or better-

ments Brown may have made in the tube subsequent to the breach of the second contract.

The provision for royalties "in lieu of the salary" theretofore paid for services was simply a change in the manner of payment for the convenience of the company, and this is the only part of the contract subject to rescission. The company's rights to the patents, improvements thereon, and applications, present and future, had become fixed, and his rescission was unavailing, except, of course, to give him (Brown) the absolute right to whatever improvements or betterments he had made subsequent to the breach of the second contract.

Counsel may prepare the proper orders.

Duell, Warfield & Duell, of New York City (R. W. France, of New York City, of counsel), for appellants.

Prindle, Wright & Small, of New York City, for appellee.

Before COXE, Circuit Judge, and VEEDER and MAYER, District Judges.

PER CURIAM. Affirmed, with costs, on the opinion of Judge Sheppard.

STAHLBRODT CO. v. FORD MOTOR CO.

(District Court, W. D. New York. March 14, 1916.)

No. A-96.

1. PATENTS ⇐328—VALIDITY AND INFRINGEMENT—WIND SHIELD FOR MOTOR VEHICLES.

The Samuel reissue patent, No. 13,574 (original No. 879,195), for a wind shield for motor vehicles, is within the invention of the original patent, the claims being narrower, was not anticipated, and discloses invention; also *held* infringed.

2. PATENTS ⇐141—REISSUE—DEPARTURE FROM ORIGINAL PATENT.

A reissue patent is not invalid because the claims include features not specifically claimed in the original patent, where they were fully described in the specification and their relation to the other parts shown.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 206–213; Dec. Dig. ⇐141.]

In Equity. Suit by the Stahlbrodt Company against the Ford Motor Company for infringement of reissue letters patent No. 13,574 (original No. 879,195), for a weather screen for motor and similar vehicles, granted to Henri Saul Samuel June 10, 1913. On final hearing. Decree for complainant.

Church & Rich, of Rochester, N. Y. (Melville Church, of Washington, D. C., of counsel), for complainant.

Whittemore, Hulbert & Whittemore, of Detroit, Mich. (James Whittemore, of Detroit, Mich., of counsel), for defendant.

HAZEL, District Judge. [1] This action is for alleged infringement of reissue patent No. 13,574, dated June 10, 1913, and issued to complainant company on application filed in September, 1912, for improvements in wind shields or weather screens for motor cars and

similar vehicles. The original patent, No. 879,195, was issued February 18, 1908, on application filed December 21, 1905, and described a shield or screen made of two parts—a lower part, secured to the upper edge of the dashboard of an automobile and inclining inwardly and upwardly therefrom, bolted to brackets on the dashboard, and supported on the inner side by standards and studs, the latter extending from the upper edge downwardly to the floor of the automobile; and an upper part, a glazed sash, hinged to the top of the lower section. Curved slots, engaging thumb screws on the upper section, were provided at the sides for locking the upper part at any point of adjustment from its vertical position outwardly and downwardly. The lower section extended inwardly and upwardly from the dash near the level of the steering wheel, and by such inclination protected the hands of the driver from dust and wind, without, however, interfering with the steering movements.

In April, 1912, complainant was apprised of the fact that the principal claims of the original patent were inoperative and invalid because the British patent of 1901, in evidence, to Lanchester, No. 25,121, disclosed broadly a lower inclined part with an adjustable glazed upper part resting upon it, and thereupon said original patent was surrendered and the reissue patent allowed.

The claims relied upon are the second, third, and fifth, reading as follows:

"2. A wind guard for vehicles consisting of a lower stationary and rigidly supported flat portion extending transversely of the vehicle and inclined rearwardly in proximity to the steering wheel or handle, an upper transparent flat portion adjustably and permanently hinged upon the lower portion and adapted to be folded forwardly against the latter into parallelism therewith, and means for maintaining the portions in one of their positions of relative adjustment, said means being arranged laterally so as to clear the parts when folded.

"3. In a wind shield for a motor or similar vehicle, the combination with the dash or front part of the vehicle, of a lower member fixed to the dash and extending inwardly and upwardly to a level near that of the steering wheel or handle, the rods *D* for maintaining the member in such fixed and rigid position arranged rearwardly of the member and connected thereto and to a rigid part of the vehicle, a second flat and rigid member having a permanent hinged connection with the lower member and extending vertically upward from the lower member in front of the driver's face and means arranged at the ends of the members for adjusting the upper member relatively to the lower member."

"5. In a wind shield for motor or similar vehicles, the combination with the dash, of a lower flat member rigidly fixed at its front or lower edge to the upper edge of the dash and extending at an inclination rearwardly and upwardly to a level near that of the steering wheel or handle, the rods *D* for maintaining the member in such fixed and rigid position arranged rearwardly of the member and connected thereto at its respective ends and to a rigid part of the vehicle, a second flat and rigid member having a permanent hinged connection with the lower member to turn relatively thereto on an axis substantially coincident with its lower edge and with the upper edge of the lower member, said upper member normally extending upwardly from the lower member in front of the driver's face, but being adapted to fold forwardly against the lower member, and means arranged at each end of the members for adjusting the upper member relatively to the lower member, each comprising interlocking devices connected to the members respectively at points adjacent to their axis of relative movement."

The elements of claim 2 are: (1) A lower flat part inclining inwardly; (2) an upper flat part (transparent) adapted to fold forwardly; and (3) means for adjusting the same at different angles. Claim 3 includes rods *D* arranged rearwardly for holding the lower part stationary, and means for hinging the two parts together, the lower part extending upwardly in front of the driver's face, and also means at the sides for maintaining adjustment. Claim 5 specifies in detail the points of connection and the arrangement of the elements and is more limited than the others.

The defenses are that both the reissue and the original patents are void for want of invention and are anticipated; that the reissue patent is invalid because it is for a different invention than the original patent, the claims having been broadened; and noninfringement.

I think the reissue patent is narrower than the original, which broadly included any wind guard attachment for automobiles in which an upper section was offset rearwardly from an inclined lower position, thus providing a barrier for the occupants of the car against the wind caused by the motion of the car. It was not, however, objectionable for want of definiteness, as contended, because of failure to show the steering wheel in the drawings, as the skilled in the art concededly were well aware of the ordinary position of the steering wheel in automobiles.

To anticipate the reissue patent the defendant relies on Kerr patent, No. 812,930, of February 20, 1906, and the Lanchester British patent, No. 25,121, of 1901; but I am of the opinion that such patents are not anticipatory. In both the Kerr structure and the complainant's structure means for supporting the shield were made independent of the upper section; but, while the upper section of the Kerr shield was adjustable for folding when not in use, the lower part was not inclined inwardly as in complainant's shield, so that, when protection from the wind was desired, the Kerr shield was positioned in a strictly vertical plane directly over the dash, thus offering positive resistance to the wind, causing currents to pass around its edges rearwardly to the occupants of the car.

Another objectionable feature of the Kerr shield was the method of bracing it with long rods extending forward to the hood of the engine, interfering somewhat with ready access thereto, which were not only unsightly, but subject to great vibration when the car was in motion. Complainant's arrangement of the supporting rods inside the car, extending downwardly to the floor towards the driver, was a modest patentable improvement, and its inclined arrangement of the two sections of its shield achieved a new result.

The Lanchester patent describes a crude device for protecting the driver from inclement weather. It has a lower section, which seems to be an extension of the dash of the vehicle, but which, when in use, inclines diagonally towards and close to the driver, resting on a narrow shelf, to which it was hinged at its lower edge; its arrangement being such as to require swinging the lower section in passing to and from the vehicle. The construction and appearance of the upper member indicates that it was used only on occasions when the weather was

extremely indifferent; it was not a fixed or permanent structure at all, and when in use was hooked to the lower member, engaging clips or slots so that (quoting from the specification) it can "'be made to take up a vertical position or to slope in either direction by means of a telescopic stay." The upper portion "may be lifted out of engagement with the lower dashboard." The Lanchester shield was a failure, and never appealed to users of automobiles. The inferences to be drawn from it are strongly in favor of complainant's contention that it is not entitled to material consideration, except in justification of the limited claims in issue.

[2] Defendant also challenges the validity of the reissue on the ground that certain features were added to the old combination, namely, the adjusting means at the ends of the sections and the bracing rods *D* on the rear side of the shield, instead of in front. While such adjusting means and bracing rods were not specifically included in the surrendered claims, the original specification nevertheless referred to them, together with their relationship to the operativeness of the wind shield, in such a clear way that I am impressed with the view that the inclusion of such means in the reissue claims 2, 3, and 5 was not a departure from the invention of the original patent. Topliff v. Topliff, 145 U. S. 156, 12 Sup. Ct. 825, 36 L. Ed. 658. There are numerous citations in defendant's brief bearing upon the contention that the reissue was not for the same invention as the original; but such adjudications are inapposite, as they disclose an absence of identity between the features described in the original patents and those of the reissue patents. See Specialty Match. Co. v. Ashcroft Mfg. Co. (D. C.) 205 Fed. 761; Id., 213 Fed. 35, 129 C. C. A. 629; Edison v. American Mutoscope Co., 114 Fed. 926, 52 C. C. A. 546.

The invention in suit, it is true, was simple, especially in view of the Kerr patent; but I think it possessed patentable novelty and should be protected. Its sightliness, to say nothing of the convenience in handling the upper section, and the protection from the wind afforded by it, speedily secured favor for it in the eyes of manufacturers and users of automobiles.

There is no substantial difference between the wind shield sold and used by the defendant Ford Motor Company in connection with its automobile and that described in the reissue. In defendant's 1913 model the incline of the lower section is somewhat slighter than that of the patent in suit; but this is an immaterial difference, as lessening of wind resistance was nevertheless secured. The upper section was not brought as close to the steering wheel as in complainant's structure, but the shield in its entirety embodied the elements of the combination of claims 2, 3, and 5 in suit; that is, it embodied means for inclining the lower section and hinging it to the upper, and supported both by rods extending to the floor of the automobile rearwardly and downwardly, and means (though not the specific means of complainant) for maintaining adjustment. In the 1914 model marketed by defendant the same combination of elements was employed, save that the upper section was folded from the vertical to a horizontal or parallel position rearwardly and towards the driver; but such varia-

tion was easily made, and does not avoid infringement. Indeed, such manner of folding the upper section was suggested in the specification in suit.

There is nothing in the record to show that the reissue should be held invalid for delay in applying for it, nor is the doctrine of intervening rights applicable to this case. Baldwin v. Abercrombie & Fitch Co. (D. C.) 227 Fed. 455; Motion Picture Patents Co. v. Laemmle et al. (D. C.) 214 Fed. 787.

The reissue patent is valid, the claims 2, 3, and 5 are infringed by the wind shield used and sold by the defendant company, and complainant is entitled to a decree and accounting, with costs.

SYRACUSE CHILLED PLOW CO. v. LEROY PLOW CO.

(District Court, W. D. New York. February 18, 1916.)

No. 128B.

1. PATENTS ⟸328—VALIDITY AND INFRINGEMENT—SULKY PLOW.
   The Wiard patent, No. 865,141, for a sulky plow, construed, and *held* infringed.

2. PATENTS ⟸226—INFRINGEMENT.
   Infringement is not avoided because the infringing construction is not adapted to attain all the benefits of the patented device.
   [Ed. Note.—For other cases, see Patents, Cent. Dig. § 357; Dec. Dig. ⟸226.]

In Equity. Suit by the Syracuse Chilled Plow Company against the Leroy Plow Company. On final hearing. Decree for complainant.

Parsons & Bodell, of Syracuse, N. Y. (Karl E. Wilhelm, of Buffalo, N. Y., and Arthur E. Parsons, of Syracuse, N. Y., of counsel), for plaintiff.

Church & Rich, of Rochester, N. Y. (Frederick F. Church, of Rochester, N. Y., of counsel), for defendant.

HAZEL, District Judge. The bill charges infringement of patent No. 865,141, granted to H. Wiard September 3, 1907, relating to reversible sulky plows. The object of the inventor was to furnish means for connecting the plow beams at their front ends to a substantially level hitch bar or draft member, as the specification has it, to increase the efficiency of the plow. The separate elements of the combination were old. The validity of the patent is not disputed. It is, however, urged that the claims in issue are limited to a sulky plow in which the ends of the beams are held in a horizontal plane under all circumstances, and that, as defendant does not so hold them, infringement was not proven.

[1] It is shown that prior to the improvement in question the complainant company manufactured and sold sulky plows in accordance with the description contained in patent No. 372,884, a prior expired patent granted to Wiard & Bullock and owned by complainant, which

were identical with the one described in the patent in suit, save that the earlier plow used a shifting hitch and bar in front of the beams, with loose links between the clevis and the eye in the hitch bar; the idea at that time being that the plow would work better with a loose or flexible shifting hitch; but this proved erroneous, and, though such arrangement was used for many years, it was never satisfactory, as it failed to shift readily, or to stay shifted when the horses were drawing back the plow to turn for beginning another furrow. It was often necessary to loosen the shifting clevis from the pull of the team, which had a tightening tendency, rendering it difficult for the plowman to move it downward from the rod or bar. Various changes were made at different times to remedy such defects or inefficiencies, but without avail, until the disclosures by the patentee herein.

The shift bar of the patent in suit is made straight throughout its length from one front beam to another, and horizontal movable members having eyes connecting the hitch bar are provided to support it coaxially at the end. This arrangement enables holding it substantially rigid and approximately horizontal when the other mechanism tends to move it, and prevents it from holding to the bar when the front ends of the plow beam are either lifted from the ground or lowered for plowing. The specification says:

"When a plow is in its operative or depressed position, the front end of the beam carrying such plow is in advance of the corresponding end of the other beam, and since each member *6* holds one end of the bar *17* from substantial vertical movement relatively to the end of the plow beam comprising member, said bar *17* is held by the members *6* in a substantially horizontal position and inclines rearwardly from the front end of the beam carrying the plow in use. Consequently the draft member *20*, under the strain transmitted thereby to the plow, moves automatically lengthwise of the bar *17* to the desired position in advance of the beam from which the bar *17* inclines rearwardly. This invention, although simple in construction, greatly reduces the necessity of attention to the draft connections, and enhances the utility and efficiency of the plow."

The claims in controversy are the first, second, fourth, fifth, seventh, and eighth. They differ from the prior Wiard & Bullock patent, in that the forward ends of the beams therein described are held at substantially the same level, and that the hitch bar is held from vertical movement relative to its beam end and to the hitch and eyes carrying it.

Defendant's contention that the claims are limited to a maintenance of the beams in the same horizontal plane is not substantiated. The patentee was the first to arrange a shift bar in a substantially horizontal position between the plow beams to overcome the difficulties in plowing, and accordingly a plow substantially embodying the improvement and achieving the identical beneficial result comes I think within the scope of the claims in suit. Therefore any slight differences between the position of the shift bars of complainant's and defendant's plows are not of material importance and do not avoid infringement. It is clear enough that there are advantages in holding the hitch bar of complainant's structure approximately horizontal. As defendant's structure has the detailed arrangement of eyes at the ends of the beams, together with a straight bar to hold the ends of the beams coaxially to

prevent a substantial upward or downward movement in relation to the main part of the beam, it achieves substantially the same result as the complainant's. In the former there are the same raising and lowering mechanisms as in the latter, except that the stop device for limiting the upward movement of the beam at a point rearward of the front end is somewhat different; but such difference is immaterial, as the combination of elements in both structures is substantially the same, and in each the front ends of the beams occupy a substantially horizontal plane. Although there are adjustments in defendant's plow which function to hold the end of the hitch bar of the idle plow slightly higher than that of the working plow, I nevertheless believe that the position of the bar is nearly or approximately horizontal and within the intendment of the claims in suit.

[2] It was contended by defendant that in the operation of complainant's plow the sliding clevis shifted whenever the lever was rotated to drop one of the plows, and that therefore the mode of operation was different from defendant's; but I think the evidence fairly shows the contrary. There was testimony regarding the height of the pole in defendant's plow, which it was urged determined the plane of the forward ends of the beams under working conditions; but, as the pole is in my estimation substantially level in both plows when in use, such testimony can have no persuasive bearing to negative the asserted infringement. Of course the pole may be raised or improperly adjusted to make it impossible to use the shifting hitch with advantage; but in such case it is evident that the user of the plow would not obtain the beneficial results of the patent in suit. It makes no difference that defendant does not adapt its construction to attain all the benefits of the patent in suit. It has all the means to attain the result, and presumably it was its intention to operate the plow in the same way as complainant's operated. Cimiotti Unhairing Co. v. Bowsky (C. C.) 95 Fed. 474; Hubbard v. King Ax Co. (C. C.) 89 Fed. 713; National Binding Mach. Co. v. James D. McLaurin Co. (C. C.) 186 Fed. 996. Other points to negative infringement were argued, but they are unsubstantiated.

My conclusion is that the patent in suit was for a patentable improvement over the prior Wiard & Bullock patent, and though the claims are of narrow scope, and restricted to (1) means for maintaining the shift bar substantially or approximately horizontal, and (2) means at the end of the bar for raising and lowering the plows without causing a binding of the shift bar, I am of opinion that the defendant's plow, though not employing the identical means, employed equivalent means operating upon the same principle and achieving the same result and advantages.

Accordingly, a decree, with costs, may be entered in favor of complainant, holding the claims valid and infringed.

UNITED STATES ex rel. LYNN v. HAMILTON et al.

(District Court, W. D. New York. November 4, 1915.)

1. INDIANS ⟸32—FEDERAL GOVERNMENT—AUTHORITY OVER.
Though states have frequently denied the exclusive power of the federal government over Indians living under tribal conditions in reservations within the borders of the state, the federal government has and exercises such power; the federal government alone having made treaties with the Indian tribes before they became weakened.
[Ed. Note.—For other cases, see Indians, Cent. Dig. §§ 4, 52, 53, 57, 58; Dec. Dig. ⟸32.]

2. INDIANS ⟸3—TREATIES—VALIDITY—POWER OF CONGRESS.
Despite early Indian treaties, Congress may govern Indian tribes by direct legislation abrogating or superseding the Indian treaties; the power first being declared by Act March 3, 1871, c. 120, 16 Stat. 566, Rev. St. § 2079 (Comp. St. 1913, § 4034), and subsequently asserted by Act March 3, 1885, c. 341, § 9, 23 Stat. 385, now Criminal Code (Act March 4, 1909, c. 321) § 328, 35 Stat. 1151 (Comp. St. 1913, § 10502), relating to the punishment of Indian offenders.
[Ed. Note.—For other cases, see Indians, Cent. Dig. §§ 5–7, 11; Dec. Dig. ⟸3.]

3. INDIANS ⟸32—STATES—POWERS OF.
As the federal government has exclusive power over Indians living in tribal conditions on reservations within the borders of the state, the states cannot, though Criminal Code, § 328, is quite rudimentary, applying only to the most heinous offenses, extend their own laws to Indians on the theory that, Congress not having completely dealt with the subject, the states might deal with the matter, for, as Congress had exclusive authority, it must be assumed that Congress intended to impose no other restrictions, on the ground of more primitive civilization of the Indians; therefore an Indian living in tribal conditions on a reservation in New York is not liable for a violation of the New York state Conservation Act (Laws 1911, c. 647, as amended by Laws 1913, c. 508) in fishing on the reservation with a net without the required license.
[Ed. Note.—For other cases, see Indians, Cent. Dig. §§ 4, 52, 53, 57, 58; Dec. Dig. ⟸32.]

4. INDIANS ⟸32—TRIBAL ORGANIZATION—GUARDIANSHIP OF FEDERAL GOVERNMENT.
Only the federal government can terminate the tribal organization of Indians living on reservations, and its guardianship over them.
[Ed. Note.—For other cases, see Indians, Cent. Dig. §§ 4, 52, 53, 57, 58; Dec. Dig. ⟸32.]

Habeas Corpus. Petition by the United States of America, on relation of John D. Lynn, for a writ against Frederick W. Hamilton and others. Writ issued, and the defendant Indians charged with violating the New York Conservation Law ordered discharged.

Habeas corpus to inquire into the legality of the arrest and imprisonment of Wilford Kennedy and Nelson Hare, charged with violation of the Conservation Law of the state of New York. Upon the hearing the relator appeared by George P. Decker, Esq., and the respondents by A. F. Jenks, Deputy Attorney General. After hearing oral arguments, the court held the case to enable counsel to prepare and file with the court written briefs on the law questions involved. The

Attorney General, having reached the conclusion that the prisoners should be discharged, has prepared the following memorandum to be filed with the other papers herein:

General Statement.

Wilford Kennedy and Nelson Hare are Indians by blood and members of the Seneca Nation, residing on the Cattaraugus reservation, located in the counties of Erie and Cattaraugus in the state of New York. These Indians were arrested April 21, 1915, by Leon W. Paxon and Albert Stadelmeir, state game protectors, while fishing with a net in Cattaraugus creek and within the boundaries of the Cattaraugus reservation, and were charged with fishing with a net or seine without a license, and in violation of section 176 of the Conservation Law of the state of New York (Laws 1911, c. 647, as amended by Laws 1913, c. 508). While said Indians were being arraigned before Chief Justice William Brennan in the City Court of Buffalo, a writ of habeas corpus was sued out at the instance of the United States government to test the legality of the arrest and imprisonment. The facts, as above outlined are undisputed.

[1] The precise question is whether the Conservation Law of the state of New York extends to Indians maintaining their tribal relations and residing upon an Indian reservation within the limits of the state. The status of Indian tribes and their relation to the federal and state governments have frequently been subjects of judicial investigation. It is necessary to examine somewhat in detail the early history of these tribes and the dealings of the general and state governments with them.

At the time of the formation of the federal government several of the Indian tribes found here were powerful and warlike, and it was found expedient to treat them as possessing some of the attributes of sovereignty, and to deal with them as nations by entering into treaties with them. Later treaties with the Indian tribes were superseded by federal legislation, by which the remnants of the tribes were subjected to the general government and located upon Indian reservations.

It has been the policy of the general government to guarantee to the Indian tribes control over their internal and social affairs, including juisdiction, in certain cases, to punish crimes when committed upon the reservations. This policy was manifested by Congress in the enactment of section 2146 of the Revised Statutes (Comp. St. 1913, § 4149); and for the purpose of their protection, and to allow them to pursue their accustomed life unmolested, Congress, under its constitutional power to regulate commerce with the Indian tribes, passed appropriate legislation forbidding general intercourse between them and the whites.

I. The attitude of certain states.

Several of the states, however, did not concede that the power granted to the federal government to make treaties and to regulate commerce with the Indian tribes deprived them of jurisdiction over them when residing upon reservations within their borders, and therefore sought by statute to extend their laws over them. Thus in State v. Tassels, Dud. 239, a Georgia case, it was held that Indians were not constitutional objects of the treaty-making power of the United States, but were wards of the state within whose boundaries they were domiciled. In State v. Ta-cha-na-tah, 64 N. C. 614, it was held that the criminal laws of North Carolina extended over the Indian tribes. A similar doctrine was laid down by the Supreme Court of Wisconsin. State v. Doxtater, 47 Wis. 278, 2 N. W. 439; State v. Harris, 47 Wis. 298, 2 N. W. 543. And in New York it was held by the County Court of Cattaraugus County that Indians residing upon reservations within the state were subject to the Forest, Fish and Game Law of the state. People v. Pierce, 18 Misc. Rep. 83, 41 N. Y. Supp. 858.

II. The federal government has always claimed guardianship and control over the Indian tribes.

It clearly appears from the federal decisions that the Indian tribes, while maintaining their tribal organizations and residing on reservations set apart

for them by, or with the consent of, the general government, have always been regarded as wards of the nation, and not subject to state laws, even when their reservations are located within the borders of a state.

One of the first cases in which the status of Indian tribes was considered by the Supreme Court of the United States is Cherokee Nation v. State of Georgia, 5 Pet. 1, 8 L. Ed. 25. This was a case where the Cherokee Nation moved for an injunction to prevent the enforcement of certain acts of the Legislature of the state of Georgia in the territory of the Cherokee Nation. This tribe claimed the right to proceed in the Supreme Court of the United States as a foreign state against the state of Georgia. The injunction was denied. The court said: *"The condition of the Indians in relation to the United States is, perhaps, unlike that of any two other people in existence.* * * * Though the Indians are acknowledged to have an unquestionable, and heretofore unquestioned, right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government, yet it may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession, when their right of possession ceases. *Meanwhile, they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.* They look to our government for protection, rely upon its kindness and its power, appeal to it for relief to their wants, and address the President as their great father."

And so in the case of Worcester v. Georgia, 6 Pet. 515, 8 L. Ed. 483, where the plaintiff had been convicted of the offense of residing in the Cherokee Nation without a license, contrary to a statute of the state of Georgia. The United States Supreme Court set aside the conviction. Chief Justice Marshall in a most able and exhaustive opinion said: "The Cherokee Nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force. * * * The whole intercourse between the United States and this nation is, by our Constitution and laws, vested in the government of the United States."

Later the states of New York and Kansas passed statutes taxing the lands of Indians within their borders, which statutes were upheld by the courts of those respective states. These decisions were both reversed by the United States Supreme Court. In the case of The Kansas Indians, 5 Wall. 755, 18 L. Ed. 667, the court said: "If the tribal organization of the Shawnees is preserved intact, and recognized by the political department of the government as existing, then *they are a 'people distinct from others,'* capable of making treaties, *separated from the jurisdiction of Kansas, and to be governed exclusively by the government of the Union. If under the control of Congress, from necessity there can be no divided authority.* If they have outlived many things, they have not outlived the protection afforded by the Constitution, treaties, and laws of Congress. It may be that they cannot exist much longer as a distinct people in the presence of the civilization of Kansas, *'but until they are clothed with the rights and bound to all the duties of citizens' they enjoy the privilege of total immunity from state taxation.*"

The case of The New York Indians, 5 Wall. 761, 18 L. Ed. 708, was decided at the same time.

III. The power of Congress to govern Indian tribes by legislation, and thereby to abrogate or supersede Indian treaties has been upheld by the Supreme Court.

[2] This power was first exercised in 1871. By an act of Congress of March 3d of that year section 2079 was added to the Revised Statutes (Comp. St. 1913, § 4034), as follows: "No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty." Since 1871 Congress has governed the Indian tribes by direct legislation.

For many years Indian tribes residing on reservations were permitted to

have jurisdiction over their internal and social affairs, and were not in this respect interfered with by the federal government. The policy of the government in this respect has been uniform. Later, however, it appeared to Congress that the policy of allowing the tribes to deal with their criminals according to their local customs was not conducive to the best interest of the tribes themselves or the white population surrounding them. Crimes of a more serious nature, committed by one tribal Indian against another, were not dealt with so as to meet the seriousness of the situation.

The necessity for some action on the part of the federal government was forcibly brought to its attention in the case of Ex parte Crow Dog, 109 U. S. 556, 3 Sup. Ct. 396, 27 L. Ed. 1030. In that case the petitioner, a member of the Sioux Nation of Indians, was convicted in the District Court of Dakota for the murder of a member of the same tribe. On appeal to the Supreme Court of the United States the conviction was set aside, for the reason that under section 2146 of the Revised Statutes one Indian committing a crime against another Indian could not be punished in the courts of the United States.

This case gave rise to the passage of section 9 of the Act of Congress of March 3, 1885, now known as section 328 of the United States Criminal Code (Act March 4, 1909, c. 321, 35 Stat. 1151 [Comp. St. 1913, § 10502]). That act provides: "*All Indians* committing against the person or property of another Indian or other person any of the following crimes, namely, murder, manslaughter, rape, assault with intent to kill, arson, burglary and larceny, within any territory of the United States, and either within or without an Indian Reservation, shall be subject therefor to the laws of said Territory relating to said crimes, and shall be tried therefor in the same courts and in the same manner and shall be subject to the same penalties as are all other persons charged with the commission of said crimes, respectively; and the said courts are hereby given jurisdiction in all such cases; *and all such Indians* committing any of the above crimes against the person or property of another Indian or other person *within the boundaries of any state of the United States, and within the limits of an Indian Reservation, shall* be subject to the same laws, tried in the same courts and in the same manner, and subject to the same penalties as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States." This enactment specifically vested the federal courts with exclusive jurisdiction of the crimes therein mentioned, even when committed upon reservations wholly within the states.

The constitutionality of this act was immediately tested in the United States Supreme Court in the case of United States v. Kagama, 118 U. S. 375, 6 Sup. Ct. 1109, 30 L. Ed. 228. The question arose upon a demurrer to an indictment against two Indians for the murder of another Indian on the Hoopa Valley reservation in the state of California. The defendant in error contended that the act was unconstitutional as being an invasion of state rights. The court held the act *to be constitutional.* In this case the status of tribal Indians in their relation to the federal and state governments is completely developed and defined in plain and unmistakable language.

In the learned opinion delivered by Mr. Justice Miller, upholding the constitutionality of the statute, he says: "It seems to us that this [meaning the act of 1885, above referred to] is within the competency of Congress. These Indian tribes are *the wards of the Nation.* They are communities dependent on the United States; dependent largely for their daily food; dependent for their political rights. They owe *no allegiance to the states,* and receive from them no protection. Because of the local ill feeling, the people of the states where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the federal government * * * and the treaties in which it has been promised, *there arises the duty of protection, and with it the power.* This has always been recognized by the executive, and by Congress, and by this court, whenever the question has arisen." In concluding his opinion he says: "The power of the general government over these remnants of a race once powerful, now weak and diminished in numbers, *is necessary to their protection,* as well as to the safety of those among whom they dwell. *It must exist in that government, because it never has existed anywhere else,* because

the theater of its existence is within the geographical limits of the United States, and because it has never been denied, and because *it* alone can enforce its laws on *all* the tribes."

The opinion also makes it clear that the decision is not placed upon the ground of the constitutional grant of power to regulate commerce with the Indian tribes, but upon the broad ground that the federal government, because of its peculiar relationship to the Indian tribes, is bound to assume exclusive control over them. This case has been repeatedly cited with approval by the United States Supreme Court in recent decisions, and the policy of the federal government therein laid down has been strictly followed.

In the case of Cusick v. Daly, 212 N. Y. 183, 105 N. E. 1048, the Court of Appeals followed the Kagama Case. It was contended in that case that there was a distinction between Indian tribes whose reservations are the direct gift of the federal government and those whose reservations are derived from a state or from other sources. Judge Werner, writing for the court in this connection, said: "We find no such distinction in the statute, and we can think of none that logically differentiates one from the other."

IV. The principle that a state may act in the absence of affirmative legislation on the part of Congress is not applicable to the government of tribal Indians.

[3, 4] It might be claimed that a state may exert its authority over tribal Indians, except as to those major crimes specifically mentioned in section 328 of the United States Criminal Code, on the theory that, there being no express inhibition against the state, Congress by inaction has tacitly authorized it so to act. This is a doctrine well recognized and often applied to cases which involve questions of interstate commerce, and even to other matters. It is predicated upon the theory that where the states have original jurisdiction over a subject, but, by adopting the federal Constitution, granted to the federal government power to deal with that subject, the jurisdiction of Congress is not exclusive until Congress has, by appropriate legislation, exercised its power.

This doctrine was applied in the case of Manchester v. Massachusetts, 139 U. S. 240, 11 Sup. Ct. 559, 35 L. Ed. 159, where the Supreme Court upheld the right of the state, in the absence of federal legislation upon the subject, to control the menhaden fisheries in Buzzards Bay, a place concededly within the admiralty and maritime jurisdiction of the United States. It has never been applied to matters which, from necessity, rest exclusively with the federal government—for example, the power to coin money, establish post offices, declare war, etc. The application of this principle to the government of Indian tribes has never found support in the decisions of the courts, but the doctrine was alluded to in the opinion of Judge Werner in the Daly Case, supra. No support for such a contention can be found in the opinion of Mr. Justice Miller in the Kagama Case. *If the Indian tribes are wards of the federal government and owe no allegiance to any state, and if the power over the Indian tribes rests with the federal government because it exists nowhere else, and if from necessity there can be no divided authority, then the jurisdiction of Congress must be exclusive.*

V. Federal and state authorities hold that state laws do not apply to Indians living in their tribal relations.

In the case of In re Blackbird (D. C.) 109 Fed. 139, where an attempt was made to punish a tribal Indian for a violation of the game laws of the state of Wisconsin, Judge Bunn, of the United States District Court, after fully reviewing the Kagama Case, said: "This case should and does settle the question by the highest authority that, Congress having taken jurisdiction of crimes committed by Indians within the limits of an Indian reservation, that jurisdiction *is exclusive, and that the state laws do not extend to these cases.*"

The doctrine is well enunciated in the case of State v. Campbell, 53 Minn. 354, 55 N. W. 553, 21 L. R. A. 169, where an attempt was made to punish a tribal Indian for committing adultery. Judge Mitchell, speaking for the court, said: "*It would never do to have both the United States and the state legislating on the same subject.* By the act of 1885, presumably, Congress

has enumerated all the acts which in their judgment ought to be made crimes when committed by Indians, in view of their imperfect civilization. For the state to be allowed to supplement this by making every act a crime on their part which would be such if committed by a member of our more highly civilized society would be not only inappropriate, but also practically to arrogate the guardianship over these Indians which is *exclusively vested in the general government.*"

In the case of Peters v. Malin (C. C.) 111 Fed. 244, was involved the question whether the plaintiff, a tribal Indian, had violated a statute of the state of Iowa. It was there held that "so long as these Indians retain their tribal relation and continue to be wards of the national government, the *control* and *management* of them with respect to their tribal affairs is in the federal government, irrespective of the question of the title of the lands upon which for the time being they may be located." In this opinion Judge Shiras advances a most cogent reason for upholding the exclusive jurisdiction of the federal government when he says: "It is apparent that, if the various provisions of the laws of Iowa are to be held applicable to these Indians and their property, *then their tribal condition will be speedily broken up, not in pursuance of the acts of the national government,* but through the enforcement of the laws of the state. * * *" And further on in his opinion he adds: "Although these Indians reside within the territorial limits of the state of Iowa, they are, so far as their ordinary life is concerned, *without the plane of the legislative jurisdiction of the state.*"

VI. Power to terminate federal guardianship of tribal Indians and to break up the tribal organization is exclusively in the federal government.

From the more recent enactments of Congress, relative to Indian allotments, it is apparent that a new policy looking towards the breaking up of the tribal relations, freeing them from the national guardianship, and charging them with the duties and obligations of citizens is being inaugurated. Congress has this power, and may abandon its guardianship at any time. The states, however, have no power to disintegrate tribal relations by extending state laws over tribal Indians. As was said in the case of Matter of Heff, 197 U. S. 499, 25 Sup. Ct. 508, 49 L. Ed. 848: "It is for Congress to determine when and how the relationship of guardianship shall be abandoned. It is not within the power of the courts to overrule the judgment of Congress."

VII. Conservation laws do not extend over the Indians residing in tribal relations upon reservations within the borders of New York state.

Accepting as the law of the land the principles laid down by the courts of the United States as to the status of the tribal Indians within its borders, there seems to be no escape from the conclusion that the Conservation Law of the state of New York does not apply to tribal Indians residing on their reservations within the territorial limits of the state.

HAZEL, District Judge. The petition recites the arrest and imprisonment of Wilford Kennedy and Nelson Hare, tribal Indians of the Seneca Nation living on the Cattaraugus Reservation, for violation of the Conservation Law of the state of New York, in that on April 21, 1915, they were fishing with a net in Cattaraugus creek, within the boundaries of the Cattaraugus Indian reservation, in violation of section 176 of said law. The Indians were arrested by state game protectors, and arraigned before Judge William Brennan at Buffalo, whereupon a writ of habeas corpus was granted at the instance of the United States attorney to test the legality of the arrest and imprisonment. The case was ably argued before me at the Rochester term of court by A. F. Jenks, Esq., Deputy Attorney General, appearing for the state of New York, and by George P. Decker, Esq., appearing as counsel for the United States, and time for filing briefs was allowed. The Deputy Attorney General maintained that the state

of New York had jurisdiction over tribal Indians for violations of the Conservation Law on their reservations, but recently I have received from him an admirable opinion, based on an examination by him of the authorities bearing upon the disputed question of jurisdiction, in which he reaches the conclusion that the position of the United States government was right, and that the New York state Conservation Law does not apply to tribal Indians living on reservations within the territorial limits of the state. I adopt such opinion, which is filed herewith, and concur in the conclusions therein reached.

An order may be entered allowing the writ and discharging the defendants.

In re FEDERAL MAIL & EXPRESS CO.

(District Court, S. D. New York. June 26, 1916.)

1. BANKRUPTCY ⊂=114(1)—RECEIVER—APPOINTMENT—POWER OF COURT.
A receiver is an arm of the court, and a bankruptcy court, after petition is filed, has jurisdiction to appoint a receiver, though such appointment should not be made in the absence of special controlling circumstances.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 164, 165; Dec. Dig. ⊂=114(1).]

2. BANKRUPTCY ⊂=114(1)—RECEIVERS—APPOINTMENT—ASSIGNMENT.
Where an insolvent made a general assignment, and the assignee, who was a chattel mortgagee entitled on default to take possession of part of the insolvent's property, went into possession, the bankruptcy court will, upon the filing of a petition against the insolvent, appoint a federal receiver to conserve the insolvent's property, for to allow the estate to be administered by an assignee selected by the bankrupt would be to the prejudice of creditors, particularly as the assignee, however upright, was interested adversely to general creditors.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 164, 165; Dec. Dig. ⊂=114(1).]

3. BANKRUPTCY ⊂=60—ACT OF BANKRUPTCY—ASSIGNMENT.
A general assignment by an insolvent is an act of bankruptcy, and will support an adjudication.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 80; Dec. Dig. ⊂=60.]

In Bankruptcy. In the matter of the bankruptcy of the Federal Mail & Express Company. Receiver appointed.

A motion is made for the appointment of a receiver. On June 13, 1916, a general assignment for the benefit of creditors was made to Louis Stern, who was in the business of hay, feed, and grain, followed shortly by an involuntary petition in bankruptcy filed on the 15th day of June, 1916. Stern held a chattel mortgage on property of the alleged bankrupt executed by it on June 15, 1915, to secure the payment of $4,633.10, as evidenced by 12 notes, payable in installments of $200 each. The usual printed form of chattel mortgage used in this city contained a provision permitting the mortgagee, in case of default, to enter the store of the alleged bankrupt and "take and carry away the said goods or chattels, and to sell and dispose of the same at public or private sale, * * * and out of the money arising therefrom retain and pay the said sums above mentioned and all charges touching the same, including counsel fees." Two subsequent chattel mortgages were made to

Louis Ober, one dated January 17, 1916, and filed February 28, 1916, to secure the payment of $3,000, and a further mortgage for the sum of $300, dated May 9, 1916, covering fixtures and all paraphernalia which were not covered by the other mortgages. Within four months Stern has received payments from time to time on account of the mortgage debt aggregating upwards of $1,000. On the 3d of June Stern was paid about $400 for hay and feed delivered the prior month.

Rudolph Marks, of New York City, for petitioning creditors.
Harry L. Ettinger, of New York City, for assignee.
Harry A. Goidel, of New York City, for alleged bankrupt.
James N. Rosenberg, amicus curiæ.

AUGUSTUS N. HAND, District Judge (after stating the facts as above). [1-3] In this case I have discovered nothing which indicates a fraudulent assignment, but it well illustrates the unsatisfactory nature of administration of estates of insolvents through general assignments, which has increased rapidly in this district during the past year. The ordinary method of proceeding is for the bankrupt to choose his assignee, who is frequently some one connected with him by business or family ties, and thus in a measure to control the administration of his estate until the creditors have elected a trustee. In fraudulent cases this method of administration affords the greatest facility for concealment of assets. A person chosen by the bankrupt, even if honest, is not as likely to be as zealous in uncovering wrongful acts of the bankrupt as a stranger chosen by the court, or at the instance of creditors. The method which has been sought for the administration of these bankrupt estates is, first, to have some friendly creditor file a petition in involuntary bankruptcy, and thereafter, on the one hand, to administer the estate under the control of the assignee as the latter may please, and, on the other, to seek the aid of the bankruptcy court to restrain landlords from summary proceedings, to secure examinations under section 21a of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 544 [Comp. St. 1913, § 9606]), and in general to stay any action by the creditors which the bankrupt may find inconvenient. This method, if successful, enables the bankrupt to have his estate administered by a person of his choice, who in many cases conducts his sales under orders of the state court, and practically winds up the estate before a trustee is elected, and thus uses the bankruptcy court purely as a forum where the bankrupt can obtain a discharge from his debts more readily than would be possible under the state insolvency law, where the consent of two-thirds of the creditors is required. This method of administration involves constant problems as to jurisdiction of the respective courts, and in the end secures what many bankrupts desire, the benefits of both the state insolvency law (2 Rev. St. pt. 2, c. 5, tit. 1, art. 8) and the national bankruptcy law, and for the creditors the safeguards of neither.

In the present case I am making no personal criticism of either the assignee, or the bankrupt, or his counsel, but adverting solely to what has become, in my opinion, a most undesirable practice in this community. It must be obvious to any one, and it is certainly becoming evident to any judge of this court, that it is not desirable for a bank-

rupt to have the choice of the man who is to administer his estate. Heretofore we have hesitated to appoint receivers, except in cases of plainly fraudulent assignments, owing to the supposed doctrine of In re Oakland Lumber Company, 174 Fed. 634, 98 C. C. A. 388. In that case a receiver was appointed without notice, and without any proof before the court that the property of the lumber company was perishable, or that it was being dissipated or improvidently cared for, or that the assignee was not a careful, prudent, or responsible person. The court went upon the ground that the appointment of a receiver without notice should only be made in the clearest case, and cited the case of In re Spaulding (not reported), where an oral opinion was delivered that is followed in the Oakland Lumber Company decision. That was a proceeding where a receiver had been appointed in the state court, who had the custody of the property. Far different considerations ordinarily apply in such a case. A receiver appointed by the state court is in every sense the official arm of that court, and while this court, sitting in bankruptcy, has in my opinion exclusive jurisdiction, after a petition has been filed, to control the custody of the property, there can be no reason ordinarily for adding to the expenses by appointing a federal receiver, and such appointment should not, in the absence of special controlling circumstances, be made. That receiver is the choice of a court acting independently of the insolvent, and not of the insolvent himself. It was said in the Oakland Lumber Company Case:

"But fraud cannot be presumed, neither can danger to the property be predicated, of acts which are honest and lawful. It cannot be presumed that an assignee under a state law intends to plunder the fund he is appointed to administer. Unless something be shown to the contrary, the presumption is persuasive that during the interval between the filing of the petition and the appointment of a trustee the property will be entirely safe in the hands of the assignee, especially if he be enjoined from disposing of it pendente lite."

In other words, the objection of the Circuit Court of Appeals was not a jurisdictional one, but was made to the appointment of a receiver in the particular case in question. It is often said that there is no reason for supposing that the state court will not require as much fidelity from its officers as this court, and I do not for an instant suppose that it will not. The question is, not what the state court requires of the assignee upon his accounting, but what is the inevitable result of the administration of the estates of people who are subjected to all kinds of temptations growing out of financial embarrassment by persons of their own choice. I am satisfied that it would be the better practice in the future to restrain assignees from administering the estate, and in any case where it appears that the assignee represents an interest hostile to that of the general creditors, or is for other reasons an undesirable person to have the custody of the property, to appoint a receiver.

That my interpretation of the Oakland Lumber Company Case is correct seems to me apparent from an examination of the opinion of Judge Brown in the case of In re Gutwillig (D. C.) 90 Fed. 475, and that of Judge Wallace in the same case on appeal, reported in 92 Fed. 337, 34 C. C. A. 377. It is to be noted that the Gutwillig Case was not even referred to in the Oakland Lumber Company Case, and that the

latter, therefore, must have proceeded upon the ground that the circumstances of that case did not call for the appointment of a receiver, rather than upon lack of power. The Gutwillig Case was not a case where a receiver was appointed, but one where a motion was made to restrain an assignee's sale. Judge Addison Brown discussed the whole subject with his usual discrimination, and said:

"Our bankrupt acts have been largely modeled upon the English statutes of bankruptcy. Many of their phrases are transferred literally to our own acts, and these phrases are presumably used by Congress in the sense in which they have been previously interpreted in the English law. Since the time of George II, and even prior, the current of English adjudications, followed by our own, has been that a voluntary assignment of all his property by an insolvent debtor to an assignee of his own choosing, though without preferences, is itself an act of bankruptcy, a fraud upon the act, and hence a fraud upon creditors as respects their rights in bankruptcy, and voidable at the trustee's option, even without any express provision to that effect in the statute. These principles, and the long line of authorities in support of them, from the time of Lord Mansfield, have been clearly set forth in the elaborate review of the subject by Judge Cadwalader in Barnes v. Rattew [Rettew] 8 Phila. 133, 2 Fed. Cas. 868, and by Judge Emmons in Globe Ins. Co. v. Cleveland Ins. Co., 14 N. B. R. 311, 10 Fed. Cas. 488, and need not be repeated here. The same views were adopted and reinforced by Judge Johnson on appeal in the case of In re Biesenthal [Beisenthal] 15 N. B. R. 228, 3 Fed. Cas. 76, which settled the law in this circuit under the act of 1867. The general ground upon which all these cases, in the absence of express statutory enactments, have proceeded, is that a voluntary assignment is in effect an act of bankruptcy, and is 'fraudulent, not at common law, or under 13 Eliz., but because it defeats the rights of creditors secured by the bankrupt law to the choice of a trustee, to the summary jurisdiction of the bankruptcy court, and to the ample control which the law intended to give them over the estate of their insolvent debtor,' and is therefore a fraud upon the act and upon creditors' rights, which prevents the assignee from holding the assigned estate as against the trustee in bankruptcy. These general principles and the decisions enforcing them are as applicable to the present act as to the various English bankruptcy statutes and to our own acts of 1867, 1841, and 1800. They are not founded upon any special phrases in the bankruptcy statutes, but upon the general scope, purpose, and policy of bankruptcy laws, and the resulting rights of creditors. * * *

"The provision of the present act making a voluntary assignment ipso facto an act of bankruptcy in accordance with the original doctrine, could not have been intended as a mere vain and empty declaration, of no value to creditors. These words, on the contrary, can mean no less in the statute than they meant in prior decisions, viz., that both the bankrupt and the estate sought to be assigned in fraud of the act become thereby instanter subject to the operation of the bankrupt law. Upon such an assignment, creditors are authorized to proceed instanter against the debtor as under the old law. Careful provisions are made in the present statute for these involuntary features and for preserving this right of procedure; and if, notwithstanding these provisions, a voluntary assignment could stand valid as against the trustee in bankruptcy afterwards appointed, the whole object of declaring such an assignment to be an act of bankruptcy would be nullified. In that case, though the creditors invoking this express provision might immediately put the debtor into bankruptcy, they would thereby gain no control of any assets nor derive the least benefit from the bankruptcy proceeding; and while thus subjecting themselves to expense in the pursuit of their illusory rights, the only result would be to benefit the bankrupt by giving him a discharge for nothing. This cannot be the intent of the law. On this point Johnson, J., in the Case of Biesenthal [Beisenthal], above cited, observes: 'To permit the administration of the assets of an insolvent and bankrupt debtor to be committed to a trustee of his choice, and then to reduce the bankrupt law to a mere process of dis-

charging a debtor from his debts, is quite inconsistent with any fair view of the purpose of this legislation.'"

After these and other observations, Judge Brown, after granting a restraining order forbidding the assignee to dispose of the assigned property, or the proceeds, until the adjudication, said that a voluntary assignment "is voidable by the trustee and that the assets should be brought into the bankruptcy court." Upon the appeal, Judge Wallace, writing for the Circuit Court of Appeals, said:

"The general purpose of bankrupt laws, and of the present act, is not only to administer the assets of insolvent debtors on the basis of equality, but to secure that result by giving to the creditors, and not to the debtor, the selection of the person to be intrusted with the administration. To permit the administration to be committed by an insolvent debtor, who is on the heels of an adjudication of bankruptcy, to a trustee selected by himself, and thus be wholly withdrawn from the supervision of the bankrupt court, is irreconcilable with any reasonable view of the purpose of such legislation. Hence it has been almost uniformly adjudged that any disposition of his property by a debtor intended to accomplish that purpose is a fraud upon the creditors, who have a right to invoke its protection. That such disposition is not one which is fraudulent at common law is immaterial. It suffices if its necessary effect is to defraud, hinder, or delay creditors in their rights and remedies under the bankrupt law."

The opinion by Judge Brown in the case of In re Gutwillig was approved by the Supreme Court in the case of West Company v. Lea, 174 U. S. 590, 19 Sup. Ct. 836, 43 L. Ed. 1098, in an opinion by Mr. Justice (now Chief Justice) White, in which he said:

"Now, when it is considered that the present law, although it only retained some of the provisions of the act of 1867, contains an express declaration that a deed of general assignment shall authorize the involuntary bankruptcy of the debtor making such a deed, all doubt as to the scope and intent of the law is removed. The conclusive result of a deed of general assignment under all our previous bankruptcy acts, as well as under the English bankrupt laws, and the significant import of the incorporation of the previous rule, by an express statement, in the present statute have been lucidly expounded by Addison Brown, J., in Re Gutwillig (D. C.) 90 Fed. 475, 478. * * * Our conclusion, then, is that, as a deed of general assignment for the benefit of creditors is made by the bankruptcy act alone sufficient to justify an adjudication in involuntary bankruptcy against the debtor making such deed, without reference to his solvency at the time of the filing of the petition, the denial of insolvency by way of defense to a petition based upon the making of a deed of general assignment is not warranted by the bankruptcy law."

In the case of Bryan v. Bernheimer, 181 U. S. 188, 21 Sup. Ct. 557, 45 L. Ed. 814, a general assignment was followed in nine days by a petition in bankruptcy. Between the filing of the petition and the date of adjudication the assignee sold the property of the estate. The court held that the purchaser had a title subordinate to that of the bankrupt's estate, and that the equities between him and the creditors should be determined by the District Court.

Mr. Justice Holmes, in the case of Randolph v. Scruggs, 190 U. S. 533, 23 Sup. Ct. 710, 47 L. Ed. 1165, held that the rights of an assignee to compensation and recoupment did not depend upon the state law, or arise out of the assignment, but are based upon an equitable right to claim such recoupment and compensation as may be reasonable for his efforts in preserving the estate, which should be fixed by the

bankruptcy court. In the case of In re Watts and Sachs, Petitioners, 190 U. S. 1, 23 Sup. Ct. 718, 47 L. Ed. 933, the Chief Justice said:

"The bankruptcy law is paramount, and the jurisdiction of the federal courts in bankruptcy, when properly invoked, in the administration of the affairs of insolvent persons and corporations, is essentially exclusive."

Under the foregoing decisions it is apparent that a general assignment is an act of bankruptcy to which there can be no possible defense. If it is followed by a petition in bankruptcy, this court obtains exclusive jurisdiction, entirely irrespective of the question of solvency or insolvency. The only possible defense that a bankrupt or assignee could have to a petition in bankruptcy alleging the making of a general assignment within the statutory period would be a denial of that fact. The only question that I think arises, if it clearly appears that a general assignment has been made, is whether the assignee is a proper custodian of the property during the period between the filing of the petition and the election of a trustee. As to this matter there should be an investigation, but I have not the slightest doubt that the ordinary power in this court to appoint a receiver is not affected by the fact that an assignment for the benefit of creditors has been executed and that the assignee named therein has qualified. Whether to appoint a receiver in the given case is a matter for the exercise of a proper discretion. I am further of the opinion that in all cases where a petition in bankruptcy has been filed, after the making of a general assignment, this court has both the power and the absolute discretion to restrain the assignee from administering the estate.

In respect to the case under consideration, I was of the opinion that a mortgagee, who had powers of sale under the terms of his chattel mortgage and had apparently received preferential payments within four months, was not a proper person to administer the estate of the bankrupt prior to the election of a trustee. It was plain, as the business was an express business and the property consisted of numerous horses and vans, that a person should be chosen who could actively manage the business. It also seemed to me that a person who was given power under the terms of his mortgage to take possession of the assets and sell on account of his mortgage was a person who, however honest or capable, had an adverse interest to general creditors. I therefore stated that I would appoint a receiver and stay the assignee. Under the circumstances, the assignee said that he preferred to resign. He did so resign, and I thereupon appointed a receiver, with power to conduct the business.

By reason of the fact that the considerations involved in this case may affect cases in bankruptcy in an important way, I have set forth my reasoning and conclusions at some length. I may add that I shall be inclined to grant stays against assignees in the case of future assignments, unless the creditors should as a body desire otherwise.

WILSON v. CITIZENS' TRUST CO.

(District Court, S. D. Georgia. June 28, 1916.)

1. BANKRUPTCY ⟸154—RIGHT OF BANK TO SET OFF INDEBTEDNESS AGAINST DEPOSITS.

As a general proposition, a bank may set off any indebtedness it may hold against the bankrupt against a general deposit standing to the credit of the bankrupt; this right being expressly recognized by Bankr. Act July 1, 1898, c. 541, § 68, 30 Stat. 565 (Comp. St. 1913, § 9652).

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 451–455; Dec. Dig. ⟸154.]

2. BANKRUPTCY ⟸293(2) — PROCEEDINGS — JURISDICTION OF BANKRUPTCY COURT.

Bankr. Act, § 60b (Comp. St. 1913, § 9644), provides for actions by the trustee, either in the court of bankruptcy or in the state court which would have had jurisdiction, had bankruptcy not intervened, to avoid transfers made within four months of bankruptcy which operate as preferences. Section 23b (Comp. St. 1913, § 9607) declares that suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by the trustee, might have brought or prosecuted them, if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant, except suits for the recovery of property under section 60b, etc. The trustee's petition alleged that after a firm became insolvent, and within four months of bankruptcy, the defendant bank placed one in charge of the business of the bankrupts, that he deposited with the bank to the account of the bankrupts all moneys received, that no checks were payable unless countersigned by him, that the purpose of the arrangement was to accumulate funds so that they might be appropriated to satisfy the indebtedness due the bank from the bankrupts, and that the bank, which, on bankruptcy, drew a check for the whole deposit and applied the proceeds to its claim, thus obtained a preference. *Held* that, as a bank may set off against a general deposit to the credit of a bankrupt claims against the bankrupt, and as this right is recognized by section 68b, and is the same, whether exercised by operation of law, by the drawing of a check against the bankrupt's account, or by mere application of the deposit, the petition stated an action within the jurisdiction of the bankruptcy court, being one to set aside a preferential transfer effected by the accumulation of the deposits, and not by the application.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 411; Dec. Dig. ⟸293(2).]

3. BANKRUPTCY ⟸302(1)—ACTIONS—PETITION.

A petition to recover the amount of deposits applied by a bank upon the depositor's bankruptcy *held* to state a cause of action under Bankr. Act, § 60b, on the theory that the deposits were made to operate as a preferential transfer, and not that the application was a preference.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 456; Dec. Dig. ⟸302(1).]

At Law. Action by J. B. Wilson, trustee of Tedder & Oliver, bankrupts, against the Citizens' Trust Company. On motion to dismiss. Motion denied.

J. B. Wilson, as trustee of Tedder & Oliver, bankrupts, brought his bill in equity against the Citizens' Trust Company, a banking corporation of Savannah, Ga., in which he alleged that a petition in involuntary bankruptcy was filed against Tedder & Oliver on December 1, 1915, and that thereafter

said firm, and the individual members thereof, were duly adjudicated bankrupts; that on November 17, 1915, the said firm was insolvent, which insolvency was known to the defendant bank, and that one W. A. Burney was placed in charge of its business, he being selected for that purpose by the said Citizens' Trust Company; that said firm continued to carry on its business under the direction of said Burney, and that the cash received by said firm was each day deposited in said bank by said Burney; that when the bankruptcy petition was filed there was on deposit in said bank to the credit of said firm the sum of $1,242.15; and that the defendant bank, at or about the time the petition was filed, drew a check in the name of said firm against said amount then on deposit, and thereby transferred and appropriated the same to an indebtedness which it claimed was due it by the bankrupts. Complainant further alleged that the defendant bank, in selecting said Burney, and placing him in charge of the business of the bankrupts, and requiring him to countersign all checks drawn against the deposit of said bankrupts in said bank, and in having said Burney to deposit the funds of said bankrupts each day, did so for the purpose of accumulating these funds, in order to appropriate the same to its alleged indebtedness against the bankrupts, and that during all of this period respondent bank knew that said firm and the individual members thereof were insolvent, and that the effect of this arrangement was to give said bank a preference over the other creditors of the bankrupts, and that the purpose of the aforesaid arrangement made between said bank and said bankrupts was to effect such a preference. Complainant, therefore, prayed that the fund so transferred and appropriated by the defendant bank should be declared to be the property of the bankrupt estate, and that he be allowed to recover the same from the defendant. Respondent duly filed a motion to dismiss this bill on three grounds: (1) That the complainant had a full and adequate remedy at law, and therefore a bill in equity would not lie; (2) that under section 23b of the national Bankruptcy Act the District Court of the United States had no jurisdiction of the suit, for the reason that the same is not a suit authorized to be brought under said section 23b, because such suit cannot properly be brought under section 60b of the Bankruptcy Act, inasmuch as the bankrupts had not made the transfer of the funds in question to the defendant bank, but such funds were transferred by the act of the bank itself; (3) that the bill set forth no cause of action in favor of the complainant against the defendant.

W. R. Hewlett, of Savannah, Ga., for complainant.
Anderson, Cann, Cann & Walsh, of Savannah, Ga., for defendant.

LAMBDIN, District Judge (after stating the facts as above). This matter is before me on the motion which the defendant filed, as above stated, to dismiss the plaintiff's equitable petition. On the hearing before me, plaintiff's counsel admitted that he had no cause of action under section 67e of the Bankruptcy Act, but was proceeding entirely under section 60b; and he further admitted that the bill should be considered as a suit at law, rather than a suit in equity, and should therefore be transferred to the law docket, and such direction is given to the case.

[1, 2] 1. The first question in the case is one of jurisdiction. Defendant's counsel contend that the action brought in this case would not lie under section 60b, because of the fact that the bankrupts did not make any transfer of the funds in question to the bank, and consequently, under section 23b of the Bankruptcy Act, a District Court of the United States has no jurisdiction to entertain the suit without the consent of the defendant. Counsel for neither side have been able to cite any decision exactly in point. However, I find that many

such suits have been brought in the District Courts of the United States. Some of these suits have been carried to the different Circuit Courts of Appeals, and have also eventually found their way to the Supreme Court of the United States. Possibly the question of jurisdiction was waived in all of these reported cases, but it is somewhat singular that, if the United States courts had no jurisdiction of such suits, the question was never raised.

It is alleged in the petition that all of the deposits made by the bankrupts in the defendant bank were made within four months prior to the filing of the petition in bankruptcy. The petition alleges that a preferential payment was made to the bank as the result of these deposits under section 60b. The question of the court's jurisdiction depends upon the allegations of the plaintiff's petition, and not by facts set up in the defendant's answer. It is the view of the court that, if any preference was secured in this manner, it was made by the various deposits that were thus made by the bankrupts in the defendant bank, and not by the subsequent act of the bank in crediting these deposits, upon the filing of the petition in bankruptcy, upon the indebtedness which it claimed against the bankrupts. These deposits thus made were made by the bankrupts by their consent, and by an arrangement entered into by them, and therefore constituted their act and deed, and if they were preferential payments, within the meaning of the statute, they manifestly come under the provisions of section 60b of the Bankruptcy Act. The petition has enough in it to be sustained on this theory.

It is well settled as a general proposition that a bank has the right to set off any indebtedness it may hold against the bankrupt against a general deposit standing to the credit of such bankrupt. This is expressly allowed by section 68 of the Bankruptcy Act. See Collier on Bankruptcy (10th Ed.) p. 976 et seq. Whether the bank charges off the deposit of its customer and applies it on the indebtedness which it holds against the customer, or whether it draws a check in the name of the customer covering his deposit and applies it as a credit on the indebtedness, or whether it does neither of these things, but appeals to the law to do the same thing in effect, makes no difference as a legal proposition. Toof v. City National Bank (C. C. A. 6th Circuit) 30 Am. Bankr. Rep. 79, 206 Fed. 250, 124 C. C. A. 118; Studley v. Boylston National Bank (U. S. Sup. Ct.) 30 Am. Bankr. R. 161, 229 U. S. 523, 33 Sup. Ct. 806, 57 L. Ed. 1313; Continental, etc., Savings Bank v. Chicago Title & Trust Co., 30 Am. Bankr. R. 624, 229 U. S. 435, 33 Sup. Ct. 829, 57 L. Ed. 1268; Chisholm v. First National Bank (Ill. Sup. Ct.) 35 Am. Bankr. Rep. 598, 269 Ill. 110, 109 N. E. 657; New York County National Bank v. Massey, 192 U. S. 138, 24 Sup. Ct. 199, 48 L. Ed. 380; Lowell v. International Trust Co. (C. C. A. 1st Circuit) 158 Fed. 781, 86 C. C. A. 137, 19 Am. Bankr. Rep. 853; In re Radley Steel Construction Co. (D. C.) 212 Fed. 462, 32 Am. Bankr. R. 514.

The last case cited above points out that, while the general relation of debtor and creditor exists between the bank and its customer, yet there is this distinction, namely, that it is the duty of the bank to

honor the checks of the customer upon the deposit, and that this gives the bankruptcy court the right to order the payment of such deposit over to the trustee. In the case of Lowell v. International Trust Company, cited above, the Circuit Court of Appeals for the First Circuit discusses the effect of a deposit made in a bank upon the agreement that the same should be for the pro rata benefit of all the creditors of the bankrupt, and holds that such a quasi trust is not enforceable by the trustee. Indeed, it is my opinion that, if any such agreement existed in this case, the adjudication of the bankrupt within four months after such deposits were made freed the fund from such a trust, and gave the bank the right to a set-off. The view that it is the making of the deposit, and not the application of the same to the debt of the bank, that constitutes the preference, is borne out by the concluding part of the decision of the Supreme Court of the United States in the case of Mechanics', etc., Bank v. Ernst, 231 U. S. 60, 34 Sup. Ct. 22, 58 L. Ed. 121. I am therefore of the opinion that this court has jurisdiction of the case.

[3] 2. This brings the court to the consideration of the other ground of the motion filed by the defendant to dismiss the plaintiff's petition, to wit, that same sets out no cause of action. This has given the court some concern. A careful reading of the plaintiff's petition and of the decisions cited above will show that as a general proposition a bank has the right to apply the deposit of its customer upon any indebtedness due by him to the bank, and that it may do this by drawing a check in the name of the customer, or by charging off the deposit and applying it on the debt, or else may wait and allow the law to do the same thing by application of the rule of set-off which is allowed by section 68 of the Bankruptcy Act. Where a general deposit is made in a bank, the estate of the customer is not diminished, because he has the right to check upon such deposit. Therefore, if the deposits involved in this case were general deposits, which could be checked against by the bankrupts before the petition was filed against them, the plaintiff trustee would have no right to recover. The trustee alleges, however, in his petition, that the deposits so made were not general deposits, and that the bankrupts had no right to check against the same, and that the defendant bank entered upon the general plan outlined in the petition of having these deposits made upon special account "for the purpose of transferring and appropriating the same to its alleged indebtedness," and thus the plaintiff seeks to bring himself within the rule laid down in the Ernst Case, decided by the Supreme Court of the United States, as cited above. These allegations, therefore, save the petition from dismissal upon general demurrer.

An order will be taken accordingly, overruling the motion to dismiss upon each of the grounds taken therein.

In re LOUIS NEUBURGER, Inc.

(District Court, S. D. New York. June 10, 1916.)

1. BANKRUPTCY ⇐178(3)—FILING OF PETITION—NOTICE.
A general assignee is charged with notice of the subsequent filing of a petition in bankruptcy against his assignor.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 221, 283; Dec. Dig. ⇐178(3).]

2. BANKRUPTCY ⇐178(3)—PROCEEDINGS—POWER OF BANKRUPTCY COURT.
A general assignment having been made, a petition in bankruptcy was filed. After adjudication, which was known to the assignee, but before a trustee was appointed, the assignee sold the property assigned under order of the state court, which, after notice to creditors, settled and approved his account. *Held* that, as the adjudication in bankruptcy vested title to the bankrupt's property in the trustee, and the assignee became a mere custodian, without legal title, required to account to the trustee subsequently appointed, whose title would relate back to adjudication, the sale was wholly void, and the assignee cannot escape liability on the ground that it was authorized and approved by the state court, for the federal court has exclusive jurisdiction after an adjudication in bankruptcy.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 221, 283; Dec. Dig. ⇐178(3).]

In Bankruptcy. In the matter of the bankruptcy of Louis Neuburger, Incorporated. Proceeding to review an order of the referee, directing the general assignee of the bankrupt to account to the District Court. Order affirmed.

Harry S. Hechheimer, of Baltimore, Md., for trustee.
Walter B. Milkman, of Brooklyn, N. Y., assignee, pro se.

AUGUSTUS N. HAND, District Judge. After a general assignment a petition in bankruptcy was filed, and this matter proceeded to an adjudication. After the adjudication, which was known to the assignee, a sale was had by the order of the County Court of Bronx County, before the election of a trustee. Thereafter, and before the election of the trustee, the assignee filed his account in the County Court, which was settled and approved by that court after notice to creditors. The referee in bankruptcy thereafter ordered the assignee to account in this court. The assignee seeks to have this order of the referee reviewed and vacated.

[1, 2] It is my opinion that, according to correct legal principles, the assets of the bankrupt became vested by the adjudication in the trustee, his title to relate back to that time, and the assignee thereafter was a mere custodian without title. He could not lawfully sell the assets, the County Court had no jurisdiction over them, and all his acts in relation to them, other than mere custody in anticipation of turning them over to a trustee, when appointed, were null and void. As this court had sole jurisdiction of the assets, the assignee was bound to account here, and any accounting which he might be obliged to render to the County Court was subject to such distribution of the

assets as this court, which had plenary jurisdiction, might order. This is perfectly consistent with his obligations to the County Court, for its orders would be subordinate to the orders of this court, in which all rights of distribution became vested by the adjudication. This is what the referee decided in a well-considered opinion, and no other result is consonant with general principles and the jurisdiction in bankruptcy granted by the Constitution of the United States to the federal courts.

These general principles, however, which would seem to be based on reason, the assignee insists have been modified by decisions of the Supreme Court. He says that it was optional with him whether to account in the state court or this court, and that, as he had filed his accounts in the County Court before the trustee in bankruptcy was elected, though after adjudication, he was at liberty to proceed to have them settled in the County Court as he did, and its decree was final and binding everywhere. The trustee appeared in the County Court and filed an affidavit and submitted a brief, objecting to the jurisdiction; but the accounts were passed by that court as filed.

The decisions of the Supreme Court are in fact quite contrary to the position taken by the assignee. In the case of Bryan v. Bernheimer, 181 U. S. 188, 21 Sup. Ct. 557, 45 L. Ed. 814, a general assignment was followed in nine days by a petition in bankruptcy. Between the filing of the petition and the date of adjudication the assignee sold the property of the estate. The court held that the purchaser had a title subordinate to that of the bankrupt's estate, and that the equities between him and the creditors should be determined by the District Court. The court did not decide whether the District Court ought to have summarily passed on the question involved, if the purchaser had not submitted to the jurisdiction of the latter, but held unequivocally that the general assignment became void after the adjudication in bankruptcy and the purchaser took no title. It is for that principle that I cite the case.

Mr. Justice Holmes, in the case of Randolph v. Scruggs, 190 U. S. 533, 23 Sup. Ct. 710, 47 L. Ed. 1165, said as to general assignments made within four months of the filing of the petition:

"If, by declaring the assignment an act of bankruptcy, the statute means that the conveyance shall not be effectual against the bankruptcy proceedings, as is agreed, the natural and simple construction is that it means that the deed shall be avoided as a whole when the trustee takes the goods. The cases which we have cited, and others under insolvent and bankruptcy laws, evidently take that view. It follows that the appellants can assert no preference by way of lien under the deed."

The opinion goes on to say in substance that the right of an assignee to compensation and recoupment does not depend upon the state law or arise out of the assignment, but is based upon an equitable right to claim such recoupment and compensation as may be reasonable for his efforts in preserving the estate. Thus it appears that the bankruptcy court wholly supersedes an assignee, where the transfer was within four months of the date of the petition in bankruptcy.

In the case of Louisville Trust Co. v. Comingor, 184 U. S. 18, 22 Sup. Ct. 293, 46 L. Ed. 413, relied upon by the assignee in the case

at bar, it was held that the bankruptcy court could not by summary process require the return of moneys paid by an assignee to his counsel and moneys retained by him as commissions under the state law, when the moneys were expended *before the petition in bankruptcy was filed.* Under these circumstances the court said that the claim of the assignee constituted an adverse claim, which could not be disposed of in a summary proceeding. In the present case no question has been raised as to payments made before the petition was filed, but the broad claim is asserted that the County Court had jurisdiction to settle the accounts and fix compensation.

In the case of In re Watts & Sachs, Petitioners, 190 U. S. 1, 23 Sup. Ct. 718, 47 L. Ed. 933, which related to the rights of a state receiver after bankruptcy, the Chief Justice said:

"The Bankruptcy Law is paramount, and the jurisdiction of the federal courts in bankruptcy, when properly invoked in the administration of the affairs of insolvent persons and corporations, is essentially exclusive. Necessarily, when like proceedings in the state courts are determined by the commencement of proceedings in bankruptcy, care has to be taken to avoid collision in respect of property in possession of the state courts. Such cases are not cases of adverse possession, or of possession in enforcement of pre-existing liens, or in aid of the bankruptcy proceedings. The general rule as between courts of concurrent jurisdiction is that property already in possession of the receiver of one court cannot rightfully be taken from him without the court's consent, by the receiver of another court appointed in a subsequent suit; but that rule can have only a qualified application where winding-up proceedings are superseded by those in bankruptcy, as to which the jurisdiction is not concurrent. Still it obtains as a rule of comity, and accordingly the receiver of the District Court brought his appointment to the knowledge of the Floyd circuit court and requested the delivery of the assets. * * * It has been already assumed that the bankruptcy proceedings operated to suspend the further administration of the insolvent's estate in the state court, but it remained for the state court to transfer the assets, settle the accounts of its receiver, and close its connection with the matter. Errors, if any, committed in so doing, could be rectified in due course and in the designated way."

I think the effect of these decisions is to hold that the state court is completely divested of jurisdiction to administer the property when a petition in bankruptcy has been filed and the proceeding has gone to an adjudication. As was said by the Supreme Court in the case of Mueller v. Nugent, 184 U. S. at page 14, 22 Sup. Ct. at page 275, 46 L. Ed. 405:

"* * * The filing of the petition is a caveat to all the world, and in effect an attachment and injunction. * * *"

The assignee in the present case, not only in fact knew of the filing of the petition, but was in law bound to take notice of it. Yet he proceeded even after an adjudication to sell the assets. If he desired the protection of the state court upon his accounting, he could easily have petitioned that court for leave to account in the bankruptcy court, and leave would doubtless have been granted. Instead of doing that, he refrained from accounting in the only court which had jurisdiction to afford the proceeding any finality, and insisted in spite of the protest of the trustee on proceeding in the County Court. So far as that court is concerned, his accounts have been passed; but that court had

no jurisdiction in my opinion to settle the accounts, so as to bind the trustee in bankruptcy, or to direct payments from the assets.

In the case of In re Rogers, 116 Fed. at page 437, the United States District Court for the District of Georgia said:

"If, then, the proceedings are suspended, as is clearly the effect of the Bankruptcy Law, the state court has no right or authority to fix the fees of its receiver having charge of the property, and less right to refuse to turn over the same until those fees have been paid by the proper officer of the bankrupt court. If the assets are delivered to the trustee by the receiver of the state court, this court will consider any application for compensation which may be made by officers of the state court, and, if allowable, will grant suitable compensation; but it must definitely decline to recognize the authority of the state court to incumber the assets of the bankrupt by a judgment of this character. * * *

If it is possible for assignees, who are necessarily the choice of the bankrupt, to sell out the assets after a friendly petition in bankruptcy is filed, and then proceed to settle their accounts and obtain their compensation in the state court, there will be little reason for the existence of the Bankruptcy Law or court, except as an easier mode of obtaining a discharge than the written consent of two-thirds of the creditors required by the state act. Few assignees sell the assets after an adjudication, and none, to my knowledge, aside from the assignee in question, has recently proceeded to account and have his compensation fixed in the New York state courts against the protest of a trustee.

Whatever may be the effect of the order of the County Court, it does not, in my opinion, bind the trustee, and the order of the referee, directing the assignee to account in this court, is affirmed.

FORTY FORT COAL CO. v. KIRKENDALL, Collector of Internal Revenue.

(District Court, M. D. Pennsylvania. December Term, 1915.)

No. 762.

1. COURTS ⟸262(1)—FEDERAL COURTS—DISTINCTION BETWEEN LAW AND EQUITY.

Jurisdiction at law and in equity are as separate in the federal courts as though administered by different tribunals.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 797, 798; Dec. Dig. ⟸262(1).]

2. COURTS ⟸354—VACATION—MOTIONS.

After the expiration of the term at which it was rendered a judgment cannot be vacated by the federal courts on mere motion.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 934; Dec. Dig. ⟸354.]

3. INTERNAL REVENUE ⟸9—CORPORATE TAXES.

The Corporation Excise Tax Law (Act Aug. 5, 1909, c. 6, § 38, 36 Stat. 112 [Comp. St. 1913, § 6301]), imposing taxes on the income of corporations, provides for reasonable allowances for depreciation of corporate property. The property of a coal-mining corporation was depreciated for each ton of coal mined to the amount of 15 cents per ton. *Held*, that the

corporation could not be taxed on the theory that the full value of the coal mined represented the income, but was entitled to deduct therefrom such amounts as represented depreciation in the mining property.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 13–28; Dec. Dig. ⟸9.]

4. INTERNAL REVENUE ⟸9—CORPORATE TAXES—ERRORS IN BOOKKEEPING.

Where amounts which should have been charged to the depletion of corporate assets were carried in a surplus account, income taxes imposed by Corporation Excise Tax Law cannot be based on such amounts, for that would allow the basing of taxes on mere bookkeeping.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 13–28; Dec. Dig. ⟸9.]

At Law. Action by the Forty Fort Coal Company against Frederick C. Kirkendall, as Collector of Internal Revenue. Sur rule to show cause why judgment for plaintiff should not be opened. Rule denied.

H. S. Drinker, Jr., of Philadelphia, Pa., and John R. Wilson, of Scranton, Pa., for plaintiff

R. L. Burnett and J. M. McCourt, both of Scranton, Pa., for defendant.

WITMER, District Judge. Suit was instituted by the plaintiff to recover an excise tax assessed by the Internal Revenue Department and paid under protest. Judgment was entered December 24, 1915, for want of an affidavit of defense. This judgment the court is now requested to open, in order that the defendant may defend.

[1, 2] The proceedings in the case leading up to the judgment were not only regular, but the defendant's counsel previously asked for and obtained an extension of time for filing an affidavit of defense. The defendant, the Collector of Internal Revenue, and his department, were advised that, unless by a date previous to the entry of judgment an affidavit was forthcoming, judgment would be entered in default thereof. No request was made for a further extension of time to file an affidavit, nor was any effort made to open the judgment until almost five months after it had been entered. Since the entry of judgment four terms, viz., January, March, May, and June, have intervened, and yet it is contended that at this late day, without timely effort, this court, in the exercise of a discretionary power over its judgments, should open the judgment herein entered and grant a new trial of the action, so as to permit a defense that might have been interposed at the proper time, but for the unjustified failure and negligence of the defendant and his superiors in interposing a defense which is now suggested, and without the slightest hint that the same was prevented by fraud, mistake, or error.

In support of the proposition that this court has the authority implied in the motion, attention has been directed to the cases of King v. Brooks, 72 Pa. 363, and Ladd v. Stevenson, 112 N. Y. 325, 19 N. E. 842, 8 Am. St. Rep. 748. An effort to distinguish these cases from the one in hand, although the same could likely be successfully accomplished, will not be required, since the proposition is conclusively

negatived, in regard to the powers of the courts of the United States, by decision in Bronson v. Schulten, 104 U. S. 410, 415, 26 L. Ed. 797, and other authorities herein cited. However, it will not be denied that many of the state law courts have and exercise this power. In some states it is expressly conferred by statute; in others, it is considered one of the "inherent powers" of the law courts. In a state court, where a system has been adopted which amalgamates the equitable and law jurisdiction in one form of action, it is easy to see how relief might be granted on motion in a case like this. It would be a matter of no consequence whether the case be considered one at law or in equity; the form of action, and the court which had jurisdiction would be the same. It would be useless to examine the state decisions on this subject, for neither the practice of the state courts in exercising control over their judgments and administering equitable relief in a summary way, nor the statutes of the states, can determine the actions of the courts of the United States on this subject. "It is a question of power, and not of procedure. Jurisdiction at law and in equity are as separate in the federal courts as if administered by different tribunals." O'Connor v. O'Connor, 142 Fed. 449, 73 C. C. A. 565. Mr. Justice Miller, speaking for the court upon this point in Bronson v. Schulten, supra, said:

"In this country all courts have terms and vacations. The time of the commencement of every term, if there be half a dozen a year, is fixed by statute, and the end of it by the final adjournment of the court for that term. This is the case with regard to all the courts of the United States, and if there be exceptions in the state courts they are unimportant. It is a general rule of the law that all the judgments, decrees, or other orders of the courts, however conclusive in their character, are under the control of the court which pronounces them during the term at which they are rendered or entered of record, and they may then be set aside, vacated, modified, or annulled by that court. But it is a rule equally well established that after the term has ended all final judgments and decrees of the court pass beyond its control, unless steps be taken during that term, by motion or otherwise, to set aside, modify, or correct them; and if errors exist, they can only be corrected by such proceeding, by a writ of error or appeal, as may be allowed in a court which, by law, can review the decision. So strongly has this principal been upheld by this court that, while realizing that there is no court which can review its decisions, it has invariably refused all applications for rehearing made after the adjournment of the court for the term at which the judgment was rendered. And this is placed upon the ground that the case has passed beyond the control of the court."

The rule is of universal application, excepting cases wherein the court was influenced by clerical error or mistake. Sibbald v. United States, 12 Pet. 488, 9 L. Ed. 1167; Cameron v. McRoberts, 3 Wheat. 591, 4 L. Ed. 467; Phillips v. Negley, 117 U. S. 665, 6 Sup. Ct. 901, 29 L. Ed. 1013; Bronson v. Schulten, 104 U. S. 410, 415, 26 L. Ed. 797; Allen v. Wilson (C. C.) 21 Fed. 881; Baptist v. Trans. Co. (C. C.) 29 Fed. 180; Grames v. Hawley (C. C.) 50 Fed. 319; Klever v. Seawall, 65 Fed. 373, 12 C. C. A. 653; United States v. Fur Clippings, 106 Fed. 161, 45 C. C. A. 263; King v. Davis (C. C.) 137 Fed. 222; O'Connor v. O'Connor, 142 Fed. 449, 73 C. C. A. 565; United States v. One Trunk (D. C.) 155 Fed. 651; Electric Co. v. Import Co. (C. C.) 159 Fed. 492.

[3, 4] However the present petition sets up no defense to the plaintiff's claim. The defendant would have it appear that the plaintiff's claim was based merely on the fact that 15 cents per ton of coal mined by the plaintiff had been paid by it to the trustee of a mortgage of another company, and that this was the sole ground for the claim by the plaintiff that it should be allowed 15 cents per ton depletion on its excise tax for the years 1911, 1912, and 1913. Such, however, is not the fact, nor the basis of the plaintiff's claim as a reading of its statement of claim will show.

The twentieth paragraph of the statement of claim specifically avers that:

> The "company's property suffered actual depletion by reason of the mining of coal from said property to an amount for each ton so mined of at least 15 cents per ton, and the coal mined and sold by the said companies and each of them during the said tax years had, on the 1st of January, 1909, when the Excise Tax Law went into effect, a value in the ground of not less than 15 cents per ton."

This is the essential allegation of the complaint. It is to the effect that during these years the depreciation or depletion amounted to at least 15 cents per ton. The fact that this was the amount which the Forty Fort Coal Company paid over to the trustee of the mortgage was not the basis of the claim for refund, apparently, but was merely part of the history of the transaction, showing how the government happened to insist erroneously on the disallowance of the claim for depletion. The act of Congress requires the allowance of depreciation of property in a reasonable amount. It is not denied in the petition to set aside that the plaintiff's property was depleted to the amount of 15 cents for each ton of coal mined. The sole ground of the government's claim is based on a book entry made in 1912 or 1913, and corrected in 1914.

The decisions under the Excise Tax Law and under the Income Tax Law are uniform to the effect that the government cannot base a claim for taxes on mere bookkeeping. Industrial Trust Co. v. Walsh (D. C.) 222 Fed. 437; Baldwin Locomotive Works v. McCoach (D. C.) 215 Fed. 967; Id., 221 Fed. 59, 136 C. C. A. 660. In the latter case it was decided by the Circuit Court of Appeals for this circuit that mere reappraisement of property by a corporation on its books cannot form the basis of assessment of taxes on net income, even though the books show that during the tax year the value of the property was increased by the amount on which the government claims the regular rate of tax. The plaintiff here has admitted that during the year 1912 or 1913 a certain amount of money was carried on the books of the company in surplus account, but insists that such amount should have been properly noted on the books as depletion reserve.

In the statement of claim, however, the truth of which is in no way disputed, it was specifically averred that the amount so temporarily shown on the books as surplus was not properly surplus, or net income, or profit, but was merely a return of capital asset, being an amount which represented the minimum value of the coal in the ground. It requires no argument to demonstrate that, under a tax law

which makes an allowance for depletion or depreciation, if an owner has a ton of coal in the ground worth 15 cents, and he digs it up and sells it for 15 cents, the amount so received for it is not income, but is in fact only a return to him of the value of his coal as part of his capital asset.

The rule to open the judgment is denied.

Ex parte LARSEN et al.

(District Court, E. D. Virginia, at Norfolk. June 10, 1916.)

1. SEAMEN ⊂=34—DESERTING SEAMEN—STATUTES—IMPRISONMENT.

Rev. St. §§ 4598, 4599, providing for the apprehension of deserting seamen and their delivery to the master of the vessel from which they deserted, or their arrest, were repealed by Act Dec. 21, 1898, c. 28, § 25, 30 Stat. 764. Section 4612 (Comp. St. 1913, § 8392) indicated that those provisions were intended to apply only to seamen on vessels owned by citizens of the United States, and section 5280 (Comp. St. 1913, § 10129), providing for the arrest and imprisonment of seamen deserting from foreign vessels, was repealed by Seamen Act March 4, 1915, c. 153, § 17, 38 Stat. 1185, except where the subject was controlled by treaty or convention with foreign governments. *Held*, that the repeal of such acts indicated an intention on the part of Congress that, in the absence of treaty or convention, seamen deserting from foreign vessels should not be arrested or imprisoned, and therefore seamen deserting from a foreign vessel cannot, under Code Va. 1904, §§ 2004, 2005, be arrested, imprisoned, and delivered to the master of the vessel.

[Ed. Note.—For other cases, see Seamen, Cent. Dig. §§ 220–231; Dec. Dig. ⊂=34.]

2. HABEAS CORPUS ⊂=45(3)—JURISDICTION—FEDERAL AND STATE COURTS.

Federal courts have jurisdiction to issue a writ of habeas corpus to discharge from custody one held by state authority under criminal proceedings based on laws void for repugnance to the Constitution, laws, or treaties of the United States.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 38–44; Dec. Dig. ⊂=45(3).]

3. SEAMEN ⊂=34—STATUTES—CONSTRUCTION.

Code Va. 1904, §§ 2004, 2005, providing for the arrest of deserting seamen, their imprisonment, and delivery to the master of the vessel, was not intended to apply to foreign vessels, but only to vessels owned by citizens of the United States, supplementing Rev. St. §§ 4598, 4599, providing for the arrest of such seamen on warrants issued by state magistrates, so as to confer authority upon such magistrates.

[Ed. Note.—For other cases, see Seamen, Cent. Dig. §§ 220–231; Dec. Dig. ⊂=34.]

In the matter of the petition of John Larsen and others for writ of habeas corpus to procure their discharge from imprisonment, in which they were held by S. S. Curtis, as sheriff. Writ issued, and petitioners discharged.

H. George Stewart, of Newport News, Va., for petitioners.

A. C. Garrett, of Newport News, Va., for vessel owners.

WOODS, Circuit Judge. The petitioners ask to be discharged from arrest and imprisonment, in which they are held by S. S. Curtis, sheriff of Warwick county, Va., by virtue of conviction under a warrant issued by Justice E. P. Fowlkes, magistrate of that county, charging them with being deserting seamen of the Russian bark Procyon. Petitioners state that under the conviction they are held to be delivered to the captain of the bark.

[1] The captain of the Procyon appeared by counsel, asserting his right to have the petitioners turned over to him under the following statutes of Virginia:

Sec. 2004. *Issue of Warrant Against Runaway Seamen, etc.* If any seaman or mariner who is under a contract in writing to serve on board of any merchant vessel, or any apprentice who is lawfully bound to the master or owner of any such vessel, for the purpose of being taught to be a seaman or mariner, desert, or absent himself without lawful permission from such vessel, any justice, upon complaint thereof being made by any officer of such vessel, shall issue his warrant to apprehend such seaman, mariner, or apprentice, and bring him before the same or some other justice.

Sec. 2005. *When Justice to Commit Him to Jail.* The justice before whom the complaint is tried shall, if it be proved, commit such seaman or mariner or apprentice to the jail of his county or corporation, there to remain until he shall be delivered to the master or commander of such vessel, or until she shall sail upon her voyage.

Similar provisions relating to deserting seamen are found in sections 4598 and 4599 of the Revised Statutes of the United States. Although there has been some difference of judicial opinion on the subject, section 4612 of the Revised Statutes of the United States (U. S. Comp. St. 1913, § 8392) seems to indicate clearly that sections 4598 and 4599 were intended to apply only to seamen of vessels owned by citizens of the United States. Grant v. United States, 58 Fed. 694, 7 C. C. A. 436, and authorities cited. Sections 4598 and 4599 were both repealed by Act Dec. 21, 1898, c. 28, 30 Stat. 764. So that there is now no statute of the United States authorizing imprisonment of seamen deserting from vessels owned by citizens of the United States. In repealing these sections the Congress provided by the amendments to section 4596 of March 4, 1915 (38 Stat. p. 1166, c. 153, § 7) other punishments for desertion. It thus appears that the federal statutes, if not expressly, certainly by strong implication, prohibit the punishment by imprisonment for deserting seamen.

[2] The arrest and imprisonment of seamen deserting from foreign vessels was provided for by section 5280 of the Revised Statutes (U. S. Comp. St. 1913, § 10129), but that provision of the section was repealed, except where the subject was controlled by treaty or convention with foreign governments, by section 17 of the Seamen Act of March 4, 1915. The terms of this repeal indicate plainly the purpose of federal government to control the subject, and to prevent imprisonment of deserting seamen of foreign-owned vessels. Thus Congress, having acted on a subject within its province—imprisonment of deserting seamen of foreign-owned vessels found in the United States—and having in substance enacted that such seamen are not subject to arrest and imprisonment, except under convention or treaty, the state law, even if it be held to provide for such imprisonment, can-

not be effective. "Undoubtedly the courts of the United States have the power, under existing legislation, by writ of habeas corpus to discharge from custody any person held by state authorities under criminal proceedings instituted under state enactments, if such enactments are void for repugnancy to the Constitution, laws, or treaty of the United States." Fitts v. McGhee, 172 U. S. 516, 19 Sup. Ct. 269, 43 L. Ed. 535. There is no convention or treaty with Russia authorizing imprisonment of seamen of a Russian vessel in this country, and there is therefore no authority for the arrest and imprisonment of the petitioners.

[3] I think, however, that the Virginia law, as it appears in sections 2004 and 2005 of the Code, was not intended to apply to foreign seamen, but was probably intended to supplement sections 4598 and 4599 of the Revised Statutes of the United States, relating to seamen of vessels owned by citizens of this country, in view of the possible doubt of the power of the Congress to authorize a state officer to act under federal authority, without the legislative sanction of the state. See dissenting opinion in Ex parte Pool, 2 Virginia Cases, 230.

My conclusion, therefore, is that there is no authority either in the state or federal statutes for the arrest and imprisonment of the petitioners, seamen of a vessel owned in Russia, and they are discharged.

TILLINGHAST et al. v. RICHARDS, U. S. Marshal, et al.

(District Court, D. Rhode Island. June 30, 1916.)

No. 1260.

1. CRIMINAL LAW ⟸113—JURISDICTION—DISTRICT—INTERNAL REVENUE—INDICTMENT.

An indictment found in the Southern district of New York charged defendants, who manufactured oleomargarine in Rhode Island, with conspiring to defraud the United States internal revenue laws, alleging the concealment and clandestine use of artificial coloration, the failure to report such use to revenue officers, and the removal of such oleomargarine from the place of manufacture for consumption and use as and for uncolored oleomargarine without payment of taxes due thereon. It charged a concealment in the Southern district of New York as part of the plan and as means to effect the fraud. *Held* that, as the acts of concealment in New York were overt acts committed pursuant to the conspiracy, the indictment was sufficient to charge an offense of which the District Court for the Southern District of New York had jurisdiction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 190, 232; Dec. Dig. ⟸113.]

2. CONSPIRACY ⟸27—OFFENSES—OVERT ACTS.

In a prosecution for conspiracy to defraud the United States of its lawful revenue, a single overt act is sufficient to complete the statutory offense.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 38, 39; Dec. Dig. ⟸27.]

3. CRIMINAL LAW ⟸113—JURISDICTION—DISTRICT—INTERNAL REVENUE.

Where, pursuant to conspiracy to defraud the United States of internal revenue, overt acts were committed within a federal district, the

court for that district has jurisdiction, regardless of where the conspiracy was entered into.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 190, 232; Dec. Dig. ⟸113.]

At Law. Application by F. W. Tillinghast and others for writ of habeas corpus against J. J. Richards, United States Marshal, and others. Petition dismissed.

See, also, 225 Fed. 226.

Charles C. Mumford, John S. Murdock, and Michael J. Lynch, all of Providence, R. I., for plaintiffs.

Harvey A. Baker, U. S. Atty., of Providence, R. I., for defendants.

BROWN, District Judge. The marshal's return to the writ of habeas corpus shows that the petitioners were in his custody by virtue of warrants of commitment issued by United States Commissioner Healy, after an examination and a finding of probable cause.

The evidence of probable cause before the commissioner consisted of a certified copy of an indictment found by the grand jury of the District Court of the United States for the Southern District of New York, charging the defendants with a conspiracy to defraud the United States, and the doing of acts within that district to effect the object of the conspiracy.

Former proceedings against these petitioners are set forth in Tillinghast et al. v. Richards, U. S. Marshal, et al. (D. C.) 225 Fed. 226.

I agree with the opinion of the commissioner that the charge in the indictment before the court in that case is not the same as the charge contained in any of the counts in the present indictment; and I am of the opinion that the decision in that case does not control the present case.

In the former case the indictment charged a conspiracy to defraud the United States of sums to become due for internal revenue taxes of 10 cents per pound on oleomargarine not free from artificial coloration, by an act specifically prohibited by law; i. e., the removal of such oleomargarine from the place of manufacture for consumption and use, etc., without affixing the required coupon stamps, and without the payment of the tax—an act to be performed wholly at Providence, R. I.

The court followed the decision in Joplin Mercantile Co. v. U. S., 236 U. S. 531, 35 Sup. Ct. 291, 59 L. Ed. 705, as to the scope of the conspiracy, and was of the opinion that none of the acts alleged to have been done in New York was an act to effect the object of the conspiracy defined in the indictment.

[1-3] The present indictment sets forth a conspiracy of wider scope, including inter alia, as intended means of defrauding the United States, the concealment and clandestine use of artificial coloration, the failure to report such use to the revenue officers, and the removal of artificially colored oleomargarine for consumption and use, as and for uncolored oleomargarine, without payment of taxes due thereon.

It is evidence of a scheme to defraud by concealment and misrepresentation of the character of the taxable product, and by paying the

lower tax of one-quarter of a cent in lieu of the higher tax of ten cents per pound.

It is unnecessary to consider the differences in the counts, for upon the question whether there was before the commissioner sufficient evidence to show probable cause for finding that an offense had been committed of which the court in the Southern district of New York has jurisdiction, the indictment in each count sets forth, in addition to a charge of conspiracy, one or more acts which may properly be regarded as acts done in that district to effect the object of the conspiracy.

As the conspiracy charged includes as a part of the plan and as means for defrauding, the concealment of the character of the taxable product, acts to effect such concealment must be regarded as overt acts under this indictment, though the same could not be so regarded under the former indictment.

While the indictment is prolix, and sets forth as overt acts many acts which cannot be regarded as acts to effect the object of the conspiracy, yet as only one overt act is essential to complete the statutory offense, and as acts of this kind are set forth in each count of the indictment, it appears that an offense is charged of which the District Court of the Southern District of New York has jurisdiction, by virtue of the commission in that jurisdiction of overt acts, irrespective of the actual place of the formation of the conspiracy or of the presence in that jurisdiction of all of the conspirators.

Objections to many of the allegations of overt acts, and to the technical sufficiency of other allegations, may be presented to the trial court, and need not be here considered.

I am of the opinion that the commissioner correctly found that upon the face of the indictment it appeared that the offense charged was within the jurisdiction of, and triable in, the District Court of the United States for the Southern District of New York; that there was sufficient evidence of probable cause; and that there is no error in his finding, or in issuing the warrants for commitment upon which, as appears by the marshal's return, the petitioners were held in custody.

The petition must be dismissed.

In re TILLINGHAST. In re BARBER. In re FENNER.

(District Court, D. Rhode Island. June 30, 1916.)

Nos. 1262–1264.

CRIMINAL LAW ⊜242(1)—REMOVAL FROM DISTRICT OF RESIDENCE—WARRANT.

Where defendants were indicted in the District Court for the Southern District of New York, a warrant for their removal will be granted by the District Court for Rhode Island, in which state defendants resided, notwithstanding the pendency of an indictment in that court against them for similar offenses; defendants making no claim for speedy trial in the

⊜For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

District Court for Rhode Island, and there being no showing that the granting of the warrant of removal would result in unreasonable delay.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 509, 510; Dec. Dig. ⇐242(1).]

In the matter of Frank W. Tillinghast, of Leonard L. Barber, and of Sam A. Fenner. On petitions by the United States for warrants of removal. Petitions granted.

Harvey A. Baker, U. S. Atty., of Providence, R. I., for petitioners.

Charles C. Mumford, John S. Murdock, and Michael J. Lynch, all of Providence, R. I., opposed.

BROWN, District Judge. These petitions of the United States for warrants of removal, and the petitions for discharge upon writs of habeas corpus, were heard together.

The opinion of the court on habeas corpus proceedings filed this day (Law No. 1260, 233 Fed. 710), disposes of most of the questions arising upon these petitions for warrants of removal.

The fact that indictments for another offense are now pending in this district is not, under the present circumstances, a sufficient reason for a refusal to issue warrants of removal. At the hearing an inquiry was made by the court whether the defendants claimed the right to a speedy trial of the indictments pending in this court, and whether they claimed that the right to such speedy trial would be unreasonably delayed by the removal; but, though opportunity was offered, no such claim was made.

There appears, therefore, no sufficient reason for denying the petitions for warrants of removal. Haas v. Henkel, 216 U. S. 462, 475, 30 Sup. Ct. 249, 54 L. Ed. 569, 17 Ann. Cas. 1112.

The petitions for warrants of removal are granted.

COOK v. FLAGG.

(District Court, S. D. New York. June 5, 1916.)

COURTS ⇐350—TAKING DEPOSITIONS—STATE PRACTICE.

Act March 9, 1892, c. 14, 27 Stat. 7 (Comp. St. 1913, § 1476), provides that, in addition to the mode of taking depositions of witnesses in causes pending at law or in equity in the District Court, it shall be lawful to take depositions in the mode prescribed by the laws of the state in which the courts are held. Rev. St. § 863 (Comp. St. 1913, § 1472), provides for the taking of the testimony of any witness by deposition de bene esse when the witness lives at a distance of more than 100 miles from the place of trial, upon notice, before a notary public or other official named. In a suit to establish a trust in funds held by the defendant on the ground that the moneys were obtained by him through false representations to complainant and other customers, complainant moved to take the depositions of customers under the state practice. It appeared that by granting an open commission under state practice, whereby depositions could be taken on written interrogatories, a considerable saving would be effected. *Held* that, as defendant, if not fully protected, could take the depositions of the customers under section 863, the motion to take depositions under the state practice should be granted.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 923; Dec. Dig. ⇐350.]

In Equity. Bill by Ellsworth E. Cook against Jared Flagg. On motion by complainant to take deposition under the state practice. Motion granted.

Gilbert E. Roe, of New York City, for complainant.
Martin W. Littleton, of New York City, for defendant.

AUGUSTUS N. HAND, District Judge. This is a motion to take the deposition of the complainant on his own behalf under the state practice in an equity suit which the complainant brings on behalf of himself and all other customers of the defendant who might elect to become parties thereto for the purpose of impressing a trust upon the alleged balance of $200,000 in the defendant's hands. The complainant wishes to establish that certain moneys were obtained from him by the defendant, and desires to ask the defendant by written interrogatories certain formal questions to establish his residence and citizenship in order to show the jurisdiction of the court, and likewise questions for the purpose of showing that complainant received certain literature from the defendant containing alleged misrepresentations. It is stated in the moving papers that complainant wishes to examine numerous other customers from whom defendant received moneys, in order to establish misrepresentations made to them, and hereafter expects to apply for such examination. It is provided by the United States Statutes:

"That in addition to the mode of taking the depositions of witnesses in causes pending at law or equity in the District and Circuit Courts of the United States, it shall be lawful to take the depositions or testimony of witnesses in the mode prescribed by the laws of the state in which the courts are held." Act March 9, 1892, c. 14, 27 Stat. 7 (Comp. St. 1913, § 1476).

Section 863 of the Revised Statutes (Comp. St. 1913, § 1472) provides for the taking of the testimony of any witness by deposition de bene esse when the witness lives at a distance of more than 100 miles from the place of trial upon notice before a notary public or certain other official named in the statute. This is the ordinary way of taking depositions for use in the federal court. Judge Lacombe, in the case of Henning v. Boyle (C. C.) 112 Fed. 397, held that the method provided for under section 863 of the Revised Statutes was simpler than the method provided for in the state practice, and refused to make an order that a commission issue. It does not appear, however, that the case before him was not an application for an open commission, and an examination of the files of this court establish that it was such an application.

In the present case there is likely to be a very considerable saving of expense in allowing open commissions for the examination of different customers, who may not have a sufficiently large claim in the fund in question to justify the expense of sending counsel to the various distant places to take their depositions orally. I think the application of the complainant is reasonable and should be granted. If the defendant shall finally ascertain that his rights are not sufficiently protected by this method of examination, there is nothing, so far as I

know, to prevent him from calling any of the customers as witnesses on his own behalf under section 863 of the Revised Statutes.

For the foregoing reason, the motion is granted.

In re MARKOWITZ.

(District Court, E. D. Pennsylvania. July 7, 1916.)

1. ALIENS ⟸68—NATURALIZATION—DECLARATION OF INTENTION—AMENDMENT.

Though the declaration of intention of one seeking naturalization is not filed with the clerk of the District Court as clerk, nevertheless the declaration, where it erroneously stated the applicant's nationality, may be amended on application to the court.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 138–145; Dec. Dig. ⟸68.]

2. COURTS ⟸90(1)—DECISIONS—PRECEDENTS.

In the absence of a ruling by an appellate court, a former ruling of a federal District Court will thereafter be followed by the courts of that district.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 313–315; Dec. Dig. ⟸90(1).]

In the matter of the petition of Joseph Markowitz for citizenship. Sur hearing on petition to amend declaration of intention. Amendment allowed.

Edwin Fischer, of Philadelphia, Pa., for petitioner.

Thomas W. Shoemaker, of Philadelphia, Pa., Naturalization Examiner, for the United States.

DICKINSON, District Judge. [1] The fact is the petitioner, when he filed his declaration of intention, was the subject of the King of Roumania. The declaration as it appears of record refers to him as a subject of the Czar of all the Russias. The applicant asks leave to amend his declaration, so as to conform to the fact. The Bureau of Naturalization opposes the application on the ground of want of authority in the court. This is based upon the distinction that a declaration of intention is no part of the record of the court. The declaration, it is true, is made before and filed with the clerk of the court. He is, however, merely the person designated, and his official title is descriptive only. He receives the paper as the person designated to receive it, and not as the clerk of the court.

[2] The view urged has support in the rulings of a number of the District Courts. The opposite view presents the practical aspect of an error which should be corrected, and the convenient tribunal to make the correction is the court. This view also has support in the rulings of a number of the District Courts, among which is the court of this district. In the absence of a ruling by an appellate court, we regard the ruling made by this court as binding upon us, and allow the amendment, and an exception to the United States.

CHICAGO & N. W. RY. CO. v. WILLIAM S. STEIN CO.

(District Court, D. Nebraska, Lincoln Division. February 17, 1915.)

No. 114.

CARRIERS ⟸196—CARRIAGE OF GOODS—FREIGHT CHARGES—DEFENSES.

In an action by an interstate carrier for freight charges, the shipper cannot set off a claim for injuries to the goods, for the freight can be paid only in cash, and such set-offs would open the door to fraud and discrimination.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 879-887; Dec. Dig. ⟸196.]

At Law. Action by the Chicago & Northwestern Railway Company against the William S. Stein Company, a corporation, which counterclaimed. On motion to strike out the counterclaim. Motion granted.

A. A. McLaughlin, for plaintiff.

Tibbets, Anderson & Baylor, for defendant.

THOMAS C. MUNGER, District Judge. This action was brought to recover for charges for freight transported in interstate commerce. The answer sets up a claim for damages accruing to defendant by reason of the negligence of the carrier in transporting articles in interstate commerce. A motion has been presented by the railway company to strike out that part of defendant's answer, because it constitutes no defense in the plaintiff's cause of action.

Under the acts of Congress relating to the transportation of interstate commerce, as construed by the Supreme Court of the United States in Louisville & Nashville Railroad Company v. Mottley, 219 U. S. 467, 31 Sup. Ct. 265, 55 L. Ed. 297, 34 L. R. A. (N. S.) 671, and in Chicago, Indianapolis & Louisville Railway Company v. United States, 219 U. S. 486, 31 Sup. Ct. 272, 55 L. Ed. 305, the carriers cannot accept in payment for the transportation of interstate commerce anything but cash, and no contract, however fair, looking to the payment for such services by an exchange of commodities can stand. If a shipper may be permitted to set off, in an action for freight earned by the carrier, claims for damages which the shipper alleges that he has sustained the court must prevent the usual right to make compromises of such suits, and must undertake the impossible task of holding the carrier to diligence and good faith in preparing and presenting its defenses, in order to prevent the granting and receiving of rebates by insidious agreement between the parties with reference to the disposition of the suit.

The public policy evinced by the acts of Congress relating to interstate commerce requires the denial of the right to set off in such cases, leaving the shippers an independent action to enforce any rights that belong to them.

The motion will be sustained.

UNITED STATES v. ORR et al.

(District Court, D. Rhode Island. July 7, 1916.)

No. 89.

1. CONSPIRACY ⟸43(5)—INDICTMENT—SUFFICIENCY—OVERT ACTS.
An indictment charging a conspiracy to defraud the United States of taxes on artificially colored oleomargarine, which alleged that the conspiracy included as a part of it intended removal of the oleomargarine from the place of manufacture, and averred a removal, contains a sufficient averment of overt acts; it being unnecessary to allege that the conspiracy was actually completed, or the government defrauded.
[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. § 89; Dec. Dig. ⟸43(5).]

2. CONSPIRACY ⟸27—OFFENSES—OVERT ACTS.
Only one overt act is essential to a conviction of a conspiracy to defraud the United States of taxes on artificially colored oleomargarine.
[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 38, 39; Dec. Dig. ⟸27.]

3. CONSPIRACY ⟸43(5)—INDICTMENT—SUFFICIENCY—SURPLUSAGE.
As only one overt act is sufficient to support a conviction for conspiracy to defraud revenue laws with relation to sale of colored oleomargarine, an indictment alleging several overt acts is not demurrable, because open to the objection that some of the allegations were surplusage.
[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. § 89; Dec. Dig. ⟸43(5).]

James S. Orr and Clarence H. Orr were indicted for conspiracy to defraud the United States internal revenue laws. On demurrer to the indictment. Demurrers overruled.

Harvey A. Baker, U. S. Atty., of Providence, R. I.
Wilson, Gardner & Churchill, of Providence, R. I., for defendants.

BROWN, District Judge. The indictment charges a conspiracy to defraud the United States of taxes on artificially colored oleomargarine. The defendants have demurred on grounds already passed upon and overruled by opinion upon a similar indictment, No. 77, reported in U. S. v. Orr (D. C.) 223 Fed. 220. They now make the additional point that:

"The charge of the supposed conspiracy * * * is not supported by any sufficient allegation of any act done by any party or parties to such conspiracy to effect the object thereof."

[1] Upon this point we need consider only the defendants' contention that those allegations of overt acts which relate to the removal of oleomargarine are insufficient, in that none of them shows that the removal was under such circumstances that the tax was due on the product removed.

This contention is, in my opinion, unsound, and is not supported by the decision in Tillinghast v. Richards (D. C.) 225 Fed. 226. In that case it was held that certain of the so-called overt acts alleged to have been done in New York were not acts to effect the purpose of

the conspiracy defined and charged in the indictment. The present indictment, however, charges a conspiracy which includes as a part of it the intended removal of the goods from the place of manufacture. An allegation that this was done is a sufficient allegation of the doing of an act to effect the object of the conspiracy as defined and charged in the indictment. It is unnecessary to allege facts snowing that the scheme was actually completed, or that the United States was actually defrauded.

[2, 3] While the allegation of overt acts is unnecessarily voluminous, as is usual in these cases, and while it may be doubtful if all of the acts alleged can properly be regarded as overt acts, yet as only one overt act is essential, and as the indictment properly charges several, the indictment is not demurrable, even should other allegations be subject to objection for insufficiency or as surplusage.

The demurrers are overruled.

UNITED STATES v. ORR et al.

(District Court, D. Rhode Island. July 7, 1916.)

No. 98.

1. INTERNAL REVENUE ⇐47—INDICTMENT—SUFFICIENCY.

Oleomargarine Act Aug. 2, 1886, c. 840, § 3, 24 Stat. 209, as amended by Act May 9, 1902, c. 784, § 2, 32 Stat. 194 (Comp. St. 1913, § 5977), declares that not only shall one who completes the whole process of manufacturing for sale, including the use of artificial coloration, but one who adds artificial coloration to oleomargarine manufactured by others and disposes of it in violation of the act shall be deemed a manufacturer. Section 8, as amended by section 3 of the act of 1902 (Comp. St. 1913, § 6220), imposes a tax of 10 cents a pound on oleomargarine other than that free from artificial coloration, while section 17 (section 6229) provides for the punishment of any person engaged in the business of manufacturing oleomargarine, who defrauds or attempts to defraud the United States of a tax. *Held* that, as it is reasonable for the statute to declare any person who adds artificial coloration to be a manufacturer of oleomargarine, an indictment charging in the language of the statute that defendants as manufacturers of artificially colored oleomargarine defrauded the government of its revenues is not bad, because not specifying whether defendants merely added artificial coloration or manufactured the whole product.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 144–150; Dec. Dig. ⇐47.]

2. INDICTMENT AND INFORMATION ⇐82—SUFFICIENCY—PRINCIPALS.

An indictment charging defendants with defrauding the United States of taxes on artificially colored oleomargarine, which alleged that they carried on their business under a corporate name, but treated them as principals, is not bad as failing to charge them as principals.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 225; Dec. Dig. ⇐82.]

James S. Orr and Clarence H. Orr were indicted for violating the Oleomargarine Act, and for defrauding the United States of taxes on

artificially colored oleomargarine. On demurrers to indictment. Demurrers overruled.

Harvey A. Baker, U. S. Atty., of Providence, R. I.
Wilson, Gardner & Churchill, of Providence, R. I., for defendants.

BROWN, District Judge. This is an indictment for violation of section 17 of the Oleomargarine Act, and for defrauding the United States of taxes on artificially colored oleomargarine.

[1] As was pointed out in United States v. Orr (D. C.) 223 Fed. 222, the fraud punishable under section 17 is only that committed by "any person engaged in carrying on the business of manufacturing oleomargarine." Section 3 of the Oleomargarine Act of August 2, 1886, as amended by section 2 of the act of May 9, 1902, defines who shall be deemed or held to be a manufacturer of oleomargarine. The term applies, not only to one who completes the whole process of manufacture for sale, including the use of artificial coloration, but to one who adds artificial coloration to oleomargarine manufactured by others, and sells or disposes of it as specified in the act.

By section 8 of the act of August 2, 1886, as amended by section 3 of the act of May 9, 1902, there is imposed a tax of 10 cents per pound upon oleomargarine other than that free from artificial coloration that causes it to look like butter of any shade of yellow, which shall be manufactured and sold, or removed for consumption and use; such tax to be paid by the manufacturer. The tax is payable by the manufacturer, whether he be one who completes the product by adding artificial coloration to oleomargarine made by others, or one who adds it to oleomargarine wholly of his own production.

The first point on demurrer is:

"The defendants are not sufficiently charged as manufacturers of oleomargarine as defined by Act Aug. 2, 1886, as amended."

It is contended that it is essential that the indictment should indicate whether the defendants manufacture by adding coloring matter to oleomargarine made by others, or add it to oleomargarine made entirely by themselves.

I am of the opinion that the indictment is sufficient to apprise the defendants that the government may offer testimony as to either or both ways of carrying on the business of manufacturing, and of giving to the product the artificial coloration which makes it taxable at 10 cents per pound.

It is no undue extension of the term "manufacture" to make it apply to the addition of artificial coloration as the final step in completing the product taxable at 10 cents per pound, as well as to cover its addition in connection with other processes of producing the product. It is not unreasonable in a statute imposing a tax upon an artificially colored, as distinguished from an uncolored, product to treat the step by which the article is given the characteristic color which makes it subject to the special tax as manufacture of the taxable product, irrespective of other steps in the process. See Burdick v. Dillon, 144 Fed. 737, 741, 742, 75 C. C. A. 603. The coloring of the article is not

in itself the means of defrauding the United States, but only a step towards liability to the payment of special taxes.

The defendants are sufficiently charged in the language of the statute as persons engaged in carrying on the business of manufacturing oleomargarine; and the statute, by its definition of the term "manufacturer," removes any uncertainty as to the meaning of that term under the law. That under this allegation the government may show that the defendants produced the taxable product by adding coloring matter to uncolored oleomargarine made by others, as well as to that made by themselves, does not make the charge uncertain or indefinite. There is no reason why the government should be restricted to either class of evidence in showing that the defendants are manufacturers. In fact, it may be possible for the government to prove that a defendant is a manufacturer within the terms of the statute by showing that he used coloring matter to produce colored oleomargarine, though unable to show whether the rest of the process of manufacture was performed by him or by others. The ultimate fact to be proved is charged with requisite certainty; and the first ground of demurrer must be overruled.

[2] The second point relates to counts 13 to 24, inclusive, and is that the defendants are not properly charged as principals, under either section 17 of the Oleomargarine Act or section 332 of the Criminal Code (Act March 4, 1909, c. 321, 35 Stat. 1152 [Comp. St. 1913, § 10506]), and that the decision in U. S. v. Orr (D. C.) 223 Fed. 222, is applicable to these counts as well as to the counts then before the court. But in the present counts there is no allegation, as in that case, that the defendants carried on the business in "their said several capacities" as officers of a corporation. They are here charged individually as principals, though it is also alleged that they carried on business in the name of the Narragansett Dairy Company. The second point must be overruled.

The third point relates only to the thirty-seventh count. I am of the opinion that the nonpayment of the tax at the time of sale is sufficiently alleged, and that the indictment is not demurrable on this ground.

The demurrers are overruled.

GLOVER et al. v BRADLEY et al.

(Circuit Court of Appeals, Fourth Circuit. May 2, 1916.)

No. 1406.

1. PARTITION ⊂=109(1)—PARTIES—SALE—TITLE OF PURCHASER.
Where contingent remaindermen were not made parties to a partition suit, though the life tenants were, a sale of the land for partition disposes only of the life estates, and does not carry the fee.
[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 375, 376, 387; Dec. Dig. ⊂=109(1).]

2. REMAINDERS ⊂=16—SALE OF LAND SUBJECT TO REMAINDERMEN—AUTHORITY OF COURT.
A sale of land by order of court in a suit to which the remaindermen in being were parties is binding on all contingent remaindermen.
[Ed. Note.—For other cases, see Remainders, Cent. Dig. § 11; Dec. Dig. ⊂=16.]

3. REMAINDERS ⊂=16—SALES—UNAUTHORIZED SALE—RATIFICATION.
A testator devised interests in lands to his children, devising a life estate to his daughters, with remainder to their issue, and remainders over in default of issue. In a suit to which the daughters were parties, though the remaindermen in being were not, the lands were ordered sold for partition. After the sale, the executor, who bought in the lands and resold them at a profit, brought a suit against the children, life tenants and contingent remaindermen, setting forth the existence of the fund, his desire to distribute it among the heirs, and praying a construction of the will. *Held*, that as the fund had taken the place of the land, and as the remaindermen in being were made parties, and the court might bind contingent remaindermen by its decree, it could in such proceeding ratify the original sale and vest the title in fee in the executor, though his original purchase gave him only a life estate.
[Ed. Note.—For other cases, see Remainders, Cent. Dig. § 11; Dec. Dig. ⊂=16.]

4. EVIDENCE ⊂=82—PRESUMPTIONS—JUDICIAL PROCEEDINGS.
In such case, where the law required that the proceedings be heard in open court, it will be presumed, notwithstanding a consent that the decree should be made at chambers, that it was made in open court.
[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 104; Dec. Dig. ⊂=82.]

5. ESTOPPEL ⊂=37—AFTER-ACQUIRED TITLE.
Though the purchaser from the executor was not made a party, the executor's title, having been perfected, inured to the benefit of the purchaser; no relief against him being sought.
[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 91-98; Dec. Dig. ⊂=37.]

6. ATTORNEY AND CLIENT ⊂=101(1)—AUTHORITY OF ATTORNEY—CONSENT JUDGMENTS.
Consent of counsel to orders and judgments made in the progress of a cause and intended to promote the interest of his client is binding on the client; a compromise settlement made in good faith by counsel, though the client is an infant, when sanctioned by the court and embodied in a decree, being binding.
[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 209-213, 216; Dec. Dig. ⊂=101(1).]

7. ATTORNEY AND CLIENT ⟸101(1)—AUTHORITY OF ATTORNEY—RELEASE OF CLAIM.

An attorney cannot release his client's claim, except upon full payment.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 209-213, 216; Dec. Dig. ⟸101(1).]

8. ATTORNEY AND CLIENT ⟸101(1)—AUTHORITY OF ATTORNEY—DISCLAIMER.

An attorney has no general power to execute a retraxit or disclaimer, or otherwise bind his client by the surrender of his rights.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 209-213, 216; Dec. Dig. ⟸101(1).]

9. ATTORNEY AND CLIENT ⟸85—AUTHORITY OF ATTORNEY—INFANTS.

An attorney who is representing interests antagonistic to infant clients cannot give binding consent to a decree against the infants, and a decree based on such consent is invalid.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 137; Dec. Dig. ⟸85.]

10. INFANTS ⟸107—CONSENT DECREE—VALIDITY.

Where, in a proceeding to which infants were parties, the court, after reference to a master, rendered a decree, it will be upheld, and is binding on the infants, though there was a stipulation that such decree might be entered by consent at chambers, for the decree was based on the action of the court, and not the consent, which was not binding on the infants, being signed by their attorney, who was representing interests antagonistic to them.

[Ed. Note.—For other cases, see Infants, Cent. Dig. § 308; Dec. Dig. ⟸107.]

Appeal from the District Court of the United States for the Eastern District of South Carolina, at Charleston; Henry A. Middleton Smith, Judge.

Suit by Eunice Glover and others against Peter B. Bradley and another. From a decree for defendants, complainants appeal. Affirmed.

W. B. Gruber, of Walterboro, S. C., and James Simons, of Charleston, S. C. (Howell & Gruber, and Fishburne & Fishburne, all of Walterboro, S. C., Edward W. Hughes, of Charleston, S. C., and Claude E. Sawyer, of Aiken, S. C., on the brief), for appellants.

George F. Von Kolnitz, of Charleston, S. C., George F. Von Kolnitz, Jr., of Spartanburg, S. C., and J. M. Moorer, of Walterboro, S. C. (Padgett & Moorer, of Walterboro, S. C., on the brief), for appellees.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

WOODS, Circuit Judge. The complainants, contingent remaindermen under the will of Dr. John O. Glover, late of Colleton county, S. C., brought this suit to have declared invalid as a cloud upon their title the claim of Peter B. Bradley and Robert S. Bradley to 3,230 acres of land devised by Dr. Glover. The defense is that W. K. Ryan, trustee, under whom the Bradleys claim, acquired the interest of all the devisees under the will, including contingent remaindermen, by virtue of proceedings in the court of common pleas for Colleton county to which the contingent remaindermen were parties. The District Court, holding that the complainants were barred by the proceedings

and that defendants had a good title against them, dismissed the bill.

The clauses of the will pertinent to the issue are as follows:

"Fourth. All the rest and residue of my estate of every kind and description, and wherever the same may be I give, devise, and bequeath to my wife, Margaret A. Glover, and my children, James Bowman Glover, Annie Eliza Glover, Catharine Clara Paul Glover, Mary Maria Glover, and Florence Spencer Glover and any other child or children, that I may leave living at my death, to be equally divided among them share and share alike equally; the issue of any deceased child, that may have died in the meantime leaving issue then living, to represent the ancestor and take per stirpes.

"Fifth. The property hereby given to my daughters, I give, devise, and bequeath unto them and each of them, during the natural life of each, and no longer, absolutely free from the debts, contracts and engagements of any husband either of them may marry, and from and after the death of either of my daughters, I give, devise and bequeath, the property given to such daughter, to be equally divided among her issue then living, the issue of any deceased child of my said daughter that may have died in the meantime, leaving issue, then living, to represent the ancestor, and take per stirpes. But should either of my aforesaid children, die without leaving issue then living, then and in that case, I give, devise and bequeath the property hereby given to such, to be equally divided, among my surviving children, the issue of any deceased child then living to represent the parent in said partition and take per stirpes.

"Sixth. I will and direct that all of my estate remaining after payment of debts be kept together under the management of my wife, Margaret A. Glover, subject nevertheless, to the supervision of my executors, and the net income thereof, appropriated, to the maintenance and education of my children and support of my wife, and I hereby give to and confer on my executors, ample power to control and manage my estate, whenever in their opinion it becomes necessary for them to do so, to preserve the property, and to maintain and educate my children and support my wife: Provided always, nevertheless, that as each of my said children arrives at the age of twenty-one years, or marries, that then my said executors shall deliver their portion hereby given to such child, to him or her, as the case may be. * * *"

The widow, having elected to take dower, forfeited under the terms of the will the devise to her, and the property covered by it passed to the children of the testator in the same proportion and under the same limitations as the direct devises to them.

No question is made of the correctness of the finding of the District Court that each daughter of the testator took an estate for life in the undivided interest devised in paragraph 4 of the will, with a contingent remainder to her issue living at her death, or in default of issue to the remaining children of the testator. The complainants as children of the daughters are therefore contingent remaindermen.

[1] On January 29, 1879, James B. Glover, a son, and Annie E. V. Glover, a daughter of testator, brought a suit in the court of common pleas against the other daughters for partition and sale of 4,527 acres of land. The complaint alleged that the children of Dr. Glover were "entitled to one undivided fifth each in fee in said estate," that the debts were inconsiderable, and that the land was yielding no income. Although there were living children of the daughters, none of them were made parties. The allegation in the complaint that the daughters took a fee under the will indicated that it was intended to sell the fee and that it was supposed to be unnecessary to make the grandchildren of testator parties. The cause proceeded regularly, with the result that at a sale made by the order of the court the land was purchased by B. F. Davis for $7,350. The purchaser having failed to

comply, James S. Glover purchased it at a resale ordered by the court for $2,500. Title was made by the sheriff December 14, 1880, and the sale was confirmed November 18, 1881, but the disposition of the purchase money does not appear. On the day of the confirmation James S. Glover conveyed to W. K. Ryan, trustee, all of his purchase except two tracts, aggregating in area 327 acres, for the consideration of $9,900. Through successive deeds the title of James S. Glover under the judicial sale was finally acquired by Wm. L. Bradley by deed from the Rose Phosphate Company dated May 4, 1887, for the expressed consideration of $24,000. The defendants Peter B. Bradley and Robert S. Bradley acquired the title of Wm. L. Bradley by devise. It is evident that, if there had been nothing else, the Bradleys would own only the life estate of the children of Dr. Glover, subject to the rights of the complainants as contingent remaindermen.

[2, 3] This brings us to the consideration of the effect of the orders of the court in a later suit. On December 1, 1881, Henry C. Glover and James S. Glover, as executors of the will of John O. Glover, brought suit against the children, life tenants, and the grandchildren, contingent remaindermen, under the will of Dr. Glover. The scope of the suit as indicated by the complaint is important in determining the effect of the orders of the court made in this cause. The complaint sets out the former suit for partition; the sale of the land for $2,500; the insufficiency of the fund to pay the debts of the estate amounting to $3,500; the sale by James S. Glover of the land to W. K. Ryan, trustee, for $9,900, and his desire to turn over the profit on the sale to the legatees and devisees under the will of Dr. Glover, after the payment of debts, reasonable compensation to him, and the expenses of the administration; the embarrassment of the executors in the distribution of the surplus, "the said will being uncertain and seemingly contradictory in its terms;" the right of the executors to the aid of the court in interpreting the will and deciding whether the children of testator are entitled to have their portions turned over to them on their arriving at the age of 21 years, or marrying, or whether there is a limitation over to their issue. The prayer was as follows:

"Wherefore plaintiffs demand the judgment of this honorable court, whether they can deliver the portions to the children of testator, on their arriving at the age of 21 years, or marrying, or whether there is a limitation over to their issue, and for such other relief as is stated in said complaint as may be just."

The infant remaindermen answered by guardian ad litem, submitting their rights to the court. The son and daughters of testator alleged in their answers that, having arrived at the age of 21 years, they were entitled to have the funds in the hands of the executors paid over to them under the sixth clause of the will, which provided:

"That as each of my said children arrives at the age of twenty-one years, or marries, that then my said executors shall deliver the portion hereby given to such child to him or her as the case may be. * * *"

The special master to whom the issues were referred made a report on January 23, 1882, in which he finds that the lands, though previously very valuable, had been rendered almost valueless by the

results of the war; that the executors had with difficulty paid the taxes; that but for the advances made by James S. Glover, one of the executors, the lands would have been sacrificed, leaving debts unpaid; that James S. Glover had been at much expense and trouble to resell the land for $9,900, and should be allowed additional compensation of 5 per cent.

On the issue of the construction of the will made by the pleadings the master reported:

"That item sixth of the will of John O. Glover confers on the executors of his estate ample power to pay over to each of his said children, as each arrives at the age of twenty-one years, or marries, the portions given them by the will."

Accordingly he recommended that the net balance arising from the sale of the lands be turned over to the children of Dr. Glover, and that the sale made to James S. Glover, and by him to W. K. Ryan, trustee, be confirmed. The report was confirmed on the same day.

This recital of the proceedings shows plainly that the judicial sale to James S. Glover was understood as a sale of the fee in the land, and not merely of life estates; that James S. Glover, by his deed to Ryan, trustee, intended to convey the fee; and that he brought the proceeds into court to represent the land, and not life estates in it. The acceptance of the court of the fund as the representative of the land is equally plain. This dealing of the court with the fund, and the disposition of it as the representative of the land, with all parties interested, including the contingent remaindermen, before it, necessarily implied recognition and confirmation of the sale as a conveyance of the interest of all concerned. The order of the court confirming the sale was therefore only the expression in definite form of what the court did by implication when it undertook to pass on the rights of all the parties to the fund which had been brought into court as the proceeds of the sale of the land.

It is not disputed that a sale of land made by the order of the court in a suit to which the remaindermen in esse were parties would be binding on all contingent remaindermen. Bofil v. Fisher, 3 Rich. Eq. (S. C.) 1, 55 Am. Dec. 627; Bouknight v. Brown, 16 S. C. 155, Powers v. Bullwinkle, 33 S. C. 293, 11 S. E. 971; Smith v. Winn, 38 S. C. 188, 17 S. E. 717, 751; Hunt v. Gower, 80 S. C. 80, 61 S. E. 218, 128 Am. St. Rep. 862; Harris v. Harris, 86 S. C. 409, 68 S. E. 628. The power of the court to make a sale connotes the powers to confirm a sale already made without sufficient authority. The rights of all parties in such case are transferred from the property to the fund, which the court disposes of according to its conceptions of their rights and interests. Smith v. Winn, supra.

[4] The objection that the order could not be made at chambers is without foundation in fact. The presumption is that the order was made in open court. The consent that it should be made at chambers does not imply that it was so made. It is presumed that the judge would have refused to hear the cause at chambers, if the law required it should be heard in open court. Ex parte Pearson, 79 S. C. 302, 60 S. E. 706.

[5] The failure to make W. K. Ryan, trustee, the purchaser from James S. Glover, a party, does not affect the force of the decree against the remaindermen. James S. Glover was a party, and the decree of the court operated as confirmation of the sale to him and his action thereunder. The sale by Glover to Ryan, trustee, was an incident of Glover's purchase, and the profit paid by Ryan was an inducement for the confirmation of the sale to Glover, but it was not necessary to the confirmation of the sale to Glover that Ryan should be before the court. Looking at the matter in another way: James S. Glover had brought the fund into court as the representative of the land, and Ryan had paid the money for what was intended by him and Glover as the conveyance of the fee. There was nothing that the court could require of Ryan. It might have been important to him to be a party, so that in case the court refused to receive the money and confirm the sale to Glover, on which his title depended, he could have asked that the money be refunded; but his absence from the case as a party, or the loss of his money, could not have injuriously affected the remaindermen, for no relief was sought against him.

[6-10] Again, it is contended that the decree was taken by consent, and cannot have the effect of an adjudication of the rights of the infant contingent remaindermen. Varying constructions of consent decrees have been given by the courts. In South Carolina the general rule is settled by the following language used in Edgerton v. Muse, 2 Hill's Eq. 51:

"Be this, however, as it may, I think the court must exercise the right of correcting its decrees in ex parte cases and cases by consent, so long as they remain unexecuted. For although they purport to be the act of the court, and as such have legal effect, yet in point of fact they are the mere act of the parties. Neither the facts nor the law can be said to be judicially ascertained in such a proceeding. The only restriction upon the exercise of this power ought to be the execution of the decree. It is then that the decree ought to be regarded as final, and to be an estoppel between all parties and privies. It then has the force of a judgment, by either vesting or divesting rights; and also by operating as authority to officers of the court acting under it, and as title to purchasers who may buy under it. This restriction guards the power against all possible abuse."

In this case the answers of the daughters of the testator and the answers of the infants were signed by the same counsel, although their interests were antagonistic. Appended to the decree is a consent "to this order and that it be granted at chambers," signed by the counsel who put in the answers. The decree was intended to bar any claim of the infants to a contingent interest in the land.

Consent of counsel to orders and judgments made in the progress of a cause and intended to promote the interest of his client is binding on the client. Ex parte Jones, 47 S. C. 393, 25 S. E. 285; Dixon v. Floyd, 73 S. C. 202, 53 S. E. 167. And a compromise settlement made in good faith by counsel, even if the client be an infant, when sanctioned by the court and embodied in a decree, is binding. Thompson v. Maxwell, 168 U. S. 451, 18 Sup. Ct. 121, 42 L. Ed. 539. But an attorney has no authority to execute a release of his client's claim, except upon full payment. Gilliland v. Gasque, 6 S. C. 406. Nor has an attorney the power, except under special authority, to execute a re-

traxit or disclaimer, or otherwise to bind the client by the surrender of his rights; for a retraxit, or disclaimer, or other form of a surrender, being in the nature of a release, must be made by the party himself. Dickerson v. Hodge, 43 N. J. Eq. 47, 10 Atl. 111; Thompson v. Odum, 31 Ala. 108, 68 Am. Dec. 159; Gorham v. Gale, 7 Cow. (N. Y.) 739, 17 Am. Dec. 549; Hallack v. Loft, 19 Colo. 74, 34 Pac. 568; Coates v. Santa Fé Ry. Co., 15 Ariz. 25, 135 Pac. 717; Turner v. Fleming, 37 Okl. 75, 130 Pac. 551, 45 L. R. A. (N. S.) 265, Ann. Cas. 1915B, 831; Forest Coal Co. v. Doolittle, 54 W. Va. 210, 46 S. E. 238. In Kingsbury v. Buckner, 134 U. S. 650, 10 Sup. Ct. 638, 33 L. Ed. 1047, it was held that a guardian ad litem himself has no power to bind an infant by consenting to surrender his rights.

We think it follows that, if the decree in this case could be considered as entered against the infants by virtue of consent of counsel, it would not be binding, because it would denote a surrender of the rights of the infants without investigation by the court. Regarded as a consent decree, it would be invalid against the infants for the additional reason that the counsel who signed the consent represented the daughters of the testator, who were antagonistic in interests to the infants, and therefore could not represent them. White v. Joyce, 158 U. S. 128, 15 Sup. Ct. 788, 39 L. Ed. 921.

But the decree cannot be referred to the consent. Without respect to consent it is always the duty of the court to make careful inquiry as to the rights and interests of the infants before adjudicating them; and the presumption is that the court has discharged this duty. Thompson v. Maxwell, supra. The presumption in this case is not necessary, however, for it affirmatively appears from the record that the court ordered a reference to the master, and that there was a full report by him on both the law and the facts involved. The decree was in terms based on this report, and not on consent, and was therefore binding on the infants.

The complaint in the proceedings under review was inartificially drawn, there are irregularities in the conduct of the cause, and the decree of the court was erroneous; but, with all necessary parties before it under pleadings which necessarily involved the recognition and confirmation of the sale and the substitution of the fund for the land, the court after investigation adjudicated the rights of the children and grandchildren of the testator and decreed that the fund should be paid to the son and daughters of Dr. Glover. This decree necessarily confirmed the sale to James Glover against any claim of the complainants.

Affirmed.

McFARLAND v. CURTIN.

(Circuit Court of Appeals, Fourth Circuit. May 2, 1916.)

No. 1408.

1. ATTORNEY AND CLIENT ⟸101(1)—AUTHORITY OF ATTORNEY—DISCLAIMER.
Without special authority, an attorney cannot enter a disclaimer for his client.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 209–213, 216; Dec. Dig. ⟸101(1).]

2. JUDGMENT ⟸461(1)—SUITS TO VACATE—BURDEN OF PROOF.
On a bill to vacate a judgment in ejectment, based on a disclaimer filed by an attorney purporting to act for complainant, the defendant in ejectment, complainant has the burden of proof.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 892; Dec. Dig. ⟸461(1).]

3. JUDGMENT ⟸461(3)—SETTING ASIDE—AUTHORITY OF CLIENT—EVIDENCE—SUFFICIENCY.
In a suit to set aside a judgment in ejectment, based on a disclaimer filed by an attorney purporting to represent complainant, the defendant in ejectment, evidence *held* insufficient to show that complainant authorized the attorney to file the disclaimer, or ratified the filing.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 895; Dec. Dig. ⟸461(3).]

4. ESTOPPEL ⟸68(2)—AUTHORITY OF ATTORNEY—DISCLAIMER.
Where an instrument filed by an attorney purporting to represent complainant, the defendant in ejectment, was in the ejectment action treated as a disclaimer, it will be so treated in a suit to set aside the judgment in ejectment, and the attorney's authority cannot be upheld on the ground that the instrument was a mere statement of facts.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 166, 169; Dec. Dig. ⟸68(2).]

5. EJECTMENT ⟸25(2)—JUDGMENT—RIGHT TO.
A plaintiff in ejectment is not entitled to judgment in his favor because defendant's title has been forfeited to the state.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. § 100; Dec. Dig. ⟸25(2).]

6. COURTS ⟸509—FEDERAL COURT—JURISDICTION—VACATING STATE COURT JUDGMENT.
Where, in ejectment against complainant, then defendant, who was not a citizen of the state in which the land was located and action was had, judgment was rendered against him on a disclaimer filed without authority, complainant may sue in the federal court to vacate the judgment in ejectment, without making any motion for that relief in the state court; a bill in equity being the appropriate remedy to vacate a judgment for matters dehors the record, as the want of authority to file the disclaimer, and the state court never having had jurisdiction to enter the judgment.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1364–1371; Dec. Dig. ⟸509.]

Appeal from the District Court of the United States for the Southern District of West Virginia, at Charleston; Benjamin F. Keller, Judge.

Bill by J. E. McFarland against George W. Curtin. From a decree dismissing the bill, complainant appeals. Reversed.

James S. McCluer, of Parkersburg, W. Va. (McCluer & McCluer, of Parkersburg, W. Va., on the brief), for appellant.

W. E. Haymond, of Sutton, W. Va. (Haymond & Fox, of Sutton, W. Va., on the brief), for appellee.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

KNAPP, Circuit Judge. The above-named appellant, plaintiff below, who claims to be the owner of a tract of land of some 500 acres in Webster county, W. Va., sold the timber thereon, in May, 1902, to Ross F. Stout and two others, who soon afterwards began cutting the same. Thereupon the defendant, Curtin, who also claims ownership of this tract, or some part of it, brought suit in the circuit court of Webster county against Stout and his associates to restrain the cutting operations which they had commenced, and obtained a temporary injunction. McFarland, who lived in Pennsylvania, was not made a party to this suit, but presently came in by petition, setting up his title, asking to be made a defendant, and adopting the answer which the other defendants had filed. Later, upon the pleadings in the suit and depositions of the parties, a motion was made to dissolve the injunction. This motion was overruled. The defendants took an appeal to the Supreme Court of Appeals of West Virginia, which reversed the lower court and remanded the case, "with directions to dismiss the plaintiff's bill unless good cause is shown to the contrary." Curtin v. Stout, 57 W. Va. 271, 50 S. E. 810. As appears from the reported opinion, the reversal was upon the ground that a court of equity will not enjoin the cutting and removal of timber when there is a conflict of title to the land and the parties sought to be enjoined are solvent, as was found to be the fact in this case. The mandate of the Supreme Court was docketed in Webster county in May, 1905, and plaintiff asserts that he never knew, until shortly before this suit was commenced, that anything further had ever been done in the cause.

In this litigation, at least down to the time when the motion to vacate the injunction was denied, plaintiff was represented by H. C. Thurmond, an attorney of Webster Springs; but for the purpose of prosecuting the appeal he employed a lawyer by the name of Brannon, who then took charge of the case, though it appears that Thurmond continued as attorney of record and assisted in the preparation of the brief.

In June and July, 1905, and presumably because of the decision of the Supreme Court of Appeals in the equity suit, Curtin brought two actions at law against the same parties, including McFarland—one an action in ejectment to recover the land in dispute, and the other for damages on account of timber cut before the injunction was granted. Process was issued in both actions, but no effort seems to have been made to serve the same on McFarland, either personally or by publication, and he alleges that he never heard of the suits until long afterwards.

After beginning these actions at law, and on the last day of July following, Curtin filed an amended bill in the equity cause, setting up the fact that he had begun an ejectment suit to establish his title to the

land, and obtained another injunction. The amended bill was thereupon remanded to rules, with leave to sue out process and mature for hearing. Process was issued accordingly, but no service was ever had upon McFarland, either in person or by publication, and apparently as to him the cause is still pending. Nothing further appears to have been done in the law actions until January 10, 1906, when Thurmond, purporting to act as attorney for the defendants in the ejectment suit, filed a disclaimer of title to the lands described in the declaration, and the case was continued. On October 3, 1906, judgment was entered in this suit, reciting the disclaimer "heretofore filed," and awarding to Curtin the lands he sued to recover.

As already indicated, the plaintiff avers that he had no knowledge of the filing of the amended bill in the equity cause, and never knew or suspected that the actions at law had been brought, until discovery was made early in September, 1910, as he testified, by the attorneys employed by him to examine the title with a view to selling the property. Within 60 days or thereabouts this action was commenced, the main object of which is to set aside the judgment entered in the ejectment suit in favor of Curtin. There was a demurrer to the bill, which was overruled; but dismissal was ordered on final hearing, and plaintiff appealed to this court. His right to the relief sought is based upon the contention that the action of Thurmond in filing the disclaimer, on which judgment was entered, was wholly without his authority or assent, at the time or afterwards, and that therefore as to him the disclaimer and judgment, with all subsequent proceedings in the case, should be set aside and held for naught. The answer denies that Thurmond acted without authority and asserts the validity of the judgment.

[1] We need not refer to acts of an attorney which will ordinarily bind his client, though done without the client's knowledge or consent, since the law is well settled that an attorney cannot, in a case like this, file a disclaimer or retraxit unless he is specially authorized to do so. As we have just had occasion to say in Glover v. Bradley, 233 Fed. 721, — C. C. A. —, decided May 2, 1916:

"But an attorney has no authority to execute a release of his client's claim except upon full payment. Gilliland v. Gasque, 6 S. C. 406. Nor has an attorney the power, except under special authority, to execute a retraxit or disclaimer, or otherwise to bind the client by the surrender of his rights; for a retraxit or disclaimer, or other form of a surrender, being in the nature of a release, must be made by the party himself. Dickerson v. Hodge, 43 N. J. Eq. 47, 10 Atl. 111; Thompson v. Odum, 31 Ala. 108, 68 Am. Dec. 159; Gorham v. Gale, 7 Cow. (N. Y.) 739, 17 Am. Dec. 549; Hallack v. Loft, 19 Colo. 74, 34 Pac. 568; Coates v. Santa Fé Ry. Co. [15 Ariz. 25] 135 Pac. 717; Turner v. Fleming [37 Okl. 75] 130 Pac. 551 [45 L. R. A. (N. S.) 265, Ann. Cas. 1915B, 831]; Forest Coal Co. v. Doolittle, 54 W. Va. 210, 46 S. E. 238."

[2, 3] On the merits, then, the case at bar comes to the question whether the plaintiff ever authorized or ratified the act of Thurmond in filing the disclaimer. Although the bill does not charge Thurmond with fraud, and it may be assumed that he acted without wrongful intent, nevertheless he would be likely to give a favorable account of his conduct. But the most he says, as a witness for defendant, is that he has no distinct recollection that McFarland ever instructed him to enter an appearance in the ejectment suit; that he does not remember

that McFarland ever authorized him to enter a disclaimer in that suit; and that he does not know whether or not he ever informed McFarland of the bringing of the suit or of the filing of the disclaimer. This is far from claiming that he was authorized; it is rather a virtual admission that he acted without authority. Indeed, a careful examination of the testimony persuades us that the filing of this disclaimer was wholly unauthorized. In this connection it is to be noted that Thurmond entered no appearance in the ejectment suit, aside from filing the disclaimer, that he entered no appearance in the suit for damages, that he did nothing in the equity cause after the amended bill was filed, and even seemed to be uncertain whether he knew at the time that an amended bill had been filed. In short, the only thing he appears to have done in any of these suits, after the equity case was argued on appeal, was to enter a disclaimer in the ejectment suit in January, 1906.

Nor is the proof of subsequent knowledge and ratification any more convincing. True, some circumstances were shown which of themselves might tend to support the inference that plaintiff became aware of what had been done and impliedly consented to it by nonaction. But the testimony as a whole leads unmistakably, as we think, to the contrary conclusion. Whilst the burden of proof must be borne by the plaintiff, it is surely reasonable to say, if the disclaimer was filed without authority, as we are constrained to hold, that plaintiff should not be put out of court and his property rights foreclosed, on the theory of later assent, without proof which fairly overcomes his positive denial of acquiescence. It is said that the correspondence which passed between plaintiff and Thurmond contains evidence of plaintiff's knowledge, and the learned District Judge, in his opinion, quotes from letters written to Thurmond in 1908 in which these expressions are found: "What about our litigation with Mr. Curtin? My understanding is you accepted service. Now we would like to have this closed up." And again: "Now in regard to our suit with Curtin, what is doing?" But why should not these expressions be held to refer, as plaintiff contends, to the equity suit, which he knew was still pending? To say that plaintiff had reference to the ejectment suit seems inconsistent with the defendant's contention that plaintiff authorized the disclaimer, or at least ratified the act of Thurmond in filing it. On that theory the ejectment suit had come to an end two years before, when Curtin got final judgment in his favor on the disclaimer in question. If plaintiff was aware of that suit and what had been done in it, he must have known that he had lost the land by an adverse judgment. Why, then, should he be writing about a suit which had long before gone against him? In short, we find nothing in this correspondence which supports the defendant's claim; it appears to us, on the other hand, to be of opposite import. Without further review of the testimony, which would serve no useful purpose, we content ourselves with the statement of our conclusion, after careful study of the evidence, that Thurmond filed the disclaimer without authority, and that his act in so doing has never been ratified by the plaintiff.

[4, 5] In the opinion below it is held that the paper filed by Thurmond is not a disclaimer, but, "in fact, merely a statement of existing

conditions with reference to the property in controversy, reciting that no legal title thereto was vested in McFarland, but that it then belonged to C. W. Fogg by virtue of his purchase thereof in delinquent proceedings." But the paper purported to be a disclaimer; it was accepted and treated by the court as a disclaimer; and it was given the full effect of a disclaimer by the award of a judgment thereon giving the land to Curtin. In view of these facts it seems clear to us that the defendant cannot be heard to say that it was not a disclaimer. And manifestly Curtin was not entitled to a judgment in his favor in an ejectment suit against McFarland because, if such be the fact, the title of the latter had been forfeited to the state.

[6] It is further held by the learned judge that the District Court ought not to take jurisdiction because the proper remedy of the plaintiff, if any he has, is to go into the state court which rendered the judgment and move to set it aside. The opinion says:

"From a review of the federal authorities on this phase of the case, it seems to be well established that federal courts ought not to review, modify, or annul the judgment of a state court, unless such a review is sought on a state of facts dehors the record in the state court."

But the judgment here sought to be set aside is entirely regular and valid upon the face of the record. Granted the authority of Thurmond to file the disclaimer, the state court had before it everything needful for the judgment rendered, and there is nothing of record by which that judgment can be impeached. The plaintiff's case rests upon the charge that the disclaimer was filed without authority and has never been ratified. It is not the record in the state court which is called in question, but its judgment is alleged to be unwarranted and invalid for reasons which the record does not disclose or suggest.

Nor are we satisfied that the remedy mentioned was available at the time this action was brought. The statute of West Virginia to which the court refers, in saying that McFarland had five years from the date of the judgment in which to move to set it aside, appears to apply only to judgments taken by default, and plainly this was not a default judgment. If there be any other statute of the state under which McFarland could have moved to set aside the judgment, four years after it was rendered, its provisions have not been brought to our attention.

But, even if it was open to plaintiff to move in the state court to set aside the judgment, we perceive no reason why he should be required to take that course. As a citizen of another state he had the right to invoke the aid of a federal court to annul the judgment, entered upon a disclaimer filed without authority, which operated to deprive him of his property. A bill in equity was the appropriate remedy, and it cannot be said that resort to it was an interference with the jurisdiction of the state court. This is distinctly held in Robb v. Vos, 155 U. S. 13, 38, 15 Sup. Ct. 4, 12 (39 L. Ed. 52) in which the Supreme Court says:

"As the proceedings in the Gugenheim Case were regular upon their face, and extrinsic evidence was required to show their invalidity, we think a court of equity was the proper tribunal to afford effectual relief. Slater v. Maxwell, 6 Wall. 268 [18 L. Ed. 796]; Cocks v. Izard, 7 Wall. 559 [19 L. Ed. 275];

Oelrichs v. Spain, 15 Wall. 211, 228 [21 L. Ed. 43]; Freeman on Judgments, §§ 449, 500. Nor do we think that the contention that for the Circuit Court of the United States to grant such relief would be to interfere with the jurisdiction of the state court, is well founded. Pennover v. Neff, 95 U. S. 714 [24 L. Ed. 565]; Johnson v. Waters, 111 U. S. 640 [4 Sup. Ct. 619, 28 L. Ed. 547]; Arrowsmith v. Gleason, 129 U. S. 86 [9 Sup. Ct. 237, 32 L. Ed. 630]."

Upon the record here presented we are of opinion that a case was made out for setting aside the judgment in the ejectment suit, and it follows that the decree dismissing the bill should be reversed.

Reversed.

GLOVER et al. v. GLOVER et al.

(Circuit Court of Appeals, Fourth Circuit. May 2, 1916.)

No. 1429.

Appeal from the District Court of the United States for the Eastern District of South Carolina, at Charleston; Henry A. Middleton Smith, Judge.

Suit between Francis St. Clair Glover and others and Eunice Glover and others. From a decree for the latter, the former appeal. Affirmed.

W. B. Gruber, of Walterboro, S. C., and James Simons, of Charleston, S. C. (Howell & Gruber and Fishburne & Fishburne, all of Walterboro, S. C., Edward W. Hughes, of Charleston, S. C., and Claude E. Sawyer, of Aiken, S. C., on the brief), for appellants.

George F. Von Kolnitz, of Charleston, S. C., George F. Von Kolnitz, Jr., of Spartanburg, S. C., and J. M. Moorer, of Walterboro, S. C. (Padgett & Moorer, of Walterboro, S. C., on the brief), for appellees.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

WOODS, Circuit Judge. By stipulation the questions involved in this case are decided by the opinion filed in No. 1406, Glover et al. v. Bradley et al., 233 Fed. 721, — C. C. A. —.

Affirmed.

In re VIDAL.

In re RAMIREZ-QUIÑONES.

(Circuit Court of Appeals, First Circuit. May 23, 1916.)

No. 1148.

1. BANKRUPTCY ⊂=350—STATUTES—CONSTRUCTION—STATES—"STATE."

Under Bankr. Act July 1, 1898, c. 541, § 64b (5), 30 Stat. 563 (Comp. St. 1913, § 9648), declaring that debts owing to any person, who by the laws of the states or the United States is entitled to priority, shall have priority and be paid in full out of the bankrupt estate, the word "state," in view of section 1, cl. 24 (section 9585), declaring that it shall include territories, includes Porto Rico, and so one entitled to priority by Porto Rican laws is entitled to priority under the Bankruptcy Act.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 537; Dec. Dig. ⊂=350.

For other definitions, see Words and Phrases, First and Second Series, State.]

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2. BANKRUPTCY ⟸350—PRIORITY—PREFERENCE—CLAIMS.
Under Civ. Code Porto Rico, § 1825 (4) a, declaring that preference shall be given to indebtedness which, without a special privilege, appears in a public instrument, a debtor, by authenticating and acknowledging notes by notarial deed, cannot secure priority for the payment of such notes.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 537; Dec. Dig. ⟸350.]

3. BANKRUPTCY ⟸9(2)—STATUTE—EFFECT ON LOCAL LAWS.
Under Organic Act April 12, 1900, c. 191, § 14, 31 Stat. 80 (Comp. St. 1913, § 3762), declaring federal statutes not locally inapplicable effective in Porto Rico, local laws relating to distribution of insolvent estates are unavailing, in so far as the matter is governed by the Bankruptcy Act, and those provisions contrary to the act are of no effect.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 8; Dec. Dig. ⟸9(2).]

4. BANKRUPTCY ⟸350—PREFERENCES—STATUTES.
Civ. Code Porto Rico, § 1825 (4) a, declaring that preference shall be given to indebtedness which, without a special privilege, appears in a public instrument, is part of a comprehensive system for distributing the estates of insolvents, the preferences provided for being different from the priorities created by the Bankruptcy Act, in that they establish various classes of claims which are to be paid in varying orders. Bankr. Act, § 64b (5), while giving preference to liens created by local laws, does not discriminate between such liens. *Held* that, in the distribution of the estate of a bankrupt, the Bankruptcy Act alone governs, and, though they be treated as not repealed by Organic Act April 12, 1900, making the Bankruptcy Act applicable to Porto Rico, isolated provisions of the Porto Rico Civ. Code, as the above section, do not apply.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 537; Dec. Dig. ⟸350.]

5. BANKRUPTCY ⟸446—REVIEW—EVIDENCE.
On a petition to revise, in matter of law, an order of the District Court in bankruptcy, a finding of the District Court cannot be reviewed, where the evidence was not preserved.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 929; Dec. Dig. ⟸446.]

6. BANKRUPTCY ⟸159—"PREFERENCES"—WHAT CONSTITUTES.
Section 1825(4) a of the Porto Rico Code, relating to acknowledgment of notes by notarial seal, if resorted to by a creditor and an insolvent debtor within four months of his bankruptcy, for the purpose of defeating and evading the provisions of the Bankruptcy Act, cannot be recognized as establishing a priority in such creditor's favor.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 247, 248, 262, 268–281; Dec. Dig. ⟸159.
For other definitions, see Words and Phrases, First and Second Series, Preference.]

Petition to Revise in Matter of Law the Proceedings of the District Court of the United States for Porto Rico; Hamilton, Judge.

In the matter of the bankruptcy of Felipe Ramírez-Quiñones. Ermelindo Vidal, having been denied priority by the District Court of the United States for Porto Rico, petitions to revise the proceedings in matter of law. Petition dismissed, and order affirmed.

See, also, 230 Fed. 603.

José A. Poventud, of Ponce, Porto Rico, for petitioner.

Harry F. Besosa, of San Juan, Porto Rico, for respondent.

Before DODGE and BINGHAM, Circuit Judges, and ALDRICH, District Judge.

DODGE, Circuit Judge. Felipe Ramírez-Quiñones was adjudged bankrupt by the District Court in Porto Rico, March 3, 1915, upon his voluntary petition filed February 28, 1915. A claim against his estate for $5,987.49, presented by the petitioner, has been allowed as an ordinary creditor's claim. The petitioner sought to have it allowed as a claim having priority under section 64b (5) of the Bankruptcy Act; but the referee held it not entitled to such priority. On review, the District Court affirmed the referee, of which decision and order the petitioner now seeks revision in matter of law by this court.

The petitioner's proof of claim as presented to and allowed by the referee is not before us in the record. It appears from the referee's certificate to the District Court to have been based on certain promissory notes payable to the petitioner, given him by the bankrupt, and aggregating $5,442.85 in original amount. The record does not show how many notes there were, nor their separate dates and amounts.

[1] Section 64b (5) includes among debts to have priority and to be paid in full out of bankrupt estates, "debts owing to any person who by the laws of the states or the United States is entitled to priority." "States," as here used, includes territories, according to section 1 (24); and it is not disputed that if the petitioner is entitled to "priority" by the laws of Porto Rico in respect of his debt, in the sense in which section 64b (5) uses the term, the debt is within the provisions of that section.

[2] The petitioner's alleged right to priority is based by him solely on section 1825 (4) a of the Revised Civil Code of Porto Rico, which, as he has set it forth in his petition, is as follows:

"Sec. 1825. With regard to all other personal and real property of the debtor, preference shall be given to: * * * (4) Indebtedness which without a special privilege appear (a) in a public instrument."

In his petition he alleges that the promissory notes referred to "had been authenticated and acknowledged by said bankrupt debtor" by "a certain notarial deed executed by the bankrupt herein and your petitioner on the 21st day of November, 1914," and annexed to his proof of claim in bankruptcy. The "notarial deed" here mentioned does not appear in the record, any more than the proof of claim to which the petitioner says it was annexed. But the trustee in bankruptcy in his answer to the petition, filed in this court December 10, 1915, has admitted that the petitioner did at the first creditors' meeting file—

"a proof of claim for $5,987.49 against the estate of the bankrupt herein, attaching to his said proof of claim a certain notarial deed executed by the bankrupt, Felipe Ramírez-Quiñones (his father-in-law), and the said Ermelindo Vidal, on the 21st day of November, 1914, whereby certain promissory notes in favor of the said Ermelindo Vidal, of different maturity dates and for a total sum of $5,442.85 had been authenticated and acknowledged by his father-in-law, the said bankrupt herein."

The answer denied the further allegation of the petition that said authentication and acknowledgment of the notes aforesaid was in ac-

cordance with section 1825, subd. 4, par. (a) of the Code, and averred that:

"On the contrary, they are directly and expressly in contravention of said section and of the laws of Porto Rico."

1. In his opinion, the learned District Judge states as one reason for his decision denying priority to the petitioner's debt, the following:

"(3) It has also been decided in this court (Re Juan Boucet), January 4, 1915, that the Civil Code (section 1825 [4] a), does not apply to promissory notes. Promissory notes are covered by the Code of Commerce, and not by the Civil Code, and merely reciting them in an instrument executed before a notary does not change the obligation in any respect. No new obligation is created. To come within the meaning of section 1825 (4) a, there must be an instrument for a present consideration which creates some right. Unless this is so, the transaction is not protected under the terms of the Bankruptcy Act as to local liens."

If, as above held, section 1825 (4) a of the Porto Rico Code is not applicable to promissory notes, there is nothing to support the petitioner's claim to priority, and we need not inquire further as to the true meaning or proper application of the section. While the petition assigns the above ruling as an alleged error of the District Court (paragraph D), and the trustee in bankruptcy denies that the ruling was erroneous in his answer to the petition (paragraph 11), little or no reference to the ruling has been made by either party in the briefs filed or the arguments; nor have we been furnished with any report of the decision in Re Juan Boucet mentioned by the District Judge. The petitioner can hardly be said to have attempted to show that the District Court was wrong in ruling as it did upon this point. We find the mere terms of section 1825 (4) a, as submitted to us, insufficient to satisfy us that the Porto Rican law really permits the payee of a note to secure its payment in preference to claims of the maker's other creditors merely by agreement with him to that effect made and recorded before a notary. In this case, as also appears from the opinion, the notes were due when the agreement relied on was so made and recorded.

[3, 4] 2. In the next place, even if section 1825 (4) a is capable of application to promissory notes, and the maker's indebtedness may by virtue of it become entitled to "preference" under such circumstances by Porto Rican law, the petitioner does not satisfy us that the "preference" so obtained is the equivalent of "priority" within the meaning of the Bankruptcy Act.

Title XVII of the Porto Rican Code, which includes section 1825, deals with "Concurrence and Preference of Credits." In its three chapters the application of a bankrupt's assets to the payment of creditors' claims is regulated according to an elaborate and complete system, differing widely from that established by the Bankruptcy Act. Chapter I (sections 1812–1821), "General Provisions," relates to the institution and effect of bankruptcy proceedings. Chapter II (sections 1822–1826), "Classification of Credits," prescribes an order in which debts of various kinds are to rank for payment out of various classes of assets forming the estate to be distributed. Section 1823 provides that the various kinds of debts mentioned shall have "preference," with

relation to various kinds of personal property mentioned, in a certain order. In like manner section 1824 gives "preference" in a certain order to various kinds of debts mentioned, with relation to various kinds of real property mentioned. The "preferences" allowed by these two sections seem to resemble liens, rather than priorities, in the system of the Bankruptcy Act. Next comes section 1825, with which we are concerned in this case. It gives "preference" to various kinds of debts mentioned, in a prescribed order, with relation to all other personal and real property. The kinds of debts mentioned in the first three clauses of the section are superior in rank to those mentioned in clause 4, upon which the petitioner relies. These are, in clause 1, taxes; in clause 2 "agricultural loans," which are to have preference as to the crops raised on the property for which the advances were made, another case in which a lien rather than a priority seems intended; and in clause 3, (a) costs and expenses of the proceedings, (b) funeral expenses, (c) expenses of last illness (of the bankrupt, or members of his family), (d) one year's wages due employés and servants, (e) advances for necessaries during the same period to the bankrupt or his family, (f) allowances for their support during the proceedings. Last of all comes clause 4, giving preference (a) to indebtedness not specially privileged appearing by public instrument, (b) to indebtedness appearing by final judgment after litigation. The chapter ends with section 1826, providing that debts of other kinds or upon other consideration, and not covered by the preceding sections, shall not be entitled to "preference."

The last chapter in this title, chapter III, "Priority and Payment of Credits" (sections 1827–1830), provides, in section 1827, that debts having "'preference" with regard to specified personal property under section 1823 exclude all others to the extent of the property to which the preference relates. Section 1828 has similar provisions regarding "preferences" given by section 1824 with regard to specified real property. Section 1829 provides that after satisfaction of all "preferences" the residue of the debtor's interest in the property affected shall be applicable to payment of his other debts, and as to debts having "preference," but not fully satisfied by means thereof, that they shall be payable in the order or place belonging to them. Section 1830 prescribes the order in which debts having no preference with regard to specified assets, debts having such preference but unsatisfied, and debts as to which the right to preference has expired shall be paid. As to them the order established by section 1825 is to be followed, debts having preference by their dates to be paid in the order of their dates; all others pro rata.

The system of distribution which title XVII purports to establish as above is plainly inconsistent as a whole with that established by the national Bankruptcy Act. The latter does not undertake to deal with the order in which liens or incumbrances on the assets or particular portions of them shall rank; it deals only with the assets remaining for distribution by the trustee after all such liens and incumbrances have been satisfied; and as against the assets so remaining it recognizes as entitled to prior payment only taxes, expenses connected with the

bankruptcy administration, and wages earned within three months, besides the debts entitled to priority under local law, which are to come last. Provisions of the local law securing debts of certain classes by making them liens or incumbrances upon some or all the assets, to be satisfied therefrom in a certain order, are not to be regarded, therefore, as necessarily giving such debts priority for the purposes of the Bankruptcy Act. It is further to be noticed as to several sections of title XVII that they are directly opposed to provisions of the Bankruptcy Act and could have no force whatever in the face of that act, in any event. See Fritze, Lundt & Co. v. Esperanza Central, 5 Porto Rico Federal Reports, 1, 6. But since all the sections of title XVII appear to form together a consistent whole, and the provisions of each to depend upon those contained in all the others, it is doubtful how far the provisions of any one section can remain effective, detached from the others, for any purpose. By section 14 of Organic Act April 12, 1900 (31 Stats. 77, 80), the federal statutes not locally inapplicable, except as therein otherwise provided, are to have the same force and effect in Porto Rico as in the United States. If, when title XVII of the Porto Rican Code was thus suspended in operation, speaking generally, by the national Bankruptcy Act, any of its provisions were left capable of being recognized as effective for the purpose of giving a priority under section 64b (5), this could only be true of provisions in no way relating to debts expressly dealt with as to priority by the Bankruptcy Act itself. See Re Lewis (D. C.) 99 Fed. 935; Re Worcester County, 102 Fed. 808, 42 C. C. A. 637. The petitioner does not sustain the proposition that the particular clause of section 1825 upon which he relies can be allowed the effect of establishing a priority by itself, even if all the connected provisions found in the Code, which the Bankruptcy Act excludes, be disregarded.

[5, 6] 3. The District Court declined to give section 1825 (4) a the effect claimed for it by the petitioner, holding that to do so, under the circumstances shown by the evidence, would be to recognize as valid an incumbrance created by the bankrupt upon his property, while insolvent, in favor of one creditor, within four months preceding the filing of his petition, such as the Bankruptcy Act does not permit. The briefs and arguments before us have been mainly devoted to the question of the correctness of this ruling.

As has appeared, November 21, 1914, the date of execution before the notary of the instrument relied on by the petitioner, was less than four months before the bankruptcy petition was filed. The findings of the District Court, in its opinion, that the bankrupt was insolvent and the notes due on that day, that said notes were originally given for loans to the bankrupt by the petitioner, his son-in-law, and that there was no new consideration for the execution of the notarial instrument whereby priority is claimed to have been secured, were based upon evidence not before us and cannot be reviewed in the present proceeding. Whether or not any "transfer" of the bankrupt's property was accomplished by the execution of that instrument, such as would be voidable as a preference under section 60b of the Bankruptcy Act; if section 1825 (4) a of the Code was resorted to by the bankrupt and his son-

in-law, as the District Court appears to have held, for the purpose of defeating and evading the provisions of the Bankruptcy Act, we think the court was justified in refusing to recognize the section as effective for that purpose, whatever its effect under other circumstances. But the petitioner has failed, as has been stated above, to satisfy us that the provisions of the section can in any case be taken as provisions of local law establishing priority for the purposes of the Bankruptcy Act.

Let there be a decree dismissing the petition and affirming the order of the District Court, with costs for the respondent.

GANDIA & STUBBE v. CADIERNO.

In re SOLÁ É HIJO, S. EN C.

(Circuit Court of Appeals, First Circuit. May 23, 1916.)

No. 1135.

1. AGRICULTURE ⟸13—PREFERENCES—RIGHT TO.

Under Civ. Code Porto Rico, § 1823, subd. 6, providing for a preference for creditors for seeds and expenses of cultivation with regard to the fruits of crops to which they are applied, no preference in the debtor's property generally is given, but only in the crops.

[Ed. Note.—For other cases, see Agriculture, Cent. Dig. §§ 31–33, 36, 37; Dec. Dig. ⟸13.]

2. AGRICULTURE ⟸13—PREFERENCES—RIGHT TO.

Under Civ. Code Porto Rico, § 1824, subd. 4, declaring that mortgage and agricultural credits entered and recorded in the registry of property with regard to the property mortgaged, or which had been the object of the loan, shall be entitled to priority, claims for fertilizer used in cultivation, where there was no record of the debt, are not entitled to priority.

[Ed. Note.—For other cases, see Agriculture, Cent. Dig. §§ 31–33, 36, 37; Dec. Dig. ⟸13.]

3. AGRICULTURE ⟸13—PREFERENCES—RIGHT TO.

Under Civ. Code Porto Rico, § 1824, subd. 2, giving priority to credits for advances for agricultural purposes as to the crops grown, one furnishing fertilizer is not entitled to priority generally, but only in the crops grown.

[Ed. Note.—For other cases, see Agriculture, Cent. Dig. §§ 31–33, 36, 37; Dec. Dig. ⟸13.]

4. AGRICULTURE ⟸13—PREFERENCES—RIGHT TO.

Under Civ. Code Porto Rico, § 1824, subd. 6, providing priority for agricultural loans not entered or recorded with regard to the real estate to which the loan relates, a creditor who furnished fertilizer is not entitled to priority in his debtor's property generally, but only in the agricultural property on which the fertilizer was used.

[Ed. Note.—For other cases, see Agriculture, Cent. Dig. §§ 31, 33, 36, 37; Dec. Dig. ⟸13.]

5. BANKRUPTCY ⟸350—PREFERENCES—RIGHT TO.

Under Bankr. Act July 1, 1898, c. 541, 30 Stat. 563 (Comp. St. 1913, § 9648), all valid liens and incumbrances upon the assets forming part of the bankrupt's estate are to be satisfied before distribution among the creditors holding allowed claims is to be made, debts having priority being those entitled in such distribution to be first paid; therefore, under Civ. Code Porto Rico, § 1824, subd. 6, establishing a preference for

agricultural loans, one who furnished fertilizer to enable an agriculturist to make a crop is not, in view of the fact that the Code provision is part of a comprehensive system for the distribution of insolvent's property, inconsistent with the system of the Bankruptcy Act, entitled to priority under section 64b.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 537; Dec. Dig. ⊂=350.]

6. APPEAL AND ERROR ⊂=719(5)—REVIEW—QUESTIONS REVIEWABLE.

On appeal from a judgment of the District Court affirming an order of the referee, the question of the admissibility of evidence, which was not assigned as error, and on which no finding was based, will not be reviewed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2974, 3490; Dec. Dig. ⊂=719(5).]

7. AGRICULTURE ⊂=11—PREFERENCES—RIGHT TO.

Under Civ. Code Porto Rico, § 1824, subd. 6, giving priority to agricultural loans, one furnishing an agriculturist with fertilizer is not entitled to priority, unless the fertilizer was used in cultivating his land.

[Ed. Note.—For other cases, see Agriculture, Cent. Dig. §§ 15–30; Dec. Dig. ⊂=11.]

8. BANKRUPTCY ⊂=479—PROCEEDINGS—COSTS.

On appeal from an order of the District Court, the trustee in bankruptcy, who did not appear when the case was called, and filed no brief, was not entitled to costs.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 901; Dec. Dig. ⊂=479.]

Appeal from the District Court of the United States for the District of Porto Rico; Hamilton, Judge.

In the matter of the bankruptcy of Solá é Hijo, S. en C. From an order of the District Court, affirming an order of the referee denying the motion of Gandia & Stubbe, opposed by Segundo Cadierno, trustee, to obtain priority, petitioners appeal. Affirmed.

Joseph B. Jacobs, of Boston, Mass. (Cay Call Cuchi, of San Juan, Porto Rico, and Jacobs & Jacobs, of Boston, Mass., on the brief), for appellants.

Before DODGE and BINGHAM, Circuit Judges, and ALDRICH, District Judge.

DODGE, Circuit Judge. The bankrupt in this case was a firm known by the name "Solá é Hijo, S. en C." How many partners composed the firm is not shown by the record, nor do the names of any of them appear.

The appellants are creditors of the firm and have a claim against the estate which has been allowed in the sum of $7,052.33, being the total amount due them from the firm for fertilizer sold and delivered to it at various times during 1911 and 1912.

Having obtained its allowance, as above, the appellants filed a petition to the referee, asking that their claim be granted priority. This was filed April 5, 1914, entitled, "Motion to Obtain Priority of Payment on Behalf of Gandia & Stubbe." The request made was:

"Wherefore the petitioners move that their claims be allowed priority for payment within paragraph 6 of section 1823, and paragraph 4 of the section

1824, of the Civil Code of Porto Rico, as a refactionary credit representing cultivating expenses for agricultural purposes."

The referee denied the request, holding that the petitioners had not established a proper claim for priority. The District Court, on review, sustained the referee, from which order this appeal is taken.

[1] The business done by the bankrupt firm appears to have consisted in raising tobacco and sugar cane upon various farms or plantations belonging to it in Porto Rico called "fincas." Findings by the referee that the debt in question "arose out of the sale of fertilizers sold to the bankrupt as agriculturists and not as wholesalers of fertilizer," and that "the fertilizer was sold for the purposes of cultivation," are not disputed. The material portions of sections 1823 and 1824 of the Civil Code of Porto Rico containing the provisions relied on by the appellants may be quoted from the English version of the Code included in the compilation of the Revised Statutes and Codes of Porto Rico, published by the Bureau of Insular Affairs, War Department, in 1913.

Section 1823 provides that:

"With regard to specified personal property of the debtor, the following are preferred: * * * 6. Credits for seeds and expenses of cultivation and harvesting, advanced to the debtor, with regard to the fruits of the crops to which they were applied."

There being nothing in the record to show that any of the fertilizer sold to the bankrupt firm as above was applied to any particular crop, or that the fruits of any crop to which it may have been applied, or the proceeds thereof, form any part of the bankrupt estate, it is clear that, as the referee and the District Court both held, the above provisions have no application for any purpose in the present case.

[2, 3] Section 1824 of the Code provides that:

"With regard to certain real property and rights on realty of the debtor, the following shall have preference: * * *

"2. Credits for advances for agricultural purposes, as to the crops on the property for which such advances are made, as provided in the special act relative to that subject. * * *

"4. Mortgage and agricultural credits (refaccionarios) entered and recorded in the registry of property, with regard to the property mortgaged, or which had been the object of the agricultural loan (refaccion). * * *

"6. Agricultural loans not entered or recorded with regard to the real estate to which the agricultural loan (refaccion) relates, and only with regard to other credits from that mentioned in the four preceding numbers."

[4, 5] Paragraph 4 of this section is the only paragraph expressly relied on in the above "motion to obtain priority," etc. It has no application, because no claim is made that there was ever any record relating to the debt in question or any part thereof. Paragraph 2, not mentioned in the above motion, but considered by the referee, has no application; for the same reason as those which exclude paragraph 6 of sec. 1823. It is in paragraph 6 alone, also not mentioned in the appellants' original motion, that any possible support for their claim to "preference" under the Code can be found—as was held both by the referee and by the District Court.

The "preference" given by paragraph 6 is not given with regard to the debtor's entire property, or with regard to all his real property,

but only "with regard to the real estate to which the agricultural loan relates." Assuming the debt here in question to have been for an "agricultural loan," within the meaning of the Code, to what real estate it related does not appear from the record, nor does it appear to what real estate the appellants contend that it related, unless their claim is that it related to all the real estate belonging to the bankrupt firm when the fertilizer was sold, without distinction. From the referee's opinion dated June 23, 1914, they appear to have contended, on the evidence before the referee, that the firm had only one property, a finca called "La Union," and that the fertilizer sold was presumably used on that property. But the records showed, according to the referee, that the firm had several other properties, upon any or all of which the fertilizer might have been used, wherefore he regarded the claim to priority as maintainable only if paragraph 6 of section 1824 entitled the appellants to payment out of the proceeds of sale of the finca "La Union." In his subsequent certificate to the District Court, dated October 15, 1914, the referee stated that:

"No evidence was offered to show upon which properties of the bankrupt estate the fertilizer sold by petitioner was used. No evidence was offered to show that any of the fertilizer in question was used on the property called 'Union.'"

There is no indication in the record of any attempt by the appellants to show that their "agricultural loan" related either to the finca "La Union," or to any particular piece of real property belonging to the bankrupt firm. The opinion of the District Court makes no reference to the above statements by the referee, nor does the brief submitted to us by the appellants. On behalf of the trustee in bankruptcy, there has been neither argument nor brief submitted in this court. The appellants' contention appears to be, that if the sales of fertilizer were to the firm "as agriculturists" and "for the purposes of cultivation," nothing further is necessary to make the transaction an "agricultural loan" or to make it "relate" in the sense of section 1824, to all real estate owned by the firm, without discrimination. We are by no means satisfied that the section is to be so understood; but, if it is, there are further difficulties in the way of holding that the appellants have acquired either "preference" or "priority" by virtue of it.

In the first place, the assumption that a "preference" good, according to section 1824, against all a bankrupt's real estate would be the same thing as a "priority," in the sense in which the Bankruptcy Act uses that term, is one which we are not prepared to adopt.

Under the system of distribution established by the Bankruptcy Act, all valid liens and incumbrances upon assets forming part of the bankrupt's estate are to be satisfied before any distribution among the creditors holding allowed claims is made; and debts having priority are those entitled in such distribution to be first paid, in the order fixed by Bankruptcy Act July 1, 1898, c. 541, § 64b, 30 Stat. 563 (Comp. St. 1913, § 9648), out of the net proceeds realized by the trustee from all the assets of whatever kind.

The "preferences" allowed by the various sections of title XVII of the Porto Rican Code, wherein section 1824 is included, more nearly

resemble liens or incumbrances attaching upon the various kinds of property specified in said sections respectively, than the priorities allowed by section 64b of the Bankruptcy Act out of the net proceeds of the entire estate.

Of the various provisions as to "preferences" contained in title XVII of the Code, there are some which are obviously in direct conflict with provisions of the Bankruptcy Act, and therefore of no effect whatever for the purpose of regulating distribution under it. There has been no attempt to show how the remaining provisions of said title, or any of them, connected as they are with those which must be wholly disregarded, can be recognized as valid for that purpose.

The Bankruptcy Act contemplates no such elaborate system of distribution, according to preferences ranking in a prescribed order, some upon specified kinds of personal or of real property, some upon personal or real property not of the specified kinds and some upon all the property of both kinds—as title XVII of the Code establishes. How any one provision belonging to the latter system can be safely recognized, detached from the others wherewith it is there connected, as establishing a priority under section 64b (5) of the Bankruptcy Act, belonging, as that section does, to a system so different and inconsistent in its nature, is not apparent. A like conclusion is reached in our opinion in No. 1148, Vidal, Petitioner, 233 Fed. 733, — C. C. A. —, also dated May 23, 1916, wherein the differences between the two systems are more fully considered.

There is nothing in the record to show what kinds of property constitute or originally constituted the estate in the trustee's hands. If it may be inferred that part thereof is or was real estate, whether or not there is or was also personal property, and, if so, in what proportion to the real estate, does not appear. In no event could preference of any kind be claimed for the appellants' debt except as against real estate; but so far as the record shows, allowing it priority under section 64b (5) might result in applying to its payment more than its share of the personal property. The above considerations we think sufficient to prevent us from holding that the District Court erred in holding the debt not entitled to priority, although they are not the grounds for its decision which the opinion sets forth.

It is stated in the opinion of the District Court that the referee found:

"That Gandia & Stubbe furnished this fertilizer for the cultivation of crops, but that the bankrupt, instead of using the material for that purpose, sold it to others."

We do not discover any such finding by the referee, either in his opinion dated June 23, 1914, or in his certificate dated October 15, 1914. He seems to have gone no further than to find:

"That if at any time Solá é Hijo otherwise disposed of the fertilizer, it was without the knowledge of Gandia & Stubbe, and certainly without their consent."

[6] Evidence offered before the referee by the trustee in bankruptcy to show that the bankrupt sold some or all of the fertilizer appears to have been admitted by the referee against the appellants' objection.

They argued to the District Court that it was improperly admitted, and have so argued here, though the admission of this evidence is not assigned as error. The District Court made no ruling as to its admissibility, and neither the referee nor the District Court has based any conclusion upon a finding that the bankrupt did in fact sell the fertilizer instead of using it. We find no occasion, therefore, to determine whether the evidence was admissible or not.

[7, 8] The District Court held that the appellants had failed to establish any preference for their debt under section 1824 of the Porto Rican Code, because they had failed to prove that the fertilizer sold had been ever applied to the bankrupt's land. The appellants contend that, under the Code, no such proof was necessary; but proof that the fertilizer was sold for purposes of cultivation was sufficient for the purpose. The appellants fail to satisfy us that the District Court erred in its interpretation of the Code provisions, and we think it clear that no sufficient proof appears in the record that the debt for the fertilizer "related," in the sense of the Code, to the real estate whereon preference was claimed. We find no error, therefore, in the order or decree appealed from. In view of his failure to appear when the case was called, or to file any brief, the trustee in bankruptcy is not entitled to costs. As he has not raised the possible question whether an appeal lay from the decree below, instead of a petition under section 24b (section 9608), we have not felt obliged, under the circumstances, to consider it.

The decree of the District Court is affirmed, without costs of appeal.

LYONS v. LYONS.

(Circuit Court of Appeals, Fourth Circuit. May 3, 1916.)

No. 1410.

1. WILLS ⟸441, 457—CONSTRUCTION—INTENT OF TESTATOR.
In construing a will, the court will not only consider the context, but may consider the facts and circumstances existing at the time of the will, and, to give effect to the testator's intent, adopt a nontechnical meaning of words used.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 958, 975; Dec. Dig. ⟸441, 457.]

2. WILLS ⟸566—CONSTRUCTION—PROPERTY DEVISED—"MONEY IN BANK."
A testator devised real estate appraised at a specified value to a nephew, bequeathed to his wife all his shares of capital stock of a bank, amounting to 20 shares, made small cash bequests, gave to a brother the residue "of my money in bank" remaining after payment of debts, expenses of administration, and legacies, and gave his residuary estate to his wife. Testator was, at the time of the making of the will, past 60 years of age and childless, and had retired from business. Testator and his wife had talked over the matter of the disposition of his estate, and had agreed thereon when he sent for a lawyer, who drew the will according to instructions. *Held*, that the term "money in bank," in the will, in-

cluded, not only a checking account, but also time and savings deposits of testator.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1238½, 1239; Dec. Dig. ⟸566.

For other definitions, see Words and Phrases, Second Series, Money on Deposit in Bank.]

Appeal from the District Court of the United States for the Northern District of West Virginia, at Clarksburg; Alston G. Dayton, Judge.

Suit by Michael Lyons against Mary E. Lyons, in her own right and as administratrix with will annexed of John Lyons, deceased. From a decree for complainant (224 Fed. 772), defendant appeals. Affirmed.

Edward G. Smith, of Clarksburg, W. Va. (Smith & Jackson, of Clarksburg, W. Va., on the brief), for appellant.

E. Bryan Templeman, of Clarksburg, W Va. (Davis, Swartz & Templeman, of Clarksburg, W. Va., and Walter F. Carter and Rounds, Schurman & Dwight, all of New York City, on the brief), for appellee.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

PRITCHARD, Circuit Judge. This suit was instituted in the District Court of the United States for the Northern District of West Virginia by Michael Lyons, complainant, against Mary E. Lyons, in her own right and as administratrix with the will annexed of John Lyons, deceased, defendant, for the purpose of surcharging and falsifying the accounts of Mary E. Lyons, as administratrix c. t. a. That portion of the eighth clause of the will involved in this controversy is in the following language:

"I give and bequeath to my brother, Michael Lyons, of Ganaveen, Ireland, the residue of my money in bank remaining after the payment of my aforesaid funeral expenses, debts, costs and expenses of administration of my estate and the legacies aforesaid. * * *"

It was shown by the testimony that the testator at the time of his death had on deposit certain certificates in banks in the city of Clarksburg, as follows: Three, aggregating $2,746.34, in the Home Bank for Savings; one, for $865.94, in the Union National Bank of Clarksburg; one, for $1,187.64, in the West Virginia Bank; a savings deposit in the Lowndes Savings & Trust Company, amounting to $3,866.45; and a checking account in the Home Bank for Savings, amounting to $854.14.

It is insisted by appellee that by virtue of the clause which we have just quoted the certificates of deposit, savings account, and checking account, after the payment of funeral expenses, debts, costs and expenses of administration, and the legacies mentioned, passed to him. On the other hand, it is contended by appellant that the words "money in bank" being currency or coin, that money on time deposit or savings account did not pass, because such moneys were debts, not due, owing by the bank to the depositor, and were choses in action. It is our duty to ascertain, if possible, the intent of the testator as

respects the disposition of the money or property to which reference is made in that portion of the eighth clause of the will which we have just quoted.

[1, 2] It is well settled that in the construction of a will the court may not only consider the context of the same, but may further consider the facts and circumstances existing at the time the will was made. In the case of Wootton v. Redd, 12 Grat. 205, the Supreme Court of Virginia said:

"In performing the duty of expounding a will, the court will make the amplest allowance for the unskillfulness and negligence of the testator, technical informalities will be disregarded, the most perplexing complications of words and sentences will be carefully unfolded, and the traces of the testator's intention will be diligently sought out in every part of the instrument, and the whole carefully weighed together. Nor in the performance of this duty will the judicial expositor be confined to its mere contents. For an investigation into the state of facts under which the will was made will often materially aid in elucidating the scheme which the testator had in mind for the disposition of his estate. Hence he will endeavor to place himself in the situation of the person whose language he is called on to interpret; and as this can only be done by the aid of extrinsic evidence, such evidence may be resorted to for the purpose of showing the situation of the testator and the state of his family and of his property at the time of making his will. And, generally, evidence may be received as to any facts known to the testator which may reasonably be supposed to have influenced him in the disposition of his property, and as to all the surrounding circumstances at the time of the making the will. Wigram on Admission of Extrinsic Evidence in Aid of the Interpretation of Wills, p. 11 et seq.; Id., Proposition 5, p. 51; Id., p. 57; Smith v. Bell, 6 Pet. 68, 75 [8 L. Ed. 322]; Doe v. Martin, Nev. & Mann. 524; Shelton v. Shelton, 1 Wash. [Va.] 53, 56; Kennon v. McRoberts, 1 Wash. [Va.] 96, 102 [1 Am. Dec. 428]; Ellis v. Merrimack Bridge, 2 Pick. [Mass.] 243; Brainerd v. Cowdrey, 16 Conn. 1."

It is insisted by counsel for appellant that certificates of deposit are choses in action, and that technical words will be given technical meanings, unless the contrary appears from the context of the will. This rule ordinarily applies, but after considering the language of the clause to be construed in this controversy we deem it important, if possible, to ascertain the intent of the testator, feeling as we do that the facts and circumstances are such as to show that he used the words in a nontechnical sense. In Page on Wills, § 471, it is said:

"It is presumed, therefore, that the words of the will are used in their popular and conventional meaning, unless from the face of the will they appear to be otherwise used. Thus a provision that the wife of testator should be 'sole controller' of the property of the testator, and charging all his just debts upon a certain fund, was held to constitute his wife his executrix, but not sole legatee. If, however, testator uses words which have a definite and well-understood technical meaning, the prima facie presumption will be that he intended to use them in this sense, unless it appears plainly from the context that another meaning was intended."

Charles B. Johnson, who was introduced as a witness on behalf of complainant, testified that he was engaged in the practice of law, that he had known testator probably two or three years prior to his death, and that he prepared his will. Witness further testified as follows:

"Q. Who was present when you drew the will, and where was it done? A. The will was, of course, drawn by me in my office; but I made three or four trips, possibly only three trips, to the residence of Mr. John Lyons in Clarksburg, and received from him and his wife direct the information which

was used in drawing the will. I do not remember that any other person was present during these conversations except myself. Mr. Lyons and his wife, and I think Mr. John Noon, the other witness, was present at the time that the will was executed or signed. Q. Who furnished you with the data or directions contained in the will as to his property, and the disposition made of it? A. Mr. John Lyons and his wife gave me all the information I secured respecting the property which he had and the manner of disposition. Q. More particularly, state who gave you the directions contained in said will for the benefit of Michael Lyons, and who told you where Michael Lyons lived? A. That information was given me by Mr. John Lyons himself, although he and his wife were both in the room, and both talked about it while I was securing their information, but I could not say exactly to what extent each one of them gave me the information; but Mr. John Lyons told me where his brother lived, and who he was, and what he desired to give him by this will. * * * Q. Who was that person? A. That was Michael Lyons, of Genaveen, Ireland. Q. Did Michael Lyons, testator, tell you anything about his brother, or having a brother at that time? A. You mean John Lyons? Q. I mean John Lyons; yes. A. Yes, sir. Mr. John Lyons told me that he had a brother in Ireland, and told me where he was, and told me where he was and giving me the place, Genaveen. However, both John Lyons and his wife talked about this, and I cannot say just which one exactly gave me the more information about it. It was a subject of general talk between the two and myself at the time when I was preparing the will. Q. Did he ever tell you about having such a brother more than once, or only the one time? A. I cannot say about that, Mr. Bassel. I only remember that he told me that he had a brother named Michael Lyons, at Genaveen, Ireland, and told me what he desired to leave to this brother by the will, and whether we talked about it more than once I could not say, exactly. I do remember that we talked about it."

It will be observed that the testator's wife was present at the time the will was executed, and participated in giving the draftsman the information upon which the will was prepared, and, according to the witness, made no objection to the manner in which testator disposed of his property. By virtue of the third clause of the will Thomas Rogers Lyons was given a house and lot; by the fourth clause Virginia Drudy was given the sum of $100; the sixth clause gives Reginald Bradford $100; and by the seventh clause $1 in cash was given to Patrick Lyons, a brother of the testator. This leaves only the first, second and residuary clauses. The first and second clauses were for the payment of burial and funeral expenses out of the money of the testator in bank. The residuary clause is in the following language:

"All the rest and residue of my property and estate, real, personal and mixed, of every kind or nature whatsoever, not hereinbefore given, devised and bequeathed, I do hereby give, devise and bequeath to my wife, Mary E. Lyons."

If it had been the purpose of the testator to treat the certificates of deposit as property, and not as money, he would have naturally disposed of the same in the fourth clause, wherein he bequeathed 20 shares of the capital stock of the Home Bank for Savings to his wife. That this was not the purpose of the testator is shown by the evidence of the witness Johnson, who prepared the will. This witness, among other things, in referring to what transpired at the time he was obtaining the information upon which the will was based, said:

"In giving me the property, he spoke of his real estate and how he desired to dispose of it, and I think certain personal property, such as the stock in

the bank, and then asked that the 'money in bank,' using those words, be given to the person mentioned in the eighth clause of the will."

Common observation and experience teach us that one like the testator, not familiar with the technical meaning of banking terms, would naturally employ the term "money in bank," when referring to deposits of this kind, notwithstanding the fact that such deposits were not subject to check. He knew that from time to time he had deposited money in the bank, and it was most natural that he should have referred to the same as "money in bank." Indeed, any layman, and particularly one who had not had the benefit of an education, and, therefore, not acquainted with the technical terms employed in connection with banking, would, under similar circumstances, have employed the same language used by the testator. This, taken in connection with the fact that only the bank stock he possessed was bequeathed to the wife in the fourth clause, tends strongly to support the contention that it was the purpose of the testator to give to his brother all money that he had in the bank subject to check or by virtue of time deposits.

We do not deem it necessary to discuss the relevancy of the cases relied upon by appellant, feeling as we do that, when we consider the facts and circumstances connected with the execution of the will in question, the term "money in bank," employed by the testator, was used in a broad and not a technical sense, and that therefore it was his purpose, after paying certain expenses referred to in clauses 1 and 2 to bequeath to his brother any balance that might remain in the bank of the money that he had deposited subject to check, as well as any amount on time deposit.

We think the construction placed upon this will by the lower court was eminently proper. Therefore the ruling of that court is affirmed.

THE JOHN J. TIMMINS.

(Circuit Court of Appeals, Second Circuit. April 11, 1916.)

No. 160.

COLLISION ⊂=95(2)—STEAM VESSELS MEETING—CHANGE OF COURSE.

A collision in the evening between a barge alongside of a tug and another tug *held*, on conflicting evidence, to have occurred when the vessels were on meeting courses, and to have been due solely to the fault of the towing tug in changing her course.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 200–202; Dec. Dig. ⊂=95(2).]

Appeal from the District Court of the United States for the Southern District of New York.

Suit in admiralty, for collision by the Moran Towing & Transportation Company, owner of the barge Moran No. 44, against the steam tug John J. Timmins; Edward M. Timmins, claimant. Decree for libelant, and claimant appeals. Affirmed.

H. L. Loomis and Butler, Wycoff & Campbell, all of New York City, for appellant.

Samuel Park and Park & Mattison, all of New York City, for appellee.

Before WARD and ROGERS, Circuit Judges, and HOUGH, District Judge.

WARD, Circuit Judge. Judge Mayer not only found the testimony of the witnesses in this case irreconcilable, which often occurs, but came to a conclusion founded quite as much on what he thought to be the probabilities of the situation as on the testimony of the witnesses from the vessel which he exonerated.

December 6, 1912, about 5:30 p. m., the tug Timmins was bound down Red Hook channel for Bush's Stores, South Brooklyn, with the covered barge Rose on her port and the open deck barge Moran No. 44 on her starboard side. The tug Moran was bound light from the seawall of the Erie Basin Breakwater to New York. The starboard bows of the tug and of the barge No. 44 came into sliding contact, and the owner of the barge, which is also the owner of the tug Moran, filed this libel against the tug Timmins to recover the damages caused thereby. The District Judge entered a decree against the Timmins.

The pleadings of each party give a perfectly intelligible account of what happened, which is consistent with the destination of each vessel. The libel alleges that the collision occurred, when the vessels were meeting green to green in Red Hook channel, as the result of the Timmins suddenly porting, whereupon the Moran hard-aported so as to avoid being struck amidships. On the other hand, the answer of the Timmins says that the collision occurred when the vessels were on crossing courses; the Moran having the Timmins on her starboard side and crossing so near her bows that in hard-aporting to clear she ran into the starboard side of the barge No. 44.

Now, either of these accounts is quite consistent with the destination of each vessel, and if supported by testimony might safely be adopted; but at the trial the master and mate of the Timmins added the following, viz.: That the Moran, while on a course to the westward crossing the course of the Timmins to the southward and showing her green light, suddenly starboarded, shut out her green light, got on a parallel course, and then, when about 200 feet ahead, suddenly hard-aported right across the bows of the Timmins, and in an effort to get clear swung around and ran into the starboard side of the barge No. 44. This account the District Judge rejected as incredible, and we entirely agree with him. Moreover, the navigation is not consistent with the destination of the Moran, nor with the account given in the answer of the Timmins. The conclusion so arrived at deprives the testimony of the material witnesses for the Timmins of any claim to credibility. The best that can be said for them is that they could not have seen the Moran until almost the moment of collision. Consequently we must adopt the story of the Moran, unless it also appears to be incredible. The collision obviously was sudden and unexpected. Neither vessel blew any steering signal, nor even

any alarm. The nature of the contact—a rubbing or glancing, rather than a direct, blow—shows that both vessels must have ported. Those on the Timmins deny any change of course, while the pilot of the Moran admits hard-aporting for a good reason. Obviously, if the Timmins had maintained a steady course and the Moran only had ported, the blow would have been more direct and not glancing.

The No. 44 was a barge entirely covered by her deck, and having forward and aft a perpendicular bulkhead at the bottom as wide as the deck, and angling off to the top which was much narrower. A great deal is said about the forward bulkhead obstructing the view of the Timmins' green light from those on the Moran and of the Moran's green light from those on the Timmins, to which we attach very little importance, particularly as it seems to be admitted that the outline of the vessels could be seen at a considerable distance.

The decree is affirmed.

THE BRIDGETON.

(Circuit Court of Appeals, Second Circuit. April 11, 1916.)

Nos. 233, 234.

COLLISION ⊂=95(4)—STEAM VESSELS MEETING—VIOLATION OF PASSING AGREEMENT.

A collision between a car float in tow alongside of a tug passing out of a slip at Communipaw and a steam lighter passing in *held* due solely to the fault of the tug in violating an agreement made by the two vessels to pass port to port, for which the width of the slip gave sufficient room.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 200–202; Dec. Dig. ⊂=95(4).]

Appeal from the District Court of the United States for the Southern District of New York.

Suits in admiralty for collision by the North & East River Terminal Company, owner, and by William Gaffney, charterer, of the steam lighter Varina, against the steam tug Bridgeton; the Central Railroad Company of New Jersey, claimant. Decree for libelants, and claimant appeals. Affirmed.

For opinion below, see 221 Fed. 510.

James J. Macklin, of New York City (F. V. Barnes, of New York City, of counsel), for appellant.

Armstrong, Brown & Purdy, of New York City (P. M. Brown, of New York City, of counsel), for appellee North & East River Terminal Co.

Foley & Martin, of New York City (Wm. J. Martin and G. V. A. McCloskey, both of New York City, of counsel), for appellee Gaffney.

Before WARD and ROGERS, Circuit Judges, and MAYER, District Judge.

WARD, Circuit Judge. February 28, 1913, the tug Bridgeton, with a loaded car float 250 feet long on her starboard side, left one of the

bridges between Piers 7 and 8 at Communipaw, Jersey City, bound across the Hudson into the East River. At the same time the loaded steam lighter Varina was coming down the river bound into the same slip. The tide was ebb; the slip is 350 feet wide and 1,350 feet long. The car float and lighter came into collision almost head on before the car float had got entirely out of the slip. The result was that the Varina sank with her cargo, both sustaining serious damage, to recover which the owners of the Varina and the charterer, as bailee of the cargo laden thereon, each filed a libel against the tug Bridgeton.

We are quite satisfied that the Bridgeton before leaving her slip blew the usual slip whistle of one long blast, which the master of the Varina should have heard, if he did not. This, however, is not a very material consideration, because at a time when the Varina knew the Bridgeton was coming out and the Bridgeton knew the Varina was coming in, they exchanged a signal of one whistle, indicating that they would pass port to port. There was quite room enough to do this, and the collision was brought about by a violation of the understanding either by the Varina or by the Bridgeton.

The witnesses on the Bridgeton say that the Varina just before the collision starboarded so as to head over to New York, and then came about under a port helm so as to head to New Jersey and right into the bow of the car float. The District Judge naturally declined to believe such an account. On the other hand, those on the Varina say that the Bridgeton, notwithstanding her signal of one blast, was, to correct the effect of the ebb tide on the car float as it entered the stream, heading toward the upper corner of the slip, and that, when she saw collision was imminent, she blew a signal of two whistles, which invited a passage starboard to starboard. Judge Hazel found that this second signal of two blasts was blown, notwithstanding that the master of the Bridgeton denied it, and we see no reason for differing from him. It follows that the collision was due to the violation by the Bridgeton of the agreement reached as to the navigation to be pursued, and not because the Varina was coming down too near the line of the piers, or at too great a speed.

The decree is affirmed.

In re JOHN J. GIBSON CO.

(Circuit Court of Appeals, Second Circuit. April 24, 1916.)

MANDAMUS ⇐4(1)—GROUNDS—REMEDY BY APPEAL.

Mandamus does not lie to correct errors in rulings which are reviewable on appeal.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 9, 11, 17–19; Dec. Dig. ⇐4(1).]

Application of the John J. Gibson Company for a writ of mandamus to the Judge of the District Court of the United States for the Western District of New York. Petition denied.

⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Josiah McRoberts, of Chicago, Ill., for petitioner
J. William Ellis, of Buffalo, N. Y., for respondent.

Before WARD and ROGERS, Circuit Judges, and MAYER, District Judge.

PER CURIAM. The defendant's objection to the granting of the rehearing in this case after the cause had been decided and his motion to suppress the depositions for the taking of which the rehearing was granted, on the ground that the court below exercised a discretion where no discretion existed, because the complainant was fully apprized of the existence of the evidence before he brought suit, relied upon proving it in an incompetent manner and stated no facts showing that he was not financially able to do in May, 1915, what he did in August, 1915, are questions which, if erroneously decided, can be corrected on appeal, and therefore the remedy by mandamus does not lie.

The petition is denied.

WESTINGHOUSE ELECTRIC & MFG. CO. v. WAGNER ELECTRIC MFG. CO.*

WAGNER ELECTRIC MFG. CO. v. WESTINGHOUSE ELECTRIC & MFG. CO.

(Circuit Court of Appeals, Eighth Circuit. May 1, 1916.)

Nos. 4432, 4444.

1. PATENTS ⇐324(6)—SUIT FOR INFRINGEMENT—ACCOUNTING BEFORE MASTER—PROCEEDINGS AFTER REVERSAL.

An equity case for infringement, reversed and remanded, with directions that it be recommitted to a master "for a new hearing on all the questions involved in the original reference and on evidence already submitted and such additional testimony as may be offered," is open for full new hearing before the master under the original reference, and the "evidence already submitted" is entitled to no greater weight on such hearing than that taken thereafter.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 600; Dec. Dig ⇐324(6).]

2. PATENTS ⇐322—SUIT FOR INFRINGEMENT—ACCOUNTING BEFORE MASTER—NEW HEARING.

The fact that a table showing in detail sales of infringing articles by defendant was prepared under direction of one of its officers from its books, at the instance of complainant, and admitted in evidence on the former hearing, and that its substance was stipulated into the record for the purpose of appeal, to save the cost of printing, did not estop defendant from showing on the new hearing that through mistake the table included articles not containing the infringing device.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 590-595; Dec. Dig. ⇐322.]

3. PATENTS ⇐322—SUIT FOR INFRINGEMENT—REFERENCE FOR ACCOUNTING.

Where an appellate court, on reversal of a decree awarding profits against an infringer, directed a recommittal of the case to a master for a new hearing, on setting aside the master's report for failure to prop-

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⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

*Rehearing denied September 4, 1916.

erly consider new evidence offered, the court should, under the circumstances of this case, have again referred it for further hearing.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 590–595; Dec. Dig. ⇐322.]

4. WORDS AND PHRASES—"FORCE AND EFFECT."

The "force and effect" of evidence is its ultimate expression in the facts proved by it.

Appeal from the District Court of the United States for the Eastern District of Missouri; David P. Dyer, Judge.

Suit in equity by the Westinghouse Electric & Manufacturing Company against the Wagner Electric Manufacturing Company. From a final decree, both parties appeal. Reversed.

For opinion below, see 218 Fed. 646.

Thomas B. Kerr, of New York City, and Paul Bakewell, of St. Louis, Mo., for plaintiff.

Edwin E. Huffman, of St. Louis, Mo., and Melville Church, of Washington, D. C., for defendant.

Before HOOK, Circuit Judge, and ELLIOTT and YOUMANS, District Judges.

HOOK, Circuit Judge. These appeals involve an accounting by defendant, the Wagner Company, for profits realized from an infringement of claim 4 of patent No. 366,362 to George Westinghouse, Jr., for improvements in electrical converters or transformers. The validity of claim 4 and the fact of infringement were established in the Second Circuit in a suit against a customer of the defendant. Westinghouse Electric & Mfg. Co. v. Union Carbide Co. (C. C.) 112 Fed. 417; Id., 55 C. C. A. 230, 117 Fed. 495. The plaintiff, Westinghouse Company, the assignee of the patent, then brought this suit in the court below and obtained a decree of permanent injunction and for an accounting. (C. C.) 129 Fed. 604. At that time it attempted to have the decree cover a kind of transformer called "Type M," which defendant was then manufacturing; but the trial court held that claim 4 was confined to the particular combination described, and that "Type M" did not infringe. The taking of the account was referred to a master. At the hearing before him the question was reduced to one of profits, to the exclusion of damages. From the evidence the master found and reported profits aggregating $132,433.35. The defendant contended that the infringing transformers sold by it during the accounting period contained features and elements of value not covered by the patent, and that, the plaintiff having failed to separate and apportion the profits accordingly, its recovery should be confined to a nominal sum; but the master disallowed the contentions. Upon the return of his report the trial court held with defendant. On appeal to this court the decree of the trial court was affirmed. 97 C. C. A. 621, 173 Fed. 361. A writ of certiorari was granted by the Supreme Court to review the rules applied to the accounting, but not for the purpose of re-examining the decision that defendant's "Type M" was not an infringement. That court reversed the decree and remanded

the case, "with power to hear and determine motions to amend the pleadings, and with directions that the case be recommitted to a master for a new hearing on all the questions involved in the original reference, and, on evidence already submitted and such additional testimony as may be offered, for further proceedings not inconsistent with this opinion." 225 U. S. 604, 32 Sup. Ct. 691, 56 L. Ed. 1222, 41 L. R. A. (N. S.) 653. In its opinion the Supreme Court dissipated the confusion which had long existed with respect to the burden of proof, etc., in accountings for profits in patent infringements.

When the case went back to the trial court it was recommitted to the same master. Before him the plaintiff rested upon the evidence received at the first hearing, and, although the defendant introduced much new evidence upon the number of infringing transformers sold, the profits it realized from the entire structures, and upon the separation and apportionment of the profits between what it contended were patented and unpatented elements, the master again found against it in the sum of $132,433.35. The trial court said the master had practically ignored defendant's additional evidence, sustained exceptions to the report, found the amount of defendant's liability did not exceed $10,000, and rendered a decree for that sum. Both plaintiff and defendant have appealed. The foregoing outline of the long controversy is quite general and brief, but it is sufficient for present purposes.

[1, 4] The attitude of the master toward defendant's additional evidence at the second hearing is shown by the following excerpts from his report:

"The Supreme Court of the United States has remanded this case for a rehearing. 'On the evidence already submitted,' etc. The court has given me no authority to impair, diminish, change, or reject any part of that 'evidence already submitted.' As shown elsewhere, I have no power to do any of these things, and I have endeavored during the hearing to make it clear that I have no authority to allow the parties to do so."

"Counsel for complainant insist that the defendant is estopped to contest the force and effect of the 'evidence already submitted.' I feel compelled by the decision to sustain that position."

It is clear the master did not give the new evidence the consideration it deserved. The "force and effect" of the evidence already submitted was its ultimate expression in the facts proved by it, and the ruling of the master led to a practical denial of the new hearing contemplated. So far as concerned the matters of accounting submitted to him the case was at large for a new hearing on all the questions involved in the original reference. That plainly meant the hearing was to be full and plenary, without conviction prepense or insistence upon prior conclusions of fact in the face of countervailing additional evidence. The hearing was not to be approached with the idea that certain of the questions of fact involved had been definitely settled or foreclosed. As customary in such cases, the old evidence was to remain, and new evidence relevant to the issue was to be received, if offered. In the very nature of things the former was not to be given precedence or superior regard simply because it had been first received and had been once considered. Each class and each item of evidence finally before him should have been accorded the probative value to which it was inher-

ently entitled by settled rules. It is true that the master reviewed the additional evidence to an extent and held it insufficient, but it was done in the light and under the influence of the erroneous theory adopted with reference to it.

[2] One matter of evidence merits especial attention. While plaintiff was making its proof at the first hearing before the master of the extent of defendant's infringing business, it called Mr. Layman, an officer of defendant, as a witness, and had him produce the corporate books and records. At plaintiff's instance Mr. Layman caused to be compiled a tabulation of infringing transformers sold during the accounting period. It consisted of two typewritten volumes of about 360 pages, and showed in detail each sale, the size or capacity and the type of the transformer sold, the prices to customers, commissions to agents, and net prices to defendant. It showed the sale of more than 16,000 transformers. The tabulation, termed the "Layman Schedule," was received in evidence and was the authority for the figures shown in the report of the master and the subsequent opinions of the courts. In verifying it when produced, Mr. Layman testified that he had not personally made the tabulation, that it had been done by one of his clerks, assisted by a representative of the master, but that he believed it to be a correct showing of all infringing transformers sold by the defendant.

At the second hearing the defendant offered substantial evidence tending quite strongly to show a mistake had been made, and that the Layman schedule was materially inaccurate in several respects, but principally in that it included large numbers of transformers of a size and type in which the patented invention had never been used—that the bookkeeper and the stenographer of the master had evidently endeavored to make a list of all the transformers sold, regardless of infringement. The defendant employed a public accountant, who drew off from its books a list of every transformer sold during the period, submitted it for comparison with the Layman schedule, and supplemented it with testimony to show the inaccuracy of the latter in respect of the question in issue. The master said:

"The defendant is estopped from denying the accuracy of the schedule of infringing transformers, and estopped from stating that that schedule contains anything but a list of infringing transformers. For the defendant to take any other course now would be to take an inconsistent position, and this the defendant cannot do."

The reason for this ruling was partly because a stipulation had been made by counsel for both parties of the substance of the Layman schedule, in order to save expense in printing the record for this court on the first appeal.

The master erred. The schedule should have been regarded, not as conclusive, but as evidence in the case, to be considered in connection with all the testimony respecting it and the circumstances of its production. The schedule was intended at the time as purely of a testimonial character, not as a hard and fast agreement or settlement of substantive rights. The corporate records did not themselves show infringement, but oral testimony on that subject was necessary, and it is urged a serious mistake was made in giving it. The elements of an

estoppel are not present. The plaintiff was not induced to change its position to its disadvantage. The successful impairment of the probative value of the schedule and the testimony regarding it would be nothing more than the correction of a mistake and the establishment of the truth as to an issue of fact. The stipulation of counsel was not designed even to settle a fact otherwise unproved, or to dispense with the taking of evidence which afterwards appeared to have escaped the reach of the parties. It was simply an agreement of convenience to obviate an unnecessary cost of printing. If in fact it proceeded upon a mistake or inadvertence, the defendant should have been allowed to correct it under the circumstances of the case. Carnegie Steel Co. v. Cambria Iron Co., 185 U. S. 403, 22 Sup. Ct. 698, 46 L. Ed. 968.

[3] The direction of the Supreme Court was to recommit the case to a master. We think that, when it appeared from the master's second report that the hearing contemplated had not been given, the trial court should have vacated it and again referred the case, instead of feeling obliged to institute an original investigation of its own. It was entitled, as this court is now, to the aid of a first-hand consideration of an accounting before a master. In this particular we follow Chicago, etc., Ry. v. Tompkins, 176 U. S. 167, 179, 20 Sup. Ct. 336, 44 L. Ed. 417, and the many cases in which the practice has been applied. A detailed report, after a consideration of all the evidence, showing the basis and the constituents of the award which is recommended, will enable the courts which pass upon it the better to perform their duties.

The decree is reversed, and the cause is remanded, with direction to recommit it to a master for a new hearing on all the questions involved in the original reference, and, on evidence already submitted and such additional evidence as may be offered, for further proceedings not inconsistent with this opinion.

JOHNSON v. GARNER.

(District Court, D. Nevada. June 16, 1916.)

No. A-17.

1. STATUTES ⟸226—CONSTRUCTION—STATUTE ADOPTED FROM OTHER STATE.
Where the Legislature of one state adopts a statute already in force in another state, it is presumed that the construction given such statute is also adopted.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 307; Dec. Dig. ⟸226.]

2. HUSBAND AND WIFE ⟸272(1)—COMMUNITY PROPERTY—DIVORCE.
The Nevada Constitution adopted in 1864 defines, in article 4, § 31, what shall constitute the separate property of the wife, and provides that laws shall be passed more clearly defining the rights of the wife to the community as well as to her separate property. Thereafter was enacted St. Nev. 1864-65, c. 76, § 12, declaring that, in case of dissolution of the marriage by decree of any court of competent jurisdiction, the common property shall be equally divided between the parties, and the court granting the decree shall make such order for the division of the

common property as the nature of the case may require, provided that, when the decree is rendered on the ground of adultery or extreme cruelty, the party found guilty shall be entitled to such portion of the common property as the court granting the decree may deem just and allow. In 1873 this act was repealed, but section 12 was continued, and now appears as Rev. Laws Nev. § 2166, declaring that, in case of the dissolution of the marriage, the community property must be equally divided between the parties, and the court granting the decree must make such order for the division of the community property as the nature of the case may require, while that portion of the act of 1873 appearing as section 2188 declares that the rights of husband and wife are governed by the act, unless there is a marriage contract or settlement. Rev. Laws Nev. § 5841, enacted in 1861, declares that in granting a divorce the court shall make such disposition of the property of the parties as shall seem just and equitable for the benefit of the children, and that all property and pecuniary rights and interests, and all rights touching the children, their custody and guardianship, not otherwise disposed of, shall, by such divorce, be divested out of the guilty party, and vested in the party at whose instance the divorce was granted. *Held*, in view of another section of the same act appearing as Rev. Laws Nev. § 5843, and declaring that when the marriage shall be dissolved by the husband being sentenced to imprisonment, and when a divorce shall be ordered for the cause of adultery committed by the husband, the wife shall be entitled to the same proportion of his lands and property as if he were dead; but in other cases the court shall set apart such portion for her support and the support of their children as shall be deemed just, and, as the act of 1861 was passed before the creation of community property, effect cannot be given to it, particularly in view of the construction by the California courts of the later statutes, which must be deemed to have been adopted when the statutes were adopted from that state; hence a decree of divorce in favor of the husband for desertion does not, though there was no adjudication as to property rights, deprive the wife of her rights in the community property.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1003; Dec. Dig. ⊂⊃272(1).]

3. HUSBAND AND WIFE ⊂⊃272(1)—COMMUNITY PROPERTY—DIVORCE.
A divorce terminates the community estate of the spouses, and thereafter they are tenants in common of such community property, rather than copartners.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1003; Dec. Dig. ⊂⊃272(1).]

4. EQUITY ⊂⊃39(1)—JURISDICTION—RETENTION OF JURISDICTION.
A court of equity, having jurisdiction of a suit by a divorced wife to recover her interest in the community property, will retain jurisdiction of the proceeding to do complete justice; other parties having intervened and set up their claims to such property, and the husband having died.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 104–109, 111, 114; Dec. Dig. ⊂⊃39(1).]

5. HUSBAND AND WIFE ⊂⊃272(5)—COMMUNITY PROPERTY—INTERESTS.
Where, to facilitate a divorce, a husband and wife made a settlement which for that reason was void, payments made by the husband under such settlement will be credited against the wife's share of the community estate, not against the whole property.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1007; Dec. Dig. ⊂⊃272(5).]

6. HUSBAND AND WIFE ⊂⊃272(5)—COMMUNITY PROPERTY—PAYMENTS.
Where, after divorce, the property which had belonged to the community of the spouses was greatly enhanced in value by the efforts of the

husband, the husband is entitled to reasonable compensation for his services.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1007; Dec. Dig. ⊂=272(5).]

7. HUSBAND AND WIFE ⊂=272(5)—COMMUNITY PROPERTY—COMPENSATION.
Where, after divorce, the husband retained control of the property which had been community, expenditures made by him in enhancing the value of the community should be allowed, in the suit by the wife to obtain her share.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1007; Dec. Dig. ⊂=272(5).]

8. COSTS ⊂=59—APPORTIONMENT—EQUITIES.
In suit by a former wife to obtain her share in property which had composed the community estate of herself and her former husband, the costs of receivership proceedings will not be assessed wholly against the husband's interest, though the wife prevailed, where the equities were not all in her favor.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 261–276; Dec. Dig. ⊂=59.]

9. COURTS ⊂=363—STATE LAWS AS RULES OF DECISION—ADMINISTRATION OF ESTATES—PRIORITIES.
It is within the power of the state to determine the order in which debts of an estate shall be paid; therefore the federal courts must give effect to Rev. Laws Nev. § 6052, declaring priorities.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 939–949; Dec. Dig. ⊂=363.]

10. HUSBAND AND WIFE ⊂=276(5)—COMMUNITY PROPERTY—ADMINISTRATION—PRIORITIES OF CLAIMS.
Though a suit by a divorced wife to recover her share of the property which had composed the community of herself and her former husband was begun first, creditors of the husband, who died pending suit, cannot, having in his lifetime, and after institution of suit by wife, reduced their claims to judgment in the state court be deprived of the benefit of Rev. Laws Nev. § 6052, giving judgments rendered against deceased in his lifetime priority over ordinary demands.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1037; Dec. Dig. ⊂=276(5).]

11. HUSBAND AND WIFE ⊂=276(5)—COMMUNITY PROPERTY—ADMINISTRATION—PRIORITIES OF CLAIMS—"DEBTS."
Rev. Laws Nev. § 6052, declares that the debts of the estate shall be paid: First, the funeral expenses; second, the expenses of the last sickness; third, debts preferred by federal laws; fourth, judgments rendered against the deceased in his lifetime; and, fifth, all other demands against the estate. A husband secured a divorce against his wife, and, there being no adjudication as to the rights of the former spouses with respect to the community property, the husband retained it and also converted to his own use the profits from such community estate. *Held*, that as the term "debt," used in the statute, signifies no more than a sum of money owing on a contract, express or implied, only the profits of the community estate converted by the husband can be deemed debts, but the husband must be treated as a trustee of the wife's interest in the community property, and as to such she takes priority over creditors who reduced their claims to judgment during the husband's lifetime, while as to the debt for the profits withheld she does not.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1037; Dec. Dig. ⊂=276(5).

For other definitions, see Words and Phrases, First and Second Series, Debt.]

12. COURTS ⊂=493(2)—FEDERAL COURTS—RESTRAINING ORDER—LIENS.
After an order of the federal court restraining disposition of property of defendant was served on a bank holding defendant's property, the bank cannot, by attachment in the state courts, acquire any lien.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1347; Dec. Dig. ⊂=493(2).]

13. WITNESSES ⊂=144(3)—COMPETENCY—TRANSACTIONS WITH DECEASED PARTIES.
Where one of the parties to a transaction was dead, a witness, who was really an adversary party to decedent, is incompetent to testify.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 628; Dec. Dig. ⊂=144(3).]

14. JUDGMENT ⊂=707—CONCLUSIVENESS—PERSONS NOT PARTIES.
One not a party to a judgment is not bound thereby.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1230; Dec. Dig. ⊂=707.]

15 HUSBAND AND WIFE ⊂=272(1)—COMMUNITY PROPERTY—AUTHORITY OF HUSBAND.
After divorce, the husband, who during the existence of the marriage could incumber and manage the community estate, has no further right to incumber the community property.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1003; Dec. Dig. ⊂=272(1).]

16. HUSBAND AND WIFE ⊂=272(1)—COMMUNITY PROPERTY—INTERESTS OF WIFE—LIABILITY OF WIFE.
Before marriage, a husband, to protect community interests in a mining venture, executed a note on which he was personally liable. After divorce, the note was surrendered and the husband executed a new note. The wife was not a party to a judgment recovered by the holder of the notes against the husband. *Held* that, as the husband's right to bind the community estate ended with the dissolution of the marriage, and as the old note was surrendered and limitations against its enforcement had run before judgment was recovered on the second note, the wife's share of the community property, which was retained by the husband, was not subject to the payment of the second note, though her share of the community was once liable for satisfaction of the original.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1003; Dec. Dig. ⊂=272(1).]

17. HUSBAND AND WIFE ⊂=272(5)—COMMUNITY PROPERTY—DISSOLUTION—EQUITABLE ESTOPPEL.
In such case, though the wife did not assert her rights in the community property for a number of years, yet as the bank, which held both notes, made no attempt to enforce the original note, and received no payments for a number of years, and then accepted the second note, surrendering the original, the wife was not estopped from asserting her rights in the community estate against the bank, for an estoppel cannot arise by reason of mere silence, there being nothing to show that the wife's delay misled the bank.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1007; Dec. Dig. ⊂=272(5).]

18. ESTOPPEL ⊂=110—PLEADING—NECESSITY.
To be relied on, an equitable estoppel must be pleaded.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 300; Dec. Dig. ⊂=110.]

19. HUSBAND AND WIFE ⊂=268(5)—COMMUNITY ESTATE—RIGHT OF HUSBAND TO BIND.

A note, on which a husband became individually liable given to protect his interest in a mine, is a community obligation, enforceable against the community estate.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 961; Dec. Dig. ⊂=268(5).]

20. NOVATION ⊂=5—WHAT CONSTITUTES.

Where, before divorce, a husband signed a note to obtain funds to protect his interest in a mining venture, and after divorce, though no payments were made on the note for a number of years, it was surrendered and a new note received by the bank, the second note cannot be regarded as a renewal of the first as against the divorced wife's interest in the community estate, for at the time of execution of the second note the husband could not bind the community, as it no longer existed, and the wife did not consent to be bound by such obligation.

[Ed. Note.—For other cases, see Novation, Cent. Dig. § 5; Dec. Dig. ⊂=5.]

21. HUSBAND AND WIFE ⊂=272(1)—COMMUNITY PROPERTY—LIABILITY OF.

One who did not make loans to a husband until after divorce is not a community creditor.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1003; Dec. Dig. ⊂=272(1).]

22. HUSBAND AND WIFE ⊂=272(5)—COMMUNITY PROPERTY—DISSOLUTION—EQUITABLE ESTOPPEL.

One who made loans to a husband, who was in possession of the entire community estate, after divorce, cannot assert any estoppel against the claim of the divorced wife to her share, where no misrepresentations were made by the wife, and the lender, from the facts in her possession, might have discovered the wife's right; it not appearing that the wife delayed asserting her rights to mislead the lender.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1007; Dec. Dig. ⊂=272(5).]

23. RECEIVERS ⊂=65—PROCEEDINGS—EFFECT OF.

A receivership does not operate as an attachment or execution, but is no more than a sequestration of property for safe-keeping, leaving the question as to who is entitled thereto for subsequent determination.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 114, 115; Dec. Dig. ⊂=65.]

24. RECEIVERS ⊂=65—APPOINTMENT—RIGHTS OF PARTIES SECURING.

One securing the appointment of a receiver to take possession of the property of defendant and an injunction against alienation does not for that reason obtain a lien or preference over other interested parties.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 114, 115; Dec. Dig. ⊂=65.]

25. RECEIVERS ⊂=79—RECEIVERSHIP—EFFECT OF.

A divorced wife, seeking to assert rights in the property which had composed the community estate of herself and her former husband, secured the appointment of a receiver and an injunction against disposal. Thereafter creditors of the husband, in the state courts, reduced their claims against him to judgment before his death. After the death of the husband, the federal court in which suit was brought determined to distribute the estate. *Held* that, while ordinarily the existence of a receivership suspends the power of creditors to obtain any lien or advantage over other interested parties, yet as this rule does not apply to a receiver pendente lite, where the sole object is to preserve the property for the purpose of the decree as between the parties to the suit, those creditors who reduced their claims to judgment before the death of the hus-

band are entitled to that priority over ordinary debts given by Rev. Laws Nev. § 6072, notwithstanding the federal court subsequently decided to distribute the entire estate.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 148; Dec. Dig. ⇐79.]

In Equity. Bill by Roxa S. Johnson against William S. Johnson, in which J. T. Garner, as administrator with the will annexed of the estate of William S. Johnson, was substituted as defendant, the defendant dying pending trial, and in which the Tonopah Banking Corporation and another intervened. Decree for complainant, and adjudicating the rights of the interveners.

W. W. Griffin, of Carson City, Nev., and Sweeney & Morehouse, of Reno, Nev., for plaintiff.

Ayres & Gardiner, of Reno, Nev., for defendant.

George A. Bartlett, of Reno, Nev., for receiver.

Mack & Green, of Reno, Nev., for intervener Tonopah Banking Corp.

William Forman, of Tonopah, Nev., and George B. Thatcher, of Carson City, Nev., for intervener Smith.

FARRINGTON, District Judge. W. S. Johnson and Roxa S. Johnson became husband and wife in November, 1890. The only issue of the marriage is one son, Clemmer, now about 21 years of age. December 14, 1909, at Tonopah, Nev., the husband obtained a decree of divorce on the ground of desertion. August 8, 1913, Roxa Johnson brought the present suit in this court to recover her share of the community property; 10 days later a receiver was appointed, who was authorized to take charge, possession, and control of all the property of said W. S. Johnson and Roxa Johnson within this jurisdiction.

W. S. Johnson died March 27, 1914, and in the following month J. T. Garner was by an order and decree of the district court of the Seventh judicial district of the state of Nevada for Nye county, duly and regularly appointed administrator with the will annexed of the estate of said W. S. Johnson, deceased. Garner immediately qualified, and ever since has been, and now is, acting as such administrator.

1. It was decided April 6, 1914: First, that the agreement entered into between Mr. and Mrs. Johnson immediately prior to the divorce, in which he promised to pay her $3,000, and also $75 a month additional, pending the payment of the principal sum, was null and void, because it was made in contemplation of and to facilitate the divorce; second, that all property in Johnson's possession at the date of the decree was community property, and, under section 2166 of the Revised Laws of Nevada, should then have been divided equally between the two parties; third, that the divorced wife was not divested of her interest in such property by the failure of the state court to make such a division, or of the parties to ask it; and, fourth, that on the dissolution of the marriage, the title to the community property vested in Mr. and Mrs. Johnson as tenants in common. The correctness of the opinion then expressed as to the present interest of Mrs. Johnson has been challenged by counsel who have since appeared for intervening cred-

itors, in arguments so full and exhaustive as to merit a further expression of my views.

[1, 2] It is insisted that the decree of divorce, made without any disposition or mention of property, vested in Johnson all the property belonging to the parties at the time. Section 5841 of the Revised Laws of Nevada, on which this claim is based, in so far as it is material, is as follows:

"In granting a divorce, the court shall also make such disposition of the property of the parties as shall appear just and equitable * * * for the benefit of the children. And all property and pecuniary rights and interests, and all rights touching the children, their custody and guardianship, not otherwise disposed of or regulated by the order of the court, *shall, by such divorce, be divested out of the guilty party, and vested in the party at whose instance the divorce was granted.*"

The foregoing provision, adopted by the territorial Legislature in 1861, left the disposal of property very much to the discretion of the judge, without any controlling reference to the cause for which the divorce was granted, or to the character of the property; the main consideration apparently being the benefit of the children. In 1864 a Constitution was adopted for this state, which defined what should thereafter constitute the separate property of the wife, and also directed that laws should be passed more clearly defining the rights of the wife to the community, as well as to her separate property. Const. Nev. art. 4, § 31. Pursuant to this injunction "An act defining the rights of husband and wife" was adopted by our first Legislature. Stats. 1864–65, p. 239. This act was modeled after similar legislation in California, and contained the following provision, which is a literal and exact copy of the California original:

"Sec. 12. In case of the dissolution of the marriage by decree of any court of competent jurisdiction, the common property shall be equally divided between the parties and the court granting the decree shall make such order for the division of the common property, or the sale and equal distribution of the proceeds thereof, as the nature of the case may require: Provided, that when such decree of divorce is rendered on the ground of adultery, or extreme cruelty, the party found guilty thereof shall only be entitled to such portion of the common property as the court granting the decree may in its discretion, from the facts of the case, deem just and allow." Wood's Digest, p. 488, art. 2615.

No provision was made in the act for divorces granted without disposition of the property. In 1869 our Supreme Court decided the case of Howe v. Howe, 4 Nev. 469. In the pleadings nothing was said about property, but in granting a divorce for extreme cruelty, the lower court awarded all the property to the wife, at whose instance the divorce was granted. This was held error, because there was no basis for it in the pleadings. The cause was remanded, with leave to both parties to amend their pleadings.

Under this decision, it seems that the court, in the absence of appropriate allegations in the pleadings, is powerless to obey the statute, and make such disposition of the "property of the parties as shall appear just and equitable * * * for the benefit of the children." No explanation is offered by the court as to why that portion of the decree relating to property interests was not treated as surplusage, so

as to allow all the property to vest automatically in the wife, at whose instance the divorce was obtained, as provided in section 5841.

In 1873 the act of 1865 was repealed. Section 12, however, reappeared in the repealing act, with such changes as rendered more imperative the duty of the court to divide the property equally. The new provision reads as follows:

"In case of the dissolution of the marriage by decree of any court of competent jurisdiction, the community property must be equally divided between the parties, and the court granting the decree must make such order for the division of the community property, or the sale and equal distribution of the proceeds thereof, as the nature of the case may require." Stats. 1873, p. 195; Rev. L. § 2166.

The act of 1873 also contains this provision:

"Sec. 26. The property rights of husband and wife are governed by this act, unless there is a marriage contract or settlement containing stipulations contrary thereto." Revised L. § 2180.

It is worthy of note that the peculiar provisions of section 5841 are not found in this act. Prior to the adoption of the Constitution, property rights of husband and wife in Nevada were regulated, in the main, by the common law. In the act of 1861 there is no mention of community property; it had no legal existence in this state prior to the Constitution. The phrase "all property and pecuniary rights and interests" used in section 25 of the act of 1861 (Rev. L. § 5841), as quoted above, refers to property and property rights recognized by the common law at that time. As was said by the Supreme Court of Nevada in the case of Darrenberger v. Haupt, 10 Nev. 43:

"By the marriage, the legal existence of the wife is suspended or incorporated into that of the husband; she becomes sub potestate viri, is incapable of holding any personal property, or of having the use of any real estate; her earnings belong to her husband."

In the Darrenberger Case the property in controversy was a certificate of mining stock which had been purchased by the husband with the joint earnings of himself and his wife. She subsequently obtained a divorce. There being no disposal of the stock by the decree, the husband retained, and subsequently sold, it to Darrenberger. The wife based her action to recover the stock on the above-quoted section 5841. The court held, however, that inasmuch as the stock had been acquired before the adoption of the Constitution of this state, and prior to any Nevada legislation providing for separate or community property, the right to the stock must be governed by the common law, under which it belonged to the husband, and would remain with him, unaffected by the decree.

This conclusion seems utterly at variance with the requirement that "all property * * * not otherwise disposed of * * * by the order of the court, shall, by such divorce be divested out of the guilty party, and vested in the party at whose instance the divorce was granted" (section 5841), and is justified thus:

Section 27 of the same act declares:

"When the marriage shall be dissolved by the husband being sentenced to imprisonment, and when a divorce shall be ordered for the cause of adultery committed by the husband, the wife shall be entitled to the same proportion

of his lands and property as if he were dead; but in other cases the court shall set apart such portion for her support, and the support of their children, as shall be deemed just and equitable." Rev. L. § 5843.

These two sections, says the court—

"can be harmonized only upon the theory that the Legislature intended that in case of a divorce for the misconduct of the husband, other than imprisonment or adultery, his individual or sole property should be subject to the order of the court, under the provisions of section 27; and the court having made no order in respect to the property in question, it follows that the title and right of disposal of the same continued in the husband after, the same as before the divorce, and remained unaffected thereby."

It would seem under the Howe decision that the guilty spouse cannot be divested of his estate automatically by a decree of divorce which does not dispose of property, when the pleadings are silent as to such rights; and under the Darrenberger decision, the separate property of the husband is immune when the divorce is granted to the wife for any other cause than adultery or imprisonment for crime. Here we have an unreasonable discrimination against the wife. If section 25 of the act of 1861 (Rev. L. § 5841) is still in force, the guilty husband will retain his separate property as a matter of right, when a wife, divorced for a similar offense, will be automatically stripped of all her interests.

It is difficult to believe that the Legislature intended such a result. The language of section 12 of the act of 1873 is no less repugnant to section 25 of the act of 1861 than are the provisions of section 27 of the earlier act. In the act of 1873 the property rights of the husband and wife were clearly differentiated. It was declared that, save under exceptional circumstances, neither had any interest in the separate property of the other; that the property rights of both were to be regulated by that act; that the act of 1865, and all other acts and parts of acts in conflict therewith, were repealed; and in section 12 it declares that—

"in case of the dissolution of the marriage by decree of any court of competent jurisdiction, the community property must be equally divided."

The substitution of "must" for "shall," as used in the act of 1865, is significant. It is impossible to reconcile the mandatory language of the latter statute with the act of 1861, upon any theory that both are dealing with community property. When the act of 1861 was adopted, there was in Nevada no such thing as community property. The clear and positive direction of the act of 1873 is that the community property must be equally divided between the parties only when the divorce is rendered on the ground of adultery or extreme cruelty. There is here no intimation, and no language consistent with the idea, that the consequences of a failure by the court to order or regulate the distribution of property should be more serious than the consequences of adultery or extreme cruelty, and sufficient to divest the party against whom the divorce is granted, not merely of such portion of the community property "as the court * * * may, in its discretion, from the facts of the case, deem just" (as in case of adultery or extreme cruelty), but of the entire community property, as well as of "all property and pecuniary rights and interests."

Furthermore, we must not overlook the fact that, when the act of 1873 was adopted, the Supreme Court of California, under a similar, but less positive statute (Stats. Cal. 1857, p. 199), had declared in the case of De Godey v. Godey, 39 Cal. 157, that:

"If, in an action for divorce, the decree awarding it does not determine any disposition of the community property, and no such question be presented for decision by the pleadings, it will not conclude the parties, or either of them, in respect of their claims to such property."

It is certainly reasonable to infer that in the adoption of the California statute the Legislature of Nevada intended also to adopt the construction which had been already placed on it by the Supreme Court of California. The following authorities seem to be in line with De Godey v. Godey; Biggi v. Biggi, 98 Cal. 35, 32 Pac. 803, 35 Am. St. Rep. 141; Kirschner v. Dietrich, 110 Cal. 502, 42 Pac. 1064; Ambrose v. Moore, 46 Wash. 463, 90 Pac. 588, 11 L. R. A. (N. S.) 103; Hicks v. Hicks, 69 Wash. 627, 125 Pac. 945; Barkley v. Am. Sav. Bank & Trust Co., 61 Wash. 415, 112 Pac. 495; Tabler v. Peverill, 4 Cal. App. 671, 88 Pac. 994; Lake v. Bender, 18 Nev. 361, 371, 4 Pac. 711, 7 Pac. 74; Brown v. Brown, 170 Cal. 1, 147 Pac. 1168.

In Lake v. Bender, supra, plaintiff applied for a divorce and division of the community property. The issues relating to a divorce were tried by a jury. The jury's findings established plaintiff's right to a divorce, and were by order of the court approved. Thereafter there was a trial of the property rights by the court, without a jury. In holding that the district court had the power to grant a new trial of the issues relating to the property rights alone, the Supreme Court said, following the De Godey Case above:

"If plaintiff had filed her bill for divorce, prosecuted it to judgment in her favor, without any showing by either party of the existence of community property," she could thereafter have brought a second action to recover her share of such property.

[3] If said section 5841 were still in force, it would seem that a second action to determine property rights should be unnecessary. Mrs. Johnson, under the decision of October 29, 1913, which is now the law of this case, is entitled to one-half of the community property owned by herself and her husband at the time the divorce was rendered, December 14, 1909. The divorce terminated the community, as well as the marriage, and put an end to any right which either spouse may have had in or to the property of the other. Barrett v. Failing, 111 U. S. 523, 4 Sup. Ct. 598, 28 L. Ed. 505. Thereafter the interest of the former husband and wife in the property was that of tenants in common; they were not copartners; whatever in the nature of partnership may have inhered in the marital union was terminated by the divorce. Southwestern Mfg. Co. v. Swan (Tex. Civ. App.) 43 S. W. 813.

If Johnson disposed of any integral portion of this property, she is entitled to follow it, and to claim her share of such proceeds as can be clearly identified. She is also entitled to a moiety of the rents, issues and profits of the common property, and to an accounting. If Johnson converted her portion of such rents, issues, and profits to his

own use, she is entitled to a judgment therefor. I am unable to recede from the views expressed in my opinion of April 29, 1914. No effect can be given to section 5841 of the Revised Laws of Nevada. It is hopelessly at variance with the spirit, if not with the letter, of subsequent legislation on the same subject.

[4] II. January 18, 1915, a decision was rendered herein, directing that the Tonopah Banking Corporation, Ada Smith, and J. T. Garner, and the creditors of the estate of W. S. Johnson, be permitted to intervene. It was considered that this court, having acquired jurisdiction of the controversy between W. S. Johnson and Roxa Johnson, was bound to retain it in order to do complete justice in the premises. Johnson v. Johnson (D. C.) 225 Fed. 413.

The master in chancery, L. D. Summerfield, in his first report, finds that the following described property in the possession of W. S. Johnson at the date of his death was either a part of the community property at that time, or was acquired with the proceeds of community property then held:

5,000 shares of the capital stock of the Summerfield-Johnson Company, valued at $7,500.

An option to purchase 27,500 shares of the capital stock of the Nye County Land & Live Stock Company, recently sold to J. B. Humphrey for $16,500.

A diamond ring, diamond stud, and a watch, valued at $1,365.

Mining stock in various companies, of no substantial value; and

A business known as the "Big Casino," at Tonopah, Nye county, Nev.

No exceptions have been taken to this report, except by Mrs. Johnson, and these she has withdrawn. The master in his second report, filed November 5, 1914, finds the amount due from the estate to Mrs. Johnson, on an accounting for her half of the rents, issues, and profits of the common property, between December 14, 1909, the date of the divorce, and August 18, 1913, the date when the receiver took charge, to be $20,173.72.

November 4, 1914, defendant Garner filed his exceptions, in which intervening creditors Tonopah Banking Corporation, Ada Smith, George W. Summerfield, and George Wingfield joined April 3, 1916. The master declined to allow anything for Johnson's services between the divorce and the receivership. The report shows that the net income of the Big Casino business during this period was $450 per month. Under the receivership there were no profits; the disbursements consumed the income, and in November, 1913, the business itself was entirely lost. The compensation of the receiver, his attorneys, and several of the employés, as well as other expenses, amounting to more than $3,000, all told, must be paid, not out of the income of the business, but out of the estate itself.

[5] In his report the master credits Johnson with payments on the contract of December 14, 1909, made in contemplation of the divorce, amounting to but $1,175. The production by Johnson's attorneys within the past two weeks of canceled checks and other vouchers, showing that Johnson should have been credited with $2,647.50 instead of $1,175, removes an unpleasant impression which intruded into these proceedings at the very outset. The sum so received by Mrs.

Johnson should be charged, not against the common fund, but against her share of the profits.

[6] These facts, taken in connection with the large increase in the property accomplished under Johnson's management, lead me to conclude it is no more than just to allow for his services $250 per month for 44 months.

[7] During the time he was the sole owner of the option to purchase all the stock of the Nye County Land & Live Stock Company, Johnson expended $1,212.05 for an automobile, $460.98 for auto repairs, and $37.37 for a carpet, making a total of $1,710.73. These expenditures were for the ranch, and served to enhance the value of Johnson's interest in the property and in the option, and therefore should be allowed.

[8] Mrs. Johnson has prevailed in the suit, but the equities otherwise are not so uneven as to require the expenses and losses of the receivership to be cast on the Johnson estate. These, therefore, as well as the clerk's, master's, and stenographers' fees and charges, will be paid out of the common funds. Mrs. Johnson will be allowed $300 for costs.

Mrs. Johnson's claim against the estate of W. S. Johnson, deceased, will therefore be allowed for $11,758.36.

[9, 10] III. The fact that Mrs. Johnson commenced proceedings to recover her share of the property, and for an accounting against Johnson, before Ada Smith and the Tonopah Banking Corporation took action to enforce their claims, is not sufficient to justify this court in disregarding the statute which gives to judgments obtained against a decedent during his lifetime a preference over general demands against the estate. It is within the power of the state to determine and fix the order in which debts of an estate shall be paid, and the order so fixed is binding on this court and in this proceeding. Yonley v. Lavender, 21 Wall. 276, 22 L. Ed. 536; Dodd v. Ghiselin (C. C.) 27 Fed. 405.

Section 6052 of the Revised Laws of Nevada declares that:

"The debts of the estate shall be paid in the following order: First—Funeral expenses. Second—The expenses of the last sickness. Third—Debts having preference by the laws of the United States. Fourth—Judgments rendered against the deceased in his lifetime, and mortgages in order of their date. Fifth—All other demands against the estate."

[11] The term "debt," as used in the statute, signifies no more than a sum of money owing on a contract, express or implied. 8 Am. & Eng. Ency. L. 984; 13 Cyc. 393; 3 Blackstone's Commentaries, 154; Melvin v. State, 121 Cal. 16, 53 Pac. 416, 419.

"If goods, money, or securities belonging to another person lie amongst the goods of the deceased, capable of identification, and they come altogether to the hands of the personal representative, such other person's things are not to be reckoned among assets of the estate. Nor is money collected by an attorney, factor, or agent, and kept distinct and unmixed with the rest of his property. So property held by a trustee or fiduciary officer is not assets in the hands of his executors, administrators, or assignees. * * * Only those things in which the decedent had a beneficial interest at his death are assets, and not those which he holds in trust or as the agent, bailee, or factor of another." 2 Schouler on Wills, Executors and Administrators, § 1205.

In 18 Cyc. it is said at page 193:

"Property which a decedent held in a fiduciary capacity, does not at his death properly constitute assets, but should be devoted to the purposes of the trust, although the account of the trust should be settled by the personal representative. But if any trust fund which the decedent held in his lifetime be gone, or its identity lost at his death, the personal representative does not stand in the relation of trustee to the cestui que trust, beyond the obligation imposed by his office as executor or administrator; and no remedy lies against him except such as belongs to a general creditor of the estate, unless assets exist to which the lien of the cestui que trust in equity can properly attach."

At page 553:

"Property held in trust does not on the trustee's death become assets of his estate, but, although mingled with the trustee's own funds or used by him in the purchase of property for his own benefit, may, if it can be traced, be followed and reclaimed by the cestui que trust in the hands of the decedent's personal representative, regardless of the claims of the decedent's creditors; but where the trust funds were wasted by the trustee or can no longer be traced, the cestui que trust can claim only as a general creditor of the estate unless some statute entitles him to a preference."

To the same effect, see Woerner on American Law of Administration, §§ 305, 312; Hubbard v. Alamo Irrigating & Mfg. Co., 53 Kan. 637, 36 Pac. 1053, 1055, 37 Pac. 625; 18 Cyc. p. 417.

The claim of Mrs. Johnson may be resolved into two parts: First, there is a demand for one-half of the community property; and, second, there is a demand for one-half of the rents, issues, and profits received by Johnson from such property. The first is a claim for a half interest in specific things which have been identified. That which is claimed constitutes no part of the assets of the estate of W. S. Johnson. The second is a demand for moneys due Mrs. Johnson, which Johnson received and converted to his own use. The moneys are not identified, nor have or can they be traced into any specific property now constituting a part of the estate. They cannot be found, and, if paid, it must be out of Johnson's share of the common property. There was an obligation on Johnson to turn over to Mrs. Johnson a half interest in certain specific property, and another obligation to pay her a certain sum of money. The first obligation was not, but the second was and is, a debt within the meaning of the statute quoted.

IV. *Claim of the Tonopah Banking Corporation* for $3,347.46, with interest thereon at the rate of 1 per cent. per month from December 24, 1913, until paid, costs taxed at $44.25, and attorney's fees fixed at $700.

This obligation was incurred by Johnson as joint maker with the Manhattan Gold Crater Mining Company of a promissory note for moneys advanced and loaned by the banking corporation to the mining company. In 1907 the Manhattan Gold Crater Mining Company was indebted to the Tonopah Banking Corporation between $8,000 and $9,000. The bank demanded payment. At that time the directors and principal stockholders of the mining company were: L. L. Mushett, president; W. S. Johnson, vice president; George W. Summerfield, secretary-treasurer; R. C. Moore and Jacob Hoffman. Mushett testifies that he paid $5,000 of this indebtedness for himself and Moore.

A promissory note for the balance, $3,347.46, was executed by the mining company to the bank, and signed by W. S. Johnson. Later Mushett turned his claim for $5,000 over to an associate, named Whittenberg, who brought an action thereon, and took over all the property of the Gold Crater Mining Company on execution, for the benefit of himself and Mushett. Mushett was unable to say when the Whittenberg action was brought. He testifies that he talked with W. S. Johnson about reorganizing the mining company and taking up the indebtedness; but he could not seem to do much with Johnson, who was drinking heavily.

September 29, 1910, the note of 1907 was surrendered by the banking corporation, and probably destroyed. On the same day a new note for $3,347.46 was executed in favor of the banking corporation by the mining company, L. L. Mushett, president, and signed by Johnson. December 24, 1913, a default judgment on the second note was entered in the district court of the Second judicial district for Washoe county against the mining company and W. S. Johnson. The debt was the debt of the mining company. The signature of W. S. Johnson was attached to the first note while he and Roxa Johnson were husband and wife. The second note was executed more than nine months after Roxa Johnson and W. S. Johnson were divorced.

For the following reasons the bank now contends that its judgment must be paid in preference to all other claims against the estate, save funeral expenses, expenses of the last sickness, and moneys due the United States government: (1) It is a judgment against the deceased, secured by an attachment lien. (2) The judgment was based on a debt contracted by Johnson more than two years prior to the divorce. (3) Under section 5841 of the Revised Laws of Nevada, a divorce having been granted, without any attempt in the decree to dispose of or regulate the same, all property and pecuniary rights and interests are divested out of the guilty party, Mrs. Johnson, and vested in the party at whose instance the divorce was granted. (4) Being a judgment obtained against Johnson during his lifetime, under section 5062 of the Revised Laws of Nevada, it must be paid in preference to any judgment obtained after his death. It is also suggested that by delaying this suit 44 months Mrs. Johnson is now estopped to claim that the common property is other than the sole property of Johnson.

[12] (1) On the day this suit was brought a restraining order was issued out of this court, which contained the following provisions:

"It is further ordered that you, the said defendant William S. Johnson, and all your servants, counselors, attorneys, solicitors, and agents, and all others acting in aid or assistance of you, and each and every of you, do absolutely desist and refrain from withdrawing from deposit, or in any way or manner transferring, incumbering, hypothecating, selling, disposing of, concealing, or disturbing the status quo of any moneys or property belonging to said defendant William S. Johnson, particularly 27,498 shares, or thereabouts, of the capital stock of the Nye County Land & Live Stock Company, a corporation, and 4,950 shares of the capital stock of the Summerfield-Johnson Company, a corporation, whether issued to, or held in the name or to the credit of, said William S. Johnson, or in the name of any other person for defendant's use or benefit, or in any capacity whatsoever, or deposited to his credit, or in the possession or under the control of said Tonopah Banking Corporation of Tonopah, Nevada."

Three days later a copy of this restraining order was served by the marshal of this court on E. Howell, as cashier of the said Tonopah Banking Corporation. On the 10th day of October following, the banking corporation commenced its action in the district court for Washoe county on the note, *and, notwithstanding the restraining order, caused a writ of attachment to be issued,* which four days later was served on the banking corporation itself. The said Howell, as cashier, in his written return to the writ, stated:

"There is held in this bank 29,995 shares of stock of the Nye County Land & Live Stock Company, and that said shares are in the name of the Tonopah Banking Corporation, and this is to certify that, after defendant W. S. Johnson pays the said Tonopah Banking Corporation, also the Nixon National Bank of Reno, or the Nixon estate, the sum of $19,000, or thereabouts, with interest belonging and accruing thereto, thereupon the 29,995 shares aforesaid will then be handed and given to the said W. S. Johnson, providing that any legal action in the United States court does not order otherwise."

This writ of attachment was also levied on certain mining claims and improvements in Manhattan mining district, Nye county, Nev., belonging to the Manhattan Gold Crater Mining Company. The sheriff, in his return attached to said writ, certifies:

"That L. L. Mushett, being informed of the facts above set down, stated that he personally was the true and rightful owner of any and all improvements and personal property situate on the above-described real estate, and that he, the said *L. L. Mushett, with other persons, are now, and for some time past have been, in possession of said real estate under lease* from said Manhattan Gold Crater Mining Company."

There is no evidence that Johnson ever authorized the banking corporation to hold the stock of the Nye County Land & Live Stock Company as security for the payment of either of the above-mentioned notes; and in view of the receivership proceedings, and of the restraining order served on the banking corporation, I am unable to find that the bank acquired any lien by the attempted attachment of the stock of the Nye County Land & Live Stock Company.

[13] (2) The testimony of Mrs. Coulter, F. M. Lee, and R. C. Moore, in my opinion, is sufficient to establish the existence of the note of 1907, and its execution by the Manhattan Gold Crater Mining Company, L. L. Mushett, president, and W. S. Johnson. While Mushett is not a party to this action, it is not absolutely clear that he has no interest in the result of the intervention of the banking corporation. His statement to the sheriff, quoted above, and his testimony, indicate that the banking corporation attached the property of the Manhattan Gold Crater Mining Company before any action was commenced to recover the $5,000 which he advanced for the mining company on its obligation to the banking corporation. What, if any, arrangement was had with reference to this attachment is not disclosed. He was a party to the transaction, and in view of his willingness to allow the losses of the mining venture to fall on Johnson and the Johnson estate, I think he may be regarded as the other party to the transaction as against Johnson, and, as Johnson is dead and unable to testify, I shall not consider Mushett's testimony.

(3) The third contention, in so far as it involves section 5841 of the Revised Laws of Nevada, has been considered above at page 762 et seq.

[14–19] (4) Assuming the existence of the marriage; the execution of the first note in October, 1907; the dissolution of the marriage in December, 1909; the surrender and destruction of the first note and the execution of a second note for the same amount by the mining company and Johnson in 1910, while Johnson was in possession of all the common property of himself and Mrs. Johnson; the commencement of Mrs. Johnson's suit in August, 1913; the injunction, followed 10 days later by the receivership; the commencement of an action by the banking corporation in October, 1913, against the mining company and Johnson, followed immediately by attachment of the company's property, and an attempt to attach the property interests of Johnson in the custody of the bank; the entry of default judgment against the mining company and Johnson: Does it necessarily follow that the judgment in favor of the banking corporation must be paid out of the Johnson property before it is divided between Roxa Johnson and the Johnson estate?

Inasmuch as Mrs. Johnson was not joined in the action brought by the banking corporation against Johnson and the mining company, and was not at the time Johnson's wife, she is not bound by the judgment. The marriage relation had been terminated when the second note was executed in 1910; Johnson's signature thereto could not, as against Mrs. Johnson, create any new or additional obligations or liability. Prior to the divorce Johnson could incur debts for which the community would be liable, and incumber the community property; this power, however, ended with the dissolution of the marriage. Gentry v. Collins, 1 Posey Unrep. Cas. (Tex.) 721, 724; Jackson v. Stone (Tex. Civ. App.) 155 S. W. 960; Latour v. Latour, 134 La. 342, 64 South. 133. In Hart v. Foley, 1 Rob. (La.) 378, 381, the Supreme Court of Louisiana held that:

"After the death of one of the spouses, the community, in a legal sense of the word, is terminated; each party is seised of one undivided half of the property, subject to the payment of the debts. The creditor, who wishes to hold the heirs of the wife responsible for a community debt, must join them in his suit against the husband, for the latter no longer represents the community, which is at an end."

In Grandjean v. Runke (Tex. Civ. App.) 39 S. W. 945, there was a promissory note executed during coverture by a husband. After a decree of divorce had been entered, he promised in writing to pay the note. Shortly after, and just prior to the expiration of the time fixed by the statute of limitations, the holder of the note brought an action thereon.

"The note having been made during appellant's marriage, the community property of herself and husband not exempt from execution was liable for its payment. Upon the dissolution of the marriage, she became jointly liable with her divorced husband for its satisfaction, to the extent of the community property received by her. But, when the marriage was dissolved, the husband could not bind her or her interest in the community estate by contracting for an extension of the time for the payment of the note; yet, while such contract did not affect appellant, it did not relieve her, or her property re-

ceived from the community, from liability for such indebtedness, for the note, as to her, remained as originally made, and, four years not having elapsed from the time it became due until suit was filed, appellee's cause of action was not barred."

There is nothing in evidence showing that the first note did not become due in October, 1907, immediately after its execution, and that Mrs. Johnson's liability thereon, if any, was not barred by the statute in October, 1913. The banking corporation did not attempt to intervene in this proceeding, or to urge any claim against Mrs. Johnson, until November, 1914. Though it has been asserted repeatedly in the briefs that the banking corporation knew nothing of the decree of divorce, or of the claims of Mrs. Johnson, until it discovered what was going on in the federal court, nothing to that effect, either in the pleadings or evidence, has been called to my attention. Neither is it alleged nor shown that Mrs. Johnson had any knowledge of this intervener's claim, or that she made any statement, or performed any affirmative act, by which intervener was misled to its prejudice, or creditors were induced to trust Johnson.

The alleged fraud and perjury perpetrated in procuring the decree of divorce was not directed against, nor did it influence the conduct of, the banking corporation. While Mrs. Johnson may have slept on her rights from the date of divorce until the date of this suit, it does not appear, either in the pleadings or evidence, that this induced the bank to exact a new note from Johnson in 1910, to surrender the 1907 note, or to neglect its prior attachment on the property of the Manhattan Gold Crater Mining Company. The original note was given nearly six years before the banking corporation commenced its action against Johnson in the state court. During that period, so far as the evidence shows, Johnson never paid one cent, either of principal or interest. While it is possible this forbearance was occasioned by the failure of Mrs. Johnson to assert her claims, it would tax the most robust credulity to the breaking point to believe it. Banking institutions do not do business in that way, even with their best and most responsible clients.

Finally, if the bank had retained the note of October 19, 1907, and brought an action thereon against Mrs. Johnson, as well as Johnson, October 10, 1913, when its action against Johnson was commenced in the state court, doubtless it could have held Mrs. Johnson to the extent of her interest in the property. To be available, an estoppel must be specifically pleaded. 8 Standard Ency. of Procedure, 683, 686; Hanson v. Chiatovich, 13 Nev. 395.

It must be conceded that Mrs. Johnson neglected for 44 months to bring her suit; during that time Johnson was in sole possession of all the common property, and treated it as his own. This alone, however, is not sufficient to constitute an estoppel. It must further appear that Mrs. Johnson knew, or ought to have known, that others, relying on Johnson's apparent ownership, were so dealing with him as to alter their previous condition to their injury. Johnson was doing a profitable business. It is not alleged or shown that Mrs. Johnson knew that he had signed a note for the Manhattan Gold Crater Mining

Company, or that on the faith of his ownership of what was common property the 1907 note was surrendered, and the 1910 note taken in lieu thereof. Mere silence does not constitute an estoppel. Furthermore, one who seeks to avail himself of an estoppel must not only plead misleading representations or conduct, and reliance thereon, followed by consequent injury to himself, but he must also show that he was ignorant of the truth, and in the exercise of good faith and due diligence. Gardner v. Pierce, 22 Nev. 146, 154, 36 Pac. 782; De Berry v. Wheeler, 128 Mo. 84, 30 S. W. 338, 49 Am. St. Rep. 538, 540; McAdow v. Hassard, 58 Kan. 171, 48 Pac. 846; Bennet v. Strait, 63 Iowa, 620, 19 N. W. 806; Smith v. Gott, 51 W. Va. 141, 41 S. E. 175, 177; Coolidge v. Austin, 22 Cal. App. 334, 134 Pac. 357.

Originally the banking corporation advanced money to the mining company at the request of Mushett and Johnson. It is conceded that the note of 1907 novated the prior contract. It was a written promise to pay, executed by two of the three original obligors. The failure of Mushett to sign this note, and the payment by him of $5,000, unquestionably effected his release. The first note was executed by Johnson during the existence of the marriage, and while Johnson was a large stockholder in the mining company; it was undoubtedly given to protect a community interest in the mine, and was therefore a community obligation, and enforceable against the community property. Horton v. Donohoe-Kelly Banking Co., 15 Wash. 399, 46 Pac. 409, 47 Pac. 435; Williams v. Hitchcock, 86 Wash. 536, 150 Pac. 1143, 1147; Stubblefield v. McAuliff, 20 Wash. 442, 55 Pac. 637.

[20] The note given in 1910 was executed after Johnson and wife were divorced. Intervener contends that the two notes were for the same debt, between the same parties, and hence constituted one and the same contract; in other words, the second did not operate as a novation of the first. This, however, cannot be conceded. When Johnson signed the first note, he was a husband; he signed as the legal representative of the community, and of his wife, to the extent of her interest in the community. When he signed the second note, there was no community; he was no longer a husband; he signed for himself, and not as the representative of Mrs. Johnson. The intervener voluntarily surrendered the first note, on which Mrs. Johnson was then clearly liable, and accepted in lieu thereof the second note, which she had not authorized, and which was not signed by her husband, because she was no longer a married woman. She was then liable jointly and severally with him on the first note to the extent of her share of the community property, and her liability continued until it was released, satisfied, or barred by the statute of limitations. When the marital relation was at an end, Johnson lost his authority to bind Mrs. Johnson, or her share of the property, by changing the terms of the note, or by giving a new note, or by extending the time for payment. She was in no sense a party to the second note, or liable thereon.

Under the evidence and the pleadings, I am unable to hold that Mrs. Johnson, as against the Tonopah Banking Corporation, is estopped from urging her demands.

V. *Claim of Ada Smith* on a judgment rendered August 27, 1913, in her favor for $5,340.22, with interest thereon at the rate of 7 per cent. per annum, and costs taxed at $11.70.

The intervener prays that this judgment be decreed to be a valid, prior, and subsisting claim against both the common and community property of W. S. Johnson and Roxa S. Johnson, and that it be paid out of the same in preference to any claim of Roxa Johnson. This prayer is based on the following contentions: (1) All the community property of W. S. Johnson and Roxa Johnson was, under section 5841 of the Revised Laws of Nevada, divested out of Roxa Johnson and vested in W. S. Johnson, at whose instance the divorce was granted. This contention has already been disposed of. (2) The moneys advanced by the intervener, for which the judgment was rendered, served in part at least to swell the common property of Johnson and Mrs. Johnson. (3) Mrs. Johnson, by her delay in asserting an interest in the Johnson property, is estopped. (4) Her judgment was obtained during the lifetime of W. S. Johnson, and therefore is a preferred claim.

[21] Moneys loaned by Ada Smith, and used by Johnson in the purchase of Belmont stock, or an interest in the Nye County Land & Live Stock Company, may have increased the property of Johnson, but they certainly could not have increased the common property owned by husband and wife at the time of the divorce, and before the loans were made; nor could they have increased the subsequent rents and profits issuing out of Mrs. Johnson's share of that property. There is nothing in the alleged use of the money loaned by Ada Smith which entitles her claim to precedence in order of payment. It is only reasonable to suppose that all moneys loaned to Johnson by his creditors, as well as the rents, issues, and profits due Mrs. Johnson, which were applied by Johnson to his own uses, increased the property in his hands. I do not understand that Ada Smith is attempting to set up a lien against any specific portion of the stock, or against any specific interest of the Johnson estate in the Nye County Land & Live Stock Company, and, as she did not become a creditor of Johnson until after the divorce, the obligation to her is not a community debt.

[22] Paragraph 14 of Ada Smith's petition contains the allegations on which the estoppel is asked, and is as follows:

"This intervener states: She first became acquainted with the said W. S. Johnson at or about the time the decree of divorce was made and entered. * * * That this intervener was then less than 20 years of age, that she was inexperienced in business matters, and that the said W. S. Johnson obtained her confidence, and she at all times, until the present action was commenced, believed that said W. S. Johnson was the sole owner of all the property claimed and controlled by him, which property is now in the custody of this court. That she was so induced to believe such to be the fact from the declaration to her by said W. S. Johnson, and by the general repute as to his ownership of the same, and by his exercising all the acts of ownership usually exercised by the true owner of property, and by the failure of said plaintiff, Roxa S. Johnson, to, by action or publicity, or otherwise, prior to the institution of this action, assert claim to the same. That this intervener, so believing and relying upon the sole ownership of said property to be in said

W. S. Johnson, and believing him to be solvent and responsible, loaned to him said sums aforesaid."

The only delay or failure of Mrs. Johnson to assert her claim to the property, by which Ada Smith could be aggrieved, is that which occurred subsequent to the divorce, and prior to the loans; delay following the loan could not in any way have influenced or induced her to make it. The complaint shows that all of Ada Smith's loans to Johnson, except one for $200, were made within 9 months after the divorce. It is not alleged that Mrs. Johnson made any representations or statements in relation to the property, to Ada Smith or to any one else, or that she knew, or ought to have known, that Ada Smith was doing any business with Johnson, or contemplated any loans to him, or even had any money to loan. In fact, there is nothing in the pleadings from which we may infer that Mrs. Johnson was aware of the existence of such a person as Ada Smith, or that she was in duty bound to inform Ada Smith of her interest in the property. Ada Smith knew of the divorce; she knew that Johnson was possessed of property, but she does not allege ignorance of facts from which she could have known that Johnson's estate was in part, if not altogether, community property. Ignorance of the law can avail her no more than is can avail Mrs. Johnson. It is not alleged, nor can it be inferred from any facts set out in the complaint, that Mrs. Johnson voluntarily placed her property in the possession of Johnson, or that it was suffered so to remain in order to give him credit, or to enable him to incur debts. It is impossible to draw, from the facts set out in the complaint or in evidence, any inference of fraudulent intent on Mrs. Johnson's part. It could be of no possible advantage to her that Johnson should enjoy a fictitious credit; she could have no further interest in the property which he might acquire, either with his own funds or with borrowed money, after the divorce.

In all this I am unable to find anything which is sufficient to support the plea of estoppel.

[23-25] VI. Mrs. Johnson is entitled to a decree for one-half the property described in the master's first report. Her claim for money due on accounting, however, must be regarded merely as a debt due from the estate. Its rank in order of payment is a matter of much controversy; for convenience, it will be considered with the judgments in favor of Ada Smith and the Tonopah Banking Corporation.

Mrs. Johnson commenced this suit August 8, 1913. Ada Smith began her action August 16, 1913, and obtained judgment by default on the 27th day of the same month. The Tonopah Banking Corporation commenced its action October 10, 1913, and judgment by default followed on the 24th day of the following December. The receivership dates from August 18, 1913. The original purpose of the receivership, and of the injunction which immediately preceded it, was to preserve the property of W. S. Johnson, and prevent any transfer or disposal which might render the suit fruitless. At that time Mrs. Johnson had no lien or security for the payment of moneys then or now due her. The same may be said of the demands of Ada Smith and the banking corporation.

The master's second report, in which he finds that Mrs. Johnson is entitled on accounting to certain moneys from the Johnson estate, was not made until long after the death of Johnson; consequently it cannot lift the indebtedness to her into a position of preference. The judgments cannot be treated as liens, because Johnson had no realty, except a few worthless mining claims, to which a judgment lien could attach, and his personal property passed into the custody of this court in the present suit before the judgments were rendered. A receivership does not operate as an attachment or an execution. It is no more than a general sequestration of property for safe-keeping, leaving the question as to who is entitled thereto for subsequent determination.

The injunction and receivership secured to Mrs. Johnson no lien or preference over other interested parties. High on Receivers (4th Ed.) § 5; Central Appalachian Co. v. Buchanan, 90 Fed. 454, 458, 33 C. C. A. 598; 23 Am. & Eng. Ency. L. 1043; 34 Cyc. 75. As a rule the existence of a receivership suspends the power of creditors to acquire any lien or advantage over other interested parties. Foster v. Field, 13 Okl. 230, 74 Pac. 190, 194; Barnett v. East Tenn. V. & G. Ry. Co. (Tenn. Ch. App.) 48 S. W. 817, 822; Attorney General v. Continental Life Ins. Co., 28 Hun (N. Y.) 360; Jackson v. Lahee, 114 Ill. 287, 2 N. E. 172; Besuden v. Besuden Co., 4 Ohio Dec. 144. In 34 Cyc. at page 199, it is said:

"One who has no lien when a receiver is appointed, although the mere right to acquire one may then exist, cannot proceed for that purpose by independent action after the appointment of the receiver, and gain a preference over other creditors, as in the case of the administration of insolvent's estates, in which creditors are entitled to pro rata and equitable distribution. The application of this rule depends upon the nature of the suit in which the receiver is appointed, and the rule has been held not to apply to a receiver pendente lite, where the sole object is to preserve the property for the purpose of the decree as between the parties to the suit only, without affecting the interests of third persons, as distinguished from a receivership for the general administration of assets as above mentioned."

The rule as indicated in the quotation has an exception into which the present case falls. In the beginning of this litigation there was no thought of settling Johnson's estate, or making an equitable distribution of his property. The order of appointment contained no direction to the receiver to give notice to creditors to file claims. The creditors were in no wise restricted in the prosecution of their demands, and it was not until January 18, 1915, more than 7 months after the death of Johnson, that it became apparent to this court that it must in this proceeding distribute the estate. The entry of the judgments in favor of Ada Smith and the banking corporation, followed by the death of Johnson, had then raised those debts from the fifth to the fourth class mentioned in section 6052 of the Revised Laws of Nevada, and preferred them to general demands. This preference, having once attached, was not displaced by the subsequent determination of this court to administer the estate.

These conclusions find abundant support in the following authorities: High on Receivers (4th Ed.) § 349; Cramer v. Iler, 63 Kan.

579, 66 Pac. 617; 23 Am. & Eng. Ency. L. 1043; Waggy v. Jane Lew Lumber Co., 69 W. Va. 666, 72 S. E. 778, 779; Ellicott v. U. S. Ins. Co., 7 Gill (Md.) 307; Moore v. Southern States L. & T. Co. (C. C.) 83 Fed. 399. In Ellicott v. U. S. Insurance Co., 7 Gill (Md.) 307, the court decided that a creditor who had obtained a judgment in a court of law during the pendency of proceedings in equity, in which a receiver had been appointed, acquired thereby a lien on the defendant's real property in the hands of the receiver, quite as good as if no receiver had been appointed. The opinion of the court shows the reason for so deciding was that the only object in granting the receivership was to provide for safe keeping of the property, and that other creditors were not restrained from attempting to establish their demands.

In Moore v. Southern States Land & Timber Co. (C. C.) 83 Fed. 399, the conditions were very similar to those in the case at bar, in this: After other creditors had obtained judgments against the defendant during the existence of the receivership, the court determined to enlarge the scope of the proceedings, and to make an equitable distribution of all property of the defendant. This change, however, in no wise disturbed the preference already established by the judgments, though, if the larger purpose had characterized the proceedings from their inception, no such advantage could have been acquired. The facts in the case were as follows: There was a suit to foreclose a mortgage on the property of an insolvent corporation; a receiver was appointed, and a decree pro confesso entered. Some time later there was an amended decree, in which the court indicated for the first time an intention to make an equitable distribution of the funds among all the creditors, and it then provided for notice to creditors to file their claims. During the time which intervened between the appointment and the amended decree, several creditors, not being restrained from bringing suits against the corporation, obtained judgments. The court held that the interveners who had thus obtained such judgments should have a lien on all the property and effects of the defendant not covered by the mortgage, and that their right to be paid out of the property of the debtor was paramount to that of other creditors.

The foregoing claims of the Tonopah Banking Corporation and Ada Smith are of equal rank, and will take precedence of the claim of Mrs. Johnson for moneys due her on accounting. They will be allowed as judgments obtained against the deceased during his lifetime, and as against his estate, but not as against the interest in the specific property awarded to Mrs. Johnson in the master's first report.

Let a judgment and decree be entered in accordance with the foregoing opinion.

BRADY v. SOUTH SHORE TRACTION CO.

In re BRADY et al.

(District Court, E. D. New York. May 20, 1916.)

RAILROADS ⊂=84—CONTRACTS—DEPOSIT TO SECURE PERFORMANCE—FORFEITURES—WAIVER.

The city of New York *held* without right to insist on a forfeiture of $30,000 worth of bonds deposited with the city comptroller by a traction company to secure performance of a contract by which it was to build a railroad in the borough of Queens within a specified time, because of nonaction by officers of the city, by which the work was delayed, and also because of the execution of a substituted contract, after the time had expired, by which the original contract was annulled; and the receivers for the traction company *held* entitled to recover the interest accrued on the bonds.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 222; Dec. Dig. ⊂=84.]

In Equity. Suit by Paul T. Brady against the South Shore Traction Company. In the matter of the application of Paul T. Brady and Willard V. King, receivers, for an order directing the payment of accumulated interest by the city of New York. On exceptions by the city to report of master. Exceptions overruled, and order granted.

Arthur C. Hume, of New York City, for receivers.

Lamar Hardy, Corp. Counsel, of New York City (Samuel J. Rosensohn and Vincent Victory, both of New York City, of counsel), for city of New York.

Breed, Abbott & Morgan, of New York City, for Northern Bank of New York.

CHATFIELD, District Judge. The city of New York has in its possession certain corporate stock of the city, which was deposited by the South Shore Traction Company under the provisions of section 4, paragraph 17, of a contract entered into May 20, 1909, between the South Shore Traction Company and the city of New York. Certain interest has accrued upon that corporate stock, and the receivers of the South Shore Traction Company, for the benefit of those claimants entitled to the interest, if it be properly obtained by the receivers, have undertaken to litigate with the city the right to the particular moneys made up of these interest items.

It appears that similar questions will arise with respect to other items of the same sort, and with respect to the principal of these bonds, and that the determination of the questions in this instance will be of some effect in establishing the rights of the receivers to the other funds; but the existence of collateral claims to the principal of the bonds does not render it impossible at the present time to determine the issues which arise between the receivers and the city as to the particular items representing interest already due.

The issues were referred to a master to hear the testimony and report his opinion thereupon. The report of the master as finally pre-

sented makes certain findings in the form of conclusions, both of fact and law, but has not specifically presented the various findings of fact and conclusions of law which in a matter of this sort might have been set forth consecutively and separately. If so divided and stated, they would present to this court merely the question whether they were supported by the record, in so far as they determined questions of fact, and whether the conclusions of law were correct.

The city has filed exceptions to the report of the master, in the form of assignments of error as to the statements taken as if they were specific findings, and also as assignments of error to the admission of testimony received as conclusive, or the exclusion of testimony offered to rebut the allegations urged by the petitioners.

In view of the facts that the reference was to hear and report, and that the findings made by the master stand as facts unless unsupported by the testimony, it does not seem necessary to go into the various specific grounds of objection nor the various specific matters which are presented as findings in the report.

The issue is based upon many details and allegations of fact, covering a considerable period during which the company for which the receivers were appointed was operating a railroad over the so-called Blackwell's Island Bridge into the borough of Queens, and contemplating the construction of a road from the terminal of that bridge in Long Island City through the village of Jamaica in Queens county. The proposed railroad, after crossing the bridge and leaving the bridge structure, was to cross what is known as the "Bridge Plaza" and Jackson avenue and was then to be carried over the Sunnyside Yards, and by an embankment of some 20 feet in height gradually down to the street level at the intersection of the new diagonal street with Thomson avenue.

Thomson avenue ultimately joins with Hoffman boulevard, and thus carried the route to the intersection of Pierson street, which is in the former village of Jamaica, and through the village of Jamaica from Pierson street to the intersection of the Merrick plank road and Central avenue. An uncertain route was originally contemplated, because of plans to change the Long Island Railroad station, and as early as September 12, 1907, the South Shore Traction Company filed a petition with the board of estimate and apportionment to be granted the right to construct a double track surface railroad, upon the route substantially described, to the boundaries of Nassau county. On April 13, 1908, an amended petition, to include the route over the Queensboro Bridge, was substituted, and upon December 28, 1908, a further application was made, so as to eliminate difficulties arising from the plans of the Long Island Railroad beyond Jamaica, and so as to avoid certain streets upon which the construction of street surface railway was prohibited by law.

As far east as the intersection of Hoffman Boulevard and Pierson street, the route was the same as in the earliest petition mentioned, and the object of the construction was to build a railway by which passengers could reach the new Jamaica station of the Long Island road. This station had not yet been located in the village of Jamaica,

and the granting of a franchise to the South Shore Traction Company, together with suggestions as to the proposed form of contract, was recommended by the engineer in charge, who stated that the preliminary procedure should be completed, so that the contract would be in shape for final passage as soon as possible after traffic arrangements over the Queensboro Bridge were disposed of.

This contract was approved upon the 26th of February, 1909, but on April 2, 1909, and upon recommendation of the corporation counsel, a new paragraph, numbered 17, was inserted in section 4, by which it was provided that within three months after the signing of this contract, and before anything was done in exercise of the rights thereunder, the South Shore Traction Company should deposit with the comptroller of the city $30,000,

"which said further sum shall be returned to the company upon condition that the company shall have completed the construction of a double track surface railway *from Jackson avenue* at the Queensboro Plaza and *the intersection of Hoffman Boulevard with Pierson street*, and put the same in operation within 18 months from the date upon which the consents of the property owners are obtained for the lawful construction of *such* railway * * * or from the date upon which the decision of the Appellate Division of the Supreme Court * * * is rendered," etc.

For the purpose of facilitating the work, it was consented by this section that the company might construct temporary overhead crossings on Thomson avenue within the lines of said avenue. It was further provided that upon proper certificate the comptroller was to return to the company the said sum of $30,000. Unless this certificate was delivered, and the statement accepted by the board of estimate as correct, or proven by the company to be correct, "then such sum of $30,000 shall be forfeited to and become the property of the city." If, at any time prior to the time specified for the completion and operation, any other right to construct a street surface railroad upon all or any portions of said line be granted to another corporation, then the whole $30,000 was to be returned to the South Shore Traction Company. On February 20, 1910, consents for Thomson avenue and the short connecting or diagonal street to the bridge approach were obtained, and upon October 20, 1910, the Appellate Division of the Supreme Court granted a certificate as to Hoffman Boulevard.

The city contends that at the expiration of 18 months from the latter date, which would be April 20, 1912, the city was entitled to hold the $30,000 as forfeited and as the property of the city. It appears according to the record that the station of the Long Island Railroad in Jamaica was not definitely located until long after the expiration of the 18 months in question, and so far as the extension of the road from Pierson street in Jamaica, on to the Nassau county line, we need consider nothing further than that no plans were filed or approved and no road built until long after the period in question.

As to the connection between the bridge plaza and Diagonal street, and approval of permanent plans for the railroad through Thomson avenue and Hoffman Boulevard, it appears from the record that all through the period in question the city officials intended to lay out what was to be known as the Queens Boulevard. This roadway would

necessitate a relaying and probably relocation of the tracks of the railway company, and, if these tracks were in an inconvenient or impossible place, might furnish an insuperable obstacle to the approval of plans for the Queens Boulevard itself.

Paragraph 17 was based upon the proposition that from the intersection of Pierson street and Hoffman Boulevard the road could not be built, and that from the bridge plaza along Thomson avenue it could only be constructed temporarily. With full knowledge that the report recommended that the contract run for a period of 25 years and contained provisions for complete returns to the city and payments for each year during the life of the contract, with a cash payment at the end of 3 months after signing the contract, that in the case of a violation or breach and declaration of forfeiture the property of the railroad might become the property of the city, and that actual construction should start within 6 months and be completed within 2 years, with the possibility of 6 months' extension after the obtaining of consents or order of the Appellate Division (which consents were to be obtained within a maximum of 9 months, or with 1 month to apply to the Appellate Division), nevertheless the road was given by paragraph 17 but 18 months after the signing of the contract to designate routes for the construction (and at the suggestion of the corporation counsel of New York they agreed to deposit a further sum of $30,000 to complete the construction) of a double track railroad from Jackson avenue at the bridge plaza and the intersection of Hoffman Boulevard with Pierson street (which was the place of beginning for the extension, which has never yet been built). Where this section was to terminate, or what "such railway" meant, was not stated, and was always in dispute.

It is admitted upon the record that none of the road was built within 18 months after the above-recited consents and order of the Appellate Division were obtained, but it was built within 2 years, as modified by the contract of October 29, 1912, which declared the old agreements and contracts *null and void.* It appears that the only application for a permit to build the road from the bridge on into Thomson avenue and Hoffman Boulevard was filed with a deputy commissioner of public works in the borough of Queens, and that his authority to pass upon this application is now repudiated by the city. The city alleges that the company purposely avoided applying for a permit to such officers as the city considers were authorized to approve plans for the railroad construction.

It appears from the record and from the master's report that in so far as the city officials (who might have been expected to have interested themselves in the construction and operation of means of transportation upon these streets) were concerned the plans for the improvement of those streets were definitely allowed to remain incomplete, and to be marked that tracks were "to end here until further application, subject to early action by the board of estimate and apportionment on the proposed Queens Boulevard or otherwise."

The special master has reported that the railroad was relieved from carrying out the provisions of the earlier contract by failure upon

the part of the city officials to furnish any approval of plans or to promulgate and complete, by the action of the board of estimate, any definite street map over the route in question.

The city has objected to the receipt of evidence upon any of these questions, and has insisted that the literal interpretation of the rescinded contract, and the expiration (without the completion of whatever part of the railroad was required by the particular provisions of section 17) of 18 months from October 20, 1910, make it necessary to hold that the $30,000 in question and all rights thereto had been forfeited. But this contract shows upon its face such ambiguities and discrepancies that it is impossible to exclude oral testimony, or to hold that a waiver of forfeiture could not be had by the acts of the officials in question, independent of any written modification of the contract.

The seventeenth clause (on which this action is based) as has been already said, was drawn to require the completion of a railroad running *from* two widely separated points, each of which by the other provisions of the entire contract was at a point where the ultimate location of the railroad was entirely indefinite, and this section provides that the railway is to be put in operation within 18 months after the consents for "such railway" are obtained.

As has been stated, this clause 17 seems to be impossible of reconcilement with the other general provisions of the contract, as to rental, etc. The report accompanying the proposed contract states definitely that Thomson avenue and Hoffman Boulevard, while extensively used at that time, were to be made a wide boulevard at some future date. The city officials seem to have immediately undertaken plans for the construction of this boulevard, and the general provisions of the contract, which required construction of the balance of the road within 6 months after the time within which the sections beginning at the bridge plaza and beginning at the intersection of Hoffman Boulevard and Pierson street were to be completed (whatever those sections might be), include the portions of the road which have not yet been built, as to which the city seems to have waived damages for the nominal breach of contract, and as to which the new contract entirely rescinds and makes void the old contract.

The special master has reported generally this situation. He has found specifically that the city officials, generally, considered the immediate carrying of passengers and the transportation of the public as of less importance than the completion of their plans for the so-called Queens Boulevard. The board of estimate and apportionment and some of the officials representing it seem to have kept in mind the possibility of obtaining a forfeiture of the $30,000 in question, and therefore carefully sought to avoid granting to the South Shore Traction Company relief by an admission that the forfeiture had not occurred. But neither the attitude of the city authorities in seeking to hold the $30,000, nor to now justify the indifference of all those concerned, can do away with the substantial impossibility of performance caused by the city, and which is shown by the record, in so far as the railroad was to be given the use of such streets as were to be accepted

in accordance with the terms of the contract. When the old contract was rescinded the following paragraph was inserted in the new:

"The sum of thirty thousand dollars ($30,000) provided for in this paragraph is to be in addition to any sum already deposited by the company with the comptroller of the city of New York under the provisions of paragraph seventeenth of the contract of May 20, 1909, the respective rights of the city and of the company in the sum so deposited under said contract being left for future adjustment through judicial proceedings or otherwise."

But no forfeiture was thereby agreed to or saved by the city from the waiver caused by making void the original contract and by the substitution of an extension of the original conditions.

If we assume that section 17 was intended to provide that a separate railway (between the bridge plaza at the *west end* and the intersection of Hoffman Boulevard and Pierson street at the *east end*) was contemplated, and that this section was to be completed within 18 months, and if we attempt to construe the provision that the board of estimate shall immediately verify the correctness, accept the statement as correct, or return it if they consider it incorrect, and if it is thereafter proven to be correct, that then the board shall refund the $30,000 and the further provision that, unless such a certificate is delivered and ultimately proven to be correct, the $30,000 shall be forfeited, it is evident that the conduct of every one concerned was such that no strict interpretation was acted upon or even considered to exist, and the forfeiture of the $30,000 was treated, not as the imposition of a penalty, but rather as security, if the city incurred damages from a breach of the contract, in whatever form it might ultimately be carried out. This would be the plain effect of the clause inserted in the new contract, if anything was accomplished thereby.

There is some evidence that the city was compelled to expend a certain amount in repaving Diagonal street, but that this could be considered damages is not even substantiated, as the entire contract shows that the city planned to either have the road built and the streets constructed in one form, and then have these streets torn up and rebuild them in another form when the city was ready to build the Queens Boulevard, or that the city did not anticipate actual construction of the railroad until such time as suited the city's convenience.

Upon all the evidence it would seem that the city suffered no damage whatever, and it cannot be held that the inconvenience of the public, due to lack of harmonious decision and to delay on the part of the city officials, can be treated as a basis for pecuniary damages, nor as a ground for enforcing a forfeiture of an agreement based upon strict and prompt action by the city on its part. The failure of the city authorities to live up to what was in the mind of one official and of the corporation counsel, in attempting to draw a contract for the city, is a sufficient basis for a finding that impossibility of performance was effectuated, and that this is a complete defense to strict enforcement of the penalty.

There is abundant evidence in this case that a waiver, after the expiration of the 18 months, was furnished by the action of the city authorities, and that the subsequent attempt to restore the city to a

position where it might insist upon literal compliance with the present interpretation (by the city) of the contract and to literal enforcement of the forfeiture, would be contrary to law and would certainly violate the principles of equity from which the right of the receiver's claim is to be tested, when the claims of the receiver to property submitted to the jurisdiction of this court are concerned.

The report will be confirmed, and the receiver may have a decree allowing his claim.

JACKSON v. PARKERSBURG & O. V. ELECTRIC RY. CO.

(District Court, N. D. West Virginia. June 12, 1916.)

1. JUDGMENT ⟸828(3)—JURISDICTION—PROCESS—STATE AND FEDERAL COURTS.
Where the federal court, having appointed a receiver of a railroad company, sought to enjoin the continuance of a suit in the state court, the determination of the state court, affirmed by the highest tribunal of the state, that the railroad company was duly served, will not be reviewed by the federal court.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1507, 1508; Dec. Dig. ⟸828(3).]

2. COURTS ⟸508(1)—JURISDICTION—DETERMINATION.
Whether the federal court, which appointed a receiver of a railroad company will enjoin a suit against the company in the state court, must be determined by the federal court alone, subject to review by the appellate federal tribunals.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1418; Dec. Dig. ⟸508(1).]

3. COURTS ⟸508(2)—FEDERAL AND STATE COURTS—INJUNCTION.
Despite Rev. St. § 720, declaring that a writ of injunction shall not be granted by any federal court to stay proceedings in any court of a state, except in cases where such injunction may be authorized by the law relating to proceedings in bankruptcy, a federal court, having appointed a receiver of a railroad company, may, in the aid of its own jurisdiction and to render its decrees effective, enjoin proceedings against the company in the state courts.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1418; Dec. Dig. ⟸508(2); Injunction, Cent. Dig. § 72.]

4. COURTS ⟸493(1)—CONCURRENT JURISDICTION—COMITY.
Where suits are brought in courts of concurrent jurisdiction, involving a controversy between substantially the same parties or their privies, and no seizure of the res is made, that court in which suit is first brought is entitled to exclusive jurisdiction.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1346, 1348; Dec. Dig. ⟸493(1).]

5. COURTS ⟸498—CONCURRENT COURTS—JURISDICTION.
Where suit is brought either in federal or state court simply for enforcing a lien or debt against a defendant, who is permitted to remain in possession of the property bound by the lien, and subsequently a suit is brought in the other court, in which for proper reason the defendant's property is sequestered or seized, the court first sequestering or seizing the property has exclusive jurisdiction, regardless of the prior institution of suit in the other court; this being particularly true where the practice

in the court in which suit is first brought is such that great delay in the proceedings and perfection of the lien may occur.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1387–1396; Dec. Dig. ⟸498.]

6. EXECUTION ⟸21—SALE OF REALTY—RIGHT TO ENFORCE.

In West Virginia real estate cannot be sold under execution, but only in an equity suit after the return of execution unsatisfied.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 49, 49½, 68–75; Dec. Dig. ⟸21.]

7. ATTACHMENT ⟸197—REAL ESTATE—POSSESSION.

In West Virginia, even where a suit is begun by attachment of real estate, actual possession of the land is not taken by the sheriff, and an action at law or in equity must be instituted to enforce the lien acquired.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. § 643; Dec. Dig. ⟸197.]

8. COURTS ⟸475(1)—CONCURRENT JURISDICTION—EXCLUSIVE JURISDICTION.

The rule that of two courts of concurrent jurisdiction the one first acquiring jurisdiction over a suit takes it to the exclusion of the other is applicable only where the parties or privies to the suits are the same, and the same relief or remedy is sought in both cases.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1229, 1247–1257, 1259; Dec. Dig. ⟸475(1).]

9. COURTS ⟸508(3)—CONCURRENT JURISDICTION—COMITY.

Where a federal District Court had unquestioned possession through its receiver of the property of a railroad company, while a state court, in which suit to enforce a lien on the company's property had been first instituted, had not taken possession of the property by sequestration or receiver, and the parties to the two suits and the relief sought were different, continuation of the suit in the state court and sale of the property under the lien acquired may be enjoined by the federal court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1422; Dec. Dig. ⟸508(3).]

10. COURTS ⟸508(3)—CONCURRENT JURISDICTION—PROCEEDINGS—INJUNCTION.

Where a creditor who sued a railroad company in a state court delayed any attempt to sell the railroad company's property to satisfy his lien for over two years after the federal court took possession of the railroad company's property in receivership proceedings, and ordered the completion of the road and its operation, he is guilty of such laches that further proceedings in his suit will be enjoined.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1422; Dec. Dig. ⟸508(3).]

In Equity. Suit by Henry M. Jackson against the Parkersburg & Ohio Valley Electric Railway Company. Upon motion by the Farmers' & Producers' Bank for an injunction against continuance of a suit by the Central District & Printing Telegraph Company in the state court. Injunction issued.

Arlen G. Swiger, of Sistersville, W. Va., and Arthur S. Dayton, of Philippi, W. Va., for Farmers' & Producers' Nat. Bank, a receiver's certificate holder.

V. B. Archer, of Parkersburg, W. Va., for receiver.

M. H. Willis, of New Martinsville, W. Va., for Central District & Printing Telegraph Co.

DAYTON, District Judge. The controversy here is one of conflicting jurisdiction between this and a state court. The Parkersburg & Ohio Valley Electric Railway Company was incorporated under the laws of West Virginia, for the purpose of constructing an electric railroad from Parkersburg, W. Va., through the counties of Wood, Pleasants, Tyler, Wetzel, Marshall, and Ohio, to the Pennsylvania state line. It entered upon the construction of its road in the fall of 1904, beginning at Sistersville and constructed five miles thereof from that point to Friendly. In 1905 it executed a mortgage for $100,000 of bonds, of which it issued $75,000, and used the proceeds in construction work, and hypothecated the remainder to secure a bank loan of $13,000. It entered into a contract with another road whereby cars were to be run jointly from New Martinsville to Friendly, a distance of 15 miles. It became involved before completing in full the construction of the work undertaken, and defaulted in the payment of the interest coupons attached to its mortgage bonds.

Henry M. Jackson, a citizen of Pennsylvania, claiming to be the owner and representative of some $52,000 of these mortgage bonds and of some $8,580 of overdue interest coupons thereof, on May 8, 1911, filed this bill in this court, making defendants thereto the railroad and its mortgage trustee, the Union Trust & Deposit Company. This bill set forth the embarrassed condition of the railroad company, the necessity for the completion of the work undertaken, and the performance of its contract with the other road. Upon its representation and prayer a receiver was appointed, who took possession of the physical property and assets of the company, and receiver's certificates to the amount of about $60,000 have been in this suit authorized and issued for the purpose of completing construction and operating the road.

It is to be noted that this bill in no wise disclosed the fact that any lien other than the mortgage one existed against the property or any suit had been instituted in any other court. However, on December 3, 1907, the Central District & Printing Telegraph Company recovered in the circuit court of Tyler county a judgment against this railroad company for $3,004.40 and costs, and in September, 1909, it instituted its suit in equity to enforce this judgment, making parties defendant thereto the railroad company and one Jack Hamilton, who it alleged had filed a mechanic's lien upon the road, but had failed to sue to enforce it within the statutory period and thereby lost the benefit thereof. On October 8, 1909, it sued out process upon, and at January rules, 1910, filed, an amended bill making the mortgage trustee, the Union Trust & Deposit Company, and John Schrader additional parties, in which it alleges the execution and recordation in 1905 of the $100,000 mortgage, and alleges some of the bonds thereof to have issued to Schrader, the contractor for constructing the road, but that Schrader had failed to complete his contract, and was only entitled to be paid thereout for the work actually done by him. On June 24, 1910, an order of reference to a commissioner to ascertain liens was entered, and no further proceedings were had until three years thereafter, on June 27, 1913, when another order of refer-

ence was entered, setting forth that the commissioner to whom reference had been made by the first order had retired from office and in consequence substituting another.

[1] This last reference was executed, and upon the commissioner's report that no other liens existed a decree of sale was on September 13, 1913, entered to satisfy this judgment alone. On November 15, 1913, the defendant railroad company appeared for the first time to this suit, alleged it had never been served with process upon either the original or amended bill, and moved to set aside this decree of sale. This created litigation that was finally by the opinion and mandate of the Supreme Court of Appeals of the state decided adversely to the contention of the railroad company, and the question as to whether the railroad was or was not served with process in that suit, now sought to be raised here, may be put aside and regarded as settled by this state court adjudication.

[2] It is, however, to be carefully noted that never in the course of proceeding in the state court was any attempt made by it to take in possession the corpus of the railroad company's property by the appointment of a receiver, the issuance of attachment, or otherwise, and that its decree of sale was entered more than two years after the appointment of the receiver by this court, and when such corpus was in his possession as such. A holder of receiver's certificates now here asks an injunction of the state court's decree of sale. The sole question therefore is: Which court has jurisdiction to administer the assets of this railroad company? This question must be determined alone by this court, subject to all proper appeals to and supervision by the federal appellate courts.

[3] Where the federal court acts in aid of its own jurisdiction and to render its decree effectual, it may, notwithstanding section 720, Rev. Stat., restrain all proceedings in a state court which have the effect of defeating or impairing its jurisdiction. Julian v. Central Trust Co., 193 U. S. 93, 24 Sup. Ct. 399, 48 L. Ed. 629; Dietzsch v. Huidekoper, 103 U. S. 494, 26 L. Ed. 497; French, Trustee, v. Hay, 22 Wall. 250 note, 22 L. Ed. 857. While this power by injunction to maintain jurisdiction is so clearly established, I am not unmindful of the fact that comity and the necessity of avoiding conflict where possible imperatively demands that such power should be exercised with the greatest caution, and only after the most careful consideration and abiding conviction that its exercise cannot be avoided under the rules of law enunciated by the courts of last resort. With the fullest realization of this duty, I have given this case and the very able arguments and briefs of counsel on both sides the most careful study and consideration. I have examined all authorities cited, and others, too. I am driven to the conclusion that some considerable amount of confusion exists in these authorities, and that a careful sifting of each in the light of its particular circumstances and conditions does largely, but not altogether, dissipate this confusion, and enable us to arrive at the true principles and rules of practice to be followed. Within the limits of this opinion it will be impossible to consider each and all the cases. They can be found collated in the Digests and Rose's Notes Dig. U.

S. Sup. Ct. Repts. (Lawyers' Co-op. Ed.) vol. 2, Courts, VI, g, 1, p. 2311 et seq.; Encyclopedia U. S. Sup. Ct. Repts. vol. 4, title Courts, § B, p. 1170 et seq.; Rose's Notes, vol. 2, p. 276; vol. 3, p. 584; vol. 3, p. 805; vol. 4, p. 725; vol. 5, p. 800; vol. 6, p. 518; vol. 7, p. 1011; vol. 10, p. 794.

Chief Justice Marshall, at the February term, 1824, of the Supreme Court, in Smith v. McIver, 9 Wheat. 532, 6 L. Ed. 152, announced the rule that:

"In all cases of concurrent jurisdiction, the court which first has possession of the subject must determine it conclusively."

One of the difficulties involved in enforcing this rule, thus enunciated in its broad and general terms, is strikingly illustrated in the case of Bell v. Ohio Life & Trust Co., 1 Biss. 260, Fed. Cas. No. 1,260, where a conflict arose between the federal court and a state court in Ohio. There summons to institute the suit had issued from the state court, but had not been served; thereafter a bill was filed in the federal court, a subpœna issued the same day was served, and a receiver was appointed; later in the day in the state court application was made, and another and different receiver was appointed by it. Mr. Justice McLean, sitting upon the hearing, sustained the jurisdiction of the federal court, but avoided the question here involved by holding that:

"Priority of jurisdiction as between the state and the United States courts is determined by the service of process, and not by the date of the commencement of the suit."

It can readily be perceived that this decision was not calculated to meet the practical difficulty that must inevitably arise in the enforcement of the general rule laid down by Chief Justice Marshall, because the circumstances and conditions upon which it was based necessarily would thereafter be of rare occurrence. A short time after the Supreme Court in Hagan v. Lucas, 10 Pet. 400, 9 L. Ed. 470, speaking through Justice McLean, made a further limitation upon the general rule by holding that the first levy on property, whether made under the jurisdiction of the United States or of a state, withdraws the property from the reach of process from the other jurisdiction. Following this case came that of Wiswall v. Sampson, 14 How. 52, 14 L. Ed. 322, which, to my mind, is peculiarly important in the determination of this controversy. It was there held:

One having a judgment lien on land of his debtor, which is in the possession of a receiver * * * cannot proceed to levy his execution, if he have notice of the fact that the property is in the custody of the law; he must apply to the court of chancery, which will take care to protect his interest, in making a sale, or in distributing the proceeds.

This case arose in Alabama, where the law authorized land to be sold under execution. Under the laws of West Virginia real estate cannot be sold in that way for debt, but a lien must be obtained, and resort be had to a bill in equity to enforce it. When such bill has been filed for this purpose, by proper showing made, a sequestration of the rents, issues, and profits of such real estate may be had, and this is usually accomplished by the court, acting by and through its

receiver, renting it for a fixed period. If no such sequestration is decreed, the land remains, pending the maturity and hearing of the cause, in the possession of the debtor, who retains such possession until after a sale thereof decreed by the court is made, confirmed, and writ of possession awarded, and, if necessary, executed. During all these proceedings, without sequestration, the res is never held to be in custodia legis.

Further, it is to be noted in this Wiswall v. Sampson Case the receiver's possession and the jurisdiction of the chancery court appointing him was not permitted to be ousted, notwithstanding the judgment was a lien upon the land and the execution was laid before the receiver obtained actual possession of the property. See, also, Peale v. Phipps, 14 How. 368, at page 375, 14 L. Ed. 459. From this time the vital modification or rather construction of the general rule is clearly established that "possession of the subject" must be construed to require actual possession of the res. In Pulliam v. Osborne, 17 How. 471, 15 L. Ed. 154, it was held that, in case of conflicting executions issued out of federal and state courts, priority is given to that under which there is first actual seizure of property. In Taylor's Adm'rs v. Carryl, 20 How. 583, 595, 15 L. Ed. 1028, it was held that, where a vessel had been seized under process of foreign attachment issuing from a state court, issuing of process under libel filed in United States court for mariners' wages could not divest the state's authority over the vessel; it having first acquired the actual possession thereof. In Buck v. Colbath, 3 Wall. 334, 18 L. Ed. 257, the Supreme Court, speaking through Mr. Justice Miller, went a step further in elucidating the general rule, holding that:

> The rule that, among courts of concurrent jurisdiction, that one which first obtains jurisdiction of a case has the exclusive right to decide every question arising in the case, is subject to some limitations, and is confined to suits between the same parties, or privies, seeking the same relief or remedy, and to such questions or propositions as arise ordinarily and properly in the progress of the suit first brought, and does not extend to all matters which may by possibility become involved in it.

Subsequently follow such cases as Hammock v. Loan & Trust Co., 105 U. S. 77, 82, 26 L. Ed. 1111, holding that, a seizure by a federal court was lawful, since the prior appointment of a receiver by a state judge in vacation was void under the laws of Illinois; Krippendorf v. Hyde, 110 U. S. 276, 283, 4 Sup. Ct. 27, 28 L. Ed. 145, that courts have power to protect their officers in the possession of the property seized and also to protect their own jurisdiction in the premises; Covell v. Heyman, 110 U. S. 176, 181, 4 Sup. Ct. 355, 28 L. Ed. 390, that possession by a marshal of property under execution issued by a federal court is a complete defense to an action of replevin in a state court, without regard to its rightful ownership; Heidritter v. Elizabeth Oil Cloth Co., 112 U. S. 294, 304, 5 Sup. Ct. 135, 28 L. Ed. 729, that where proceedings in rem are commenced in both state and federal courts against the same property, exclusive jurisdiction is acquired by the court which first acquires possession of the res; and many others which sustain and apply this rule that jurisdiction is secured by taking possession of the res.

Among these subsequent cases, however, particular attention should be given to that of Shields v. Coleman, 157 U. S. 168, 15 Sup. Ct. 570, 39 L. Ed. 660, for its facts are so near to those of this case as to make it very pertinent if not decisive. In that case Coleman instituted suit (the first) in the federal court against the defendant railroad company to enforce his lien for work and labor done; a receiver was appointed, who subsequently was discharged, and possession of the property returned to the railroad company by him, the railroad company, however, making answer and defense to Coleman's bill; a number of other creditors of the company also filed petitions in this cause, seeking the enforcement of their demands; in this state of affairs, a bill was presented by sundry creditors to the state court, seeking the appointment of a receiver for the railroad; such receiver was appointed by the state court, who took possession and retained it for 16 days, when such possession was taken from him by a receiver who had been appointed under an order of the federal court restoring its receivership, which order was entered in the original cause still pending there, some 14 days after this state court's receiver had been appointed. The Supreme Court reversed the lower court in its sustaining the federal receivership, holding that:

A Circuit Court of the United States has not the power to appoint a receiver of property already in the possession of a receiver duly and previously appointed by a state court, and cannot rightfully take the property out of the hands of the receiver so appointed by the state court.

Finally, the extent and exclusive character of this jurisdiction by reason of a court first taking possession of the res is illustrated by the rulings in Wabash Railroad v. Adelbert College, 208 U. S. 38, 28 Sup. Ct. 182, 52 L. Ed. 379, where it is held:

"The possession of property in the Circuit Court carries with it the exclusive jurisdiction to determine all judicial questions concerning it, and that jurisdiction continues after the property has passed out of its possession by a sale under its decree to the extent of ascertaining the rights of, and extent of liens asserted by, parties to the suit and which are expressly reserved by the decree and subject to which the purchaser takes title; and any one asserting any of such reserved matters as against the property must pursue his remedy in the Circuit Court, and the state court is without jurisdiction."

I have not attempted to consider in this review a large number of the other Supreme Court decisions, nor to refer at all to those of lower federal courts and of state courts, because of the immense number that have been enunciated. I cannot refrain, however, from citing the one case of Knott v. Evening Post Company (C. C.) 124 Fed. 342, where the question is so clearly and ably discussed by Judge Evans. Sufficient for me to say that my investigation of these cases, so far as I have been able to examine them, has convinced me that:

[4] First. Where suits have been instituted in courts of concurrent jurisdiction involving a controversy between substantially the same parties or their privies, and no actual seizure of the res has by lawful process been made by either, in such case the one in which suit was first brought is entitled to exclusive jurisdiction and should determine the controversy.

[5-7] Second. Where there has been suit brought in either federal or state court for the purpose of enforcing simply a lien or debt against a defendant who is permitted to remain in possession of the property bound by such lien, and subsequently a suit is brought in the other court to assert such a lien or for other relief, and in such suit sufficient grounds are set forth and made apparent that, by reason of insolvency, waste, or other causes, sequestration and seizure of the property should be had, and in consequence is, under order or decree, so taken in possession by said other court, jurisdiction over such property seized passes to and vests in the court of seizure, notwithstanding the prior institution of the suit without sequestration or seizure in and by the first court.

Third. That the importance of seizure of property being made the test of jurisdiction is peculiarly necessary in states like West Virginia, where under its laws real estate cannot be sold under execution, but only after execution has been returned nulla bona as against the debtor's personal property, and only after, in ordinary cases, in an equity suit, the lienors have been convened, the amount and order of priority of their liens ascertained and determined, and where actual possession can only be, pendente lite, obtained by sequestration of rents, issues, and profits by and through a special decree entered in the cause. Even where attachments are sued out against real estate, no actual possession, in practice, is taken in this state. The levy is simply indorsed by the sheriff from the record description of the land, and ordinarily this officer never goes upon the land, nor sees it, nor does he take the slightest notice or care of it after his levy, or of its rents, issues, or profits. Notice of the issuance and pendency of such attachment and of the suit to enforce it is secured by recordation of the notice of lis pendens provided for by statute. That such attachment secures only a lien in our practice is clear from the fact that it requires either an action at law or in equity to be instituted to enforce it.

And again it is to be remembered in this connection that a bill in equity in this state to enforce sale of real estate for creditor's liens can be instituted in any county where the debtor's real estate or any part of it may be situate. Many corporations and individuals hold real estate in several different counties. There are 31 counties in this federal judicial district. Under state law and decisions a suit is held to be instituted when process is sued out at rules; such process need not be returnable for 90 days, and if returned not served, alias summons may then issue, or order of publication be had requiring publication for 4 weeks. The bill or declaration need not be filed until at least a month has passed after the summons has issued, and if not filed then a dismissal at rules may be set aside at the next term, which may be months in the future. In short, the delay, confusion, and uncertainty arising from these conditions under state laws could hardly be estimated, if any other test of jurisdiction should be established, and especially the one of the mere institution of suit without seizure of the res.

[8] Fourth. The general rule is further limited that, where conflict arises, it is only applicable where the parties or privies to the suits are the same, and both seek the same relief or remedy; and then it is confined to such questions or propositions as arise ordinarily and properly in the progress of the suit first brought, and does not extend to all matters which may by possibility become involved in it, as held in Buck v. Colbath, supra.

Fifth. That, in order to maintain its jurisdiction, rightfully assumed by reason of the conditions arising in any of the ways above set forth, it is the right and the duty of a federal court to enjoin and restrain a state court from interfering with its control and disposition of the res in its possession, or from seeking to oust its jurisdiction.

[9] Applying these principles to the case here, it seems to me this court clearly has jurisdiction over this railroad company's property and the disposition of it for these reasons: (a) Because it has unquestioned possession through its receiver of it; and (b) the state court's jurisdiction over it rests alone upon the fact that a suit was first instituted in it for the sole purpose of enforcing a lien, but with no attempt to sequester the property or appoint a receiver to take possession of it; (c) because the parties to the two suits are not the same, the same relief or remedy is not sought by both, and questions involved are different in each. The purpose of the state court suit was solely to enforce collection of a debt; that of this suit to secure the completion and operation of a railroad line for public use and benefit by means of receiver's certificates to be issued by consent of the bondholders, and to enable it to perform a contract made by it with another company.

[10] I am aware that the decision of this particular case might have been based, with the same result, upon an entirely different ground—that of the laches of the plaintiff in the state court suit in prosecuting its cause. There may be laches in this particular, and this case may be considered as a fair illustration of the fact. It is true the institution of its suit as against its creditor stayed the statute of limitation, but to allow it to lie dormant for more than two years after this court, without notice of any kind of its pendency, had taken possession of the uncompleted road, and, through its receiver, had issued near $60,000 of receiver's certificates, which had been sold to innocent purchasers, and with the proceeds had completed and put into operation the uncompleted section of it, and enabled it to perform its contract with the other road, and then to appear and demand that the property shall be taken away and sold for its debt alone, and in its suit alone, which recognizes no right in the holders of the receiver's certificates, no right in the bondholders, nor in the road whose contract is to be broken, does not present, in my judgment, such diligence and fair dealing as equity requires. Its right to appear in this cause and prove its lien, and have provision made for its payment out of the assets of the company is clear; but it cannot demand any other or greater right.

However, because of the importance of this question of conflict of jurisdiction arising now so often in this district, I have made this in-

vestigation of the law, as best I could, in order that we may have restated the rules to guide us when such conflict arises.

The Central District & Printing Telegraph Company will be enjoined and restrained from prosecuting further its suit in the state court.

UNITED STATES v. RINTELEN et al.

(District Court, S. D. New York. June 29, 1916.)

No. 8–295.

1. MONOPOLIES ⟸29—CONSPIRACIES—OFFENSES.

Under Sherman Act July 2, 1890, c. 647, § 1, 26 Stat. 209 (Comp. St. 1913, § 8820), declaring that every conspiracy in restraint of trade or commerce among the several states or with foreign nations is illegal, defendants, who conspired to restrain trade between the United States and foreign nations, are guilty, though no overt acts were committed; such conspiracy being governed by the rules applicable to common-law conspiracy, which made the unlawful conspiring the gist of the offense.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 19; Dec. Dig. ⟸29.

For other definitions, see Words and Phrases, First and Second Series, Conspiracy.]

2. CONSPIRACY ⟸27—OFFENSES—OVERT ACT.

The common-law offense of conspiracy is completed when the unlawful conspiracy is completed, and proof of overt acts is unnecessary.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 38, 39; Dec. Dig. ⟸27.]

3. INDICTMENT AND INFORMATION ⟸1—PURPOSE OF INDICTMENT.

The object of an indictment is, first, to furnish accused with a description of the charge against him which will enable him to make his defense, and to avail himself of his conviction or acquittal for protection against a further prosecution for the same charge, as well as to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 1–3; Dec. Dig. ⟸1.]

4. MONOPOLIES ⟸31—OFFENSE—CONSPIRACY—INDICTMENT—SUFFICIENCY.

An indictment charging that defendants, in violation of Sherman Act, § 1, making illegal every conspiracy in restraint of trade or commerce among the several states or with foreign nations, conspired to interfere with commerce between American manufacturers of war munitions, who were too numerous to be named, and the countries of Great Britain, France, Russia, and Italy, by organizing strikes, fomenting labor troubles, and by other means hindering the production of such munitions, as well as their transportation, is sufficient to charge an offense apprising the conspirators of the charge against them and of the means by which they intended to carry out their conspiracy.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 20; Dec. Dig. ⟸31.]

5. CONSPIRACY ⟸26—OFFENSES—DEFENSES.

A combination to effect an unlawful object through lawful means may constitute a criminal conspiracy.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. § 37; Dec. Dig. ⟸26.]

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6. INDICTMENT AND INFORMATION ⟸163—VALIDITY—BILL OF PARTICULARS.
A bill of particulars cannot aid an indictment which lacks a statement of the essential facts to constitute the offense charged, but is appropriate where there is a good indictment, and defendants desire to be more particularly informed as to matters which will aid them in their defense.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 525; Dec. Dig. ⟸163.]

Franz Rintelen and others were indicted for a conspiracy in violation of the Sherman Act. On motion to quash by defendants Monnett and Taylor. Motion overruled.

John Lord O'Brian, of Buffalo, N. Y., and Isaac R. Oeland, of New York City, Sp. Asst. Attys. Gen., for the United States.

Pugh & Pugh, of Columbus, Ohio, for defendant Monnett.

WOLVERTON, District Judge. The defendants are indicted for a conspiracy in violation of the first section of what is commonly known as the Sherman Act. It is declared by that section that every conspiracy in restraint of trade or commerce among the several states or with foreign nations is illegal. The sufficiency of the indictment is brought to test by a motion to quash on the part of the defendant Frank S. Monnett, in which Jacob C. Taylor joins. At the argument I was inclined to the opinion that the motion to quash was well taken, in view of the Cruikshank Case and others holding to the same doctrine. Upon a careful examination of the authorities, however, I have arrived at the conclusion that the indictment is sufficient. I will proceed to state my reasons therefor.

[1, 2] This is not an indictment under section 37 of the Criminal Code (Act March 4, 1909, c. 321, 35 Stat. 1096 [Comp. St. 1913, § 10201]), and it is not necessary that it set out that one or more of the parties have done any act to effect the object of the conspiracy. Nash v. United States, 229 U. S. 373, 378, 33 Sup. Ct. 780, 57 L. Ed. 1232. The sufficiency of the indictment is to be measured more nearly by the sufficiency of an indictment for the common-law offense of conspiracy. Under the common law the conspiring together is the offense, and on proof thereof a conviction is warranted. 8 Cyc. 624.

"An indictment may be sustained, wherever there is a conspiracy for an unlawful purpose, or to effect a lawful purpose, by unlawful means." State v. Rowley, 12 Conn. 101, 112.

As said in Commonwealth v. Waterman, 122 Mass. 43, 57:

"It is the combination of two or more to do something unlawful, either as a means or as an ultimate end, which constitutes the crime; and many acts not punishable by indictment have been held to come within this definition. It is said to be sufficient if the end proposed, or the means to be employed, are by reason of the power of the combination, particularly dangerous to the public interests, or particularly injurious to some individual, although not criminal."

I call attention to the fact that the statute is especially calculated to protect the public interests, while it may be true that it does protect private interests as well.

[3, 4] The indictment in the present case is drawn with reference to the ultimate end to be effected by the conspiracy, namely, the reconstraint of trade or commerce between this and foreign nations, while it attempts at least to set out the means by which the object was to be attained. By way of inducement, so styled, it is alleged:

That a large number of individuals, copartnerships, and corporations called "manufacturers" were engaged in various states of the United States in the manufacture of munitions of war, military and naval stores, including rifles, cannon, and other weapons of war, also locomotives, cars, automobiles, aeroplanes, and the like, and railroad materials and other articles of many kinds, all of which were of a character adapted for use in war on land or at sea; that said articles were manufactured for the sole purpose of sale and shipment in trade and commerce with Great Britain, France, Russia, and Italy, and other foreign nations; that the manufacturers were engaged in the business of delivering and shipping said articles to persons, corporations, and organized bodies of men, from the state in which they were so manufactured, to and through the port of New York, and other ports of the United States, to foreign countries; that divers persons, corporations, and organized bodies of men other than said manufacturers were also engaged in so delivering, shipping, and transporting such articles from states of the United States to said foreign countries; that said manufacturers, etc., so engaged in foreign trade and commerce, employed large numbers of men, both in the producing and in the manufacturing of said articles, and in selling, shipping, and transporting them, in foreign trade and commerce, and said articles were continuously moved therein; that said articles, when it was necessary, were continuously moved from one state of the United States to other states; "that all of the names and localities of said manufacturers and said other parties so engaged in foreign trade and commerce as aforesaid, and the times, amounts, and routes of such shipments and transportations, are not known to the grand jurors aforesaid, and are so numerous as to preclude their enumeration in this indictment."

It is then further alleged:

"That Franz Rintelen, alias Fred Hansen, alias Miller, alias Muller, alias Edward V. Gasche, alias Edward V. Gates, David Lamar, alias Lanauer, alias David H. Lewis, Frank Buchanan, Jacob C. Taylor, H. Robert Fowler, Frank S. Monnett, Herman Schulteis, and Henry B. Martin, hereinafter called the 'defendants,' and divers other persons whose names are to the grand jurors unknown, each of whom well knew the facts as to said foreign commerce hereinbefore stated and alleged, at and within the said Southern district of New York and within the jurisdiction of this court, unlawfully did knowingly and willfully engage in a conspiracy to restrain the aforesaid foreign trade and commerce, and to restrain, hinder, and prevent the transportation of said articles in said foreign trade and commerce, so far as, and at such times, places, and as to such of said articles, and in such ways as they might thereafter be able so to do, and to restrain, prevent, and hinder the producing or manufacture of said articles for the sole purpose of restraining, preventing, and hindering the shipment and transporting in foreign trade and commerce of such of said articles and in such ways and at such times and places as they might be able so to do; that the purpose and object of said conspiracy was not confined to any particular articles, times, places, ways, and means, but the said defendants conspired and intended, at any time or place, and by any ways or means (some of which were not definitely determined upon by said defendants), to restrain, prevent, and hinder such shipments in foreign trade and commerce; and the particular articles, times, places, ways, and means determined upon by said defendants are not known to the grand jurors aforesaid."

The indictment then sets out the alleged means to be employed to effect the objects of the conspiracy. Now, here are set out the conditions existing with especial fullness, all leading up to the engaging

in foreign trade and commerce, a matter affecting the public in general, and then it is alleged that the purpose of the conspiracy was to restrain, prevent, and hinder such shipments in foreign trade and commerce.

It is laid down in United States v. Cruikshank et al., 92 U. S. 542, 558, 23 L. Ed. 588, that:

"The object of the indictment is, first, to furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent; and these must be set forth in the indictment, with reasonable particularity of time, place, and circumstances."

It is sufficient to say that this general rule has been many times reasserted and reaffirmed by the Supreme Court. The Cruikshank Case was on an indictment based upon the alleged restraint of private rights, not public, and was preferred under a statute which provided for the punishment of such as conspired to "injure, oppress, threaten, or intimidate any citizen, with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States." The counts in the indictment to which the particular objections were directed charged, in substance, that the intent was to hinder and prevent the complaining citizens in the free exercise and enjoyment of "every, each, all, and singular" the rights granted them by the Constitution. "So here," the court said in passing upon the indictment, "the crime is made to consist in the unlawful combination with an intent to prevent the enjoyment of any right granted or secured by the Constitution, etc. All rights are not so granted or secured." The court held, therefore, that the indictment was not sufficiently specific, in that it failed to specify what particular right granted by the Constitution had been overridden by the alleged conspirators.

Not so here. The defendants are informed that many persons, corporations, etc., throughout the United States are engaged in the manufacture of the different articles and supplies mentioned, and with those articles were engaging in foreign trade and commerce, and that to hinder and restrain such trade and commerce was the particular purpose and object of the alleged conspiracy. Is this indictment sufficient?

The chief element in a common-law conspiracy is the meeting of the minds of two or more or several persons to effect or accomplish an unlawful purpose, or a lawful purpose through unlawful means, or, as suggested by Mr. Justice Holmes in United States v. Kissel, 218 U. S. 601, 31 Sup. Ct. 124, 54 L. Ed. 1168, under the Sherman Act, it is in essence nothing more than a partnership in criminal purposes. Or, as said in Nash v. United States, supra:

"The Sherman Act punishes the conspiracies at which it is aimed on the common-law footing—that is to say, it does not make the doing of any act other than the act of conspiring a condition of liability."

It was held in the case of Williamson v. United States, 207 U. S. 425, 28 Sup. Ct. 163, 52 L. Ed. 278, though the indictment was preferred under section 37 of the Criminal Code, wherein it was charged that the conspiracy was entered into for the purpose of committing the offense of subornation of perjury, that it was not essential that in the minds of the conspirators the precise persons to be suborned, or the time and place of such suborning should have been agreed upon, as the criminality of the conspiracy charged consisted in the unlawful agreement to accomplish the unlawful purpose.

So in an earlier case, Dealy v. United States, 152 U. S. 539, 543, 14 Sup. Ct. 680, 682 [38 L. Ed. 545], where the indictment charges a conspiracy to defraud the government of large tracts of public lands, it was held not essential to set out by description the specific tracts of lands which it was sought to appropriate; the court saying:

"But manifestly the description in the indictment does not need to be any more definite and precise than the proof of the crime. In other words, if certain facts make out the crime, it is sufficient to charge those facts, and it is obviously unnecessary to state that which is not essential."

Summarized, it is the law on this subject that:

"Certainty to a common intent sufficient to identify the offense which the defendants conspired to commit is all that is required. When the allegation in the indictment advises the defendants fairly what act is charged as the crime which was agreed to be committed, the chief purpose of pleading is attained. Enough is then set forth to apprise the defendants so that they may make a defense." United States v. Stevens (D. C.) 44 Fed. 132, 141.

See, also, Ching v. United States, 118 Fed. 538, 540, 55 C. C. A. 304; Thomas v. United States, 156 Fed. 897, 907, 84 C. C. A. 477, 17 L. R. A. (N. S.) 720.

The purpose of the indictment in the present case is not to charge the commission of an offense against the United States, as might be done under section 37, but to charge a conspiracy in violation of the first section of the Sherman Act, namely, a conspiracy in restraint of trade and commerce with foreign nations; the very gist of the offense being the conspiracy. When the conspiracy is once entered into, as under the common law, the offense is complete. The conspiracy does not go to the restraint in trade of any particular individual or corporation, or combination of men, but to the restraint of all foreign trade where munitions of war are the subject of commerce. So what more could be essential, when the defendants are informed that many persons, corporations, and combinations of men are engaged in the manufacture of such articles constituting munitions of war, and are also engaged in transporting the same in foreign trade and commerce, the alleged purpose and object of the conspiracy being in restraint of such trade and commerce? Can it be said that the defendants are not informed of the nature and cause of the accusation?

Even in the Cruikshank Case, we must assume that the indictment would have been sufficient if it had specified the particular right that had been infringed. Here there is ample description of the foreign trade and commerce being restrained, namely, that consisting of the transportation of munitions of war, manufactured by divers and

sundry manufacturers in the United States especially for exportation to foreign countries. There are no other particulars pertinent to descend to. It is surely not designed that the name of every manufacturer even known to the grand jury, that the articles produced by such manufacturers, that the railways and ships and all routes of transportation, including the names of all the consignees, shall be set forth in the indictment, or even that any of these things be particularized, for the defendants are informed of the nature of the offense without that. "The true test is," says the court in Cochran and Sayre v. United States, 157 U. S. 286, 290, 15 Sup. Ct. 628, 630 [39 L. Ed. 704], "not whether it [the indictment] might possibly have been made more certain, but whether it contains every element of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet, and, in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction." Without extending the discussion further, I cite the cases of United States v. Patten, 226 U. S. 525, 33 Sup. Ct. 141, 57 L. Ed. 333, 44 L. R. A. (N. S.) 325, and Nash v. United States, supra, in support of the present indictment. The indictments there seem to have been drafted upon the same theory as the one in question, and have been sustained by the Supreme Court.

Now, beyond what has been here said, the indictment specifies the means, or some of them, by which the objects of the conspiracy were intended to be accomplished, namely, by instigating and causing strikes and walkouts among the workmen employed at the plants and factories of the aforesaid manufacturers, so as to prevent and hinder the aforesaid manufacture; by instigating and causing strikes and walkouts among workmen and employés of said persons, partnerships, corporations, and organized bodies of men other than said manufacturers, engaged in foreign trade and commerce as aforesaid, employed in the shipping and transporting of said articles; by inducing by solicitation, persuasion, and exhortation, through the preparation, sending, mailing, and distributing of circulars, pamphlets, etc., the aforesaid workmen to quit the employment of the aforesaid manufacturers, and thereby to restrain, hinder, and prevent, in whole or in part, the operation of said plants; by the same method to cause the aforesaid workmen to leave the employ of the aforesaid persons, partnerships, etc., other than said manufacturers, engaged in said foreign trade and commerce as aforesaid, for the purpose of restraining, hindering, and preventing, in whole or in part, the shipping and transportation of said articles in the aforesaid foreign trade and commerce; by bribing and distributing money among divers officers and persons in charge and control of various labor organizations, to induce them to cause the members of said organizations who might be employed by said manufacturers, or by the said other persons, etc., engaged in foreign trade and commerce as aforesaid, to leave their employment, and to bring about strikes and walkouts among the members of said organizations, and thereby to restrain, prevent, and hinder, in whole or in part, the producing and manufacture, and the expected shipping and trans-

portation in said foreign trade and commerce, of said articles; and by divers other means and methods not specifically determined upon by said defendants, but to be decided upon by them as occasion might arise, all calculated in furtherance of and to effect the object of said conspiracy. With these supporting the paper, my convictions are that it is sufficient.

[5] It is suggested that some of the alleged means employed or to be employed are sanctioned as lawful by the Clayton Act. But this does not help the defendants, as a combination to effect an unlawful object through lawful means may constitute a conspiracy, nevertheless.

[6] I am aware that a bill of particulars cannot aid an indictment which lacks the statement of essential facts to constitute the offense sought to be charged. Such a bill is, however, appropriate where there is a good indictment, and if the defendants desire to be more particularly informed as to matters that will aid them in their defense, it is their privilege to make application to the court for such relief. But, this aside, I think the defendants' rights for defense are adequately subserved by the indictment.

Some criticism is made that the indictment contains certain inconsistencies. I have examined the criticism in this respect, and am not impressed that it is well founded.

The motion to quash will be overruled.

In re STRINGER.

(District Court, E. D. New York. June 9, 1916.)

1. BROKERS ⟸35—RIGHTS OF CUSTOMERS.

Where a broker pledged stock belonging to a customer, who was indebted and had not furnished sufficient margins, such customer cannot complain, where on sale of her stock she was credited with the proceeds, which did not defray her debt.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 27; Dec. Dig. ⟸35.]

2. BROKERS ⟸26—RIGHTS OF CUSTOMERS.

The sister of a stockbroker, to aid in his financial difficulties, delivered to him securities. The broker pledged those securities, together with securities belonging to his customers, and after sale by the pledgee a surplus remained. The pledge of the customers' securities was as to them unauthorized. *Held* that, as the broker's sister could only claim the proceeds of her securities to the extent that, as against general creditors, the broker might have set them aside for her benefit, and as the securities belonging to the customers could be traced into the surplus, their right to such surplus is superior to hers.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 20; Dec. Dig. ⟸26.]

3. BROKERS ⟸26—PLEDGES—DISPOSAL.

Where a broker pledged securities belonging to his customers, and the pledgee disposed of such securities, receiving a surplus, the rights of the customers in such surplus will be measured as if the sales occurred at the same time, though they were made on succeeding days.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 20; Dec. Dig. ⟸26.]

On hearing after reference for the hearing of further evidence. Former opinion affirmed, and further orders made.

For former opinion, see 230 Fed. 177.

James E. Duross, of New York City, for claimant Richardson.
Henry M. Stevenson, of New York City, for claimant Lewis.
Frederick W. Stelle, of New York City, for claimant Graff.
Charles A. Hitchcock, of New York City, for claimant Nixon.
Leon M. Woodworth, of New York City, for claimant Spooner.
A. Gordon Murray, of New York City, for trustee in bankruptcy.

CHATFIELD, District Judge. Since the opinion rendered herein on the 7th day of February, 1916, a further reference has been supplemented by testimony taken in open court, in order to place upon the record the precise standing under which the various securities relating to the Graff, Richardson, Spooner, Nixon, Carpenter, and Lewis claims herein came into the hands of Stringer & Co., and under which they were held when they passed into the hands of Winslow & Co. as collateral security for Stringer & Co.'s loans.

[1] The four claimants, Graff, Spooner, Richardson, and Nixon, have entered into a stipulation by which these four claimants have agreed to waive all contention between themselves that any one has a claim superior to the claim of the others to the surplus of the stock disposed of by Winslow & Co. The net result of the further testimony taken goes to show that Mrs. Carpenter was at all times in debt to Stringer & Co., and that her stock, which came into the hands of Winslow & Co. and was sold, was insufficient, when credited to her account upon Stringer & Co's books, to balance that indebtedness. It is thus apparent that Stringer & Co. had the right to use her stock in lieu of the deposit of more collateral, and that, if Stringer & Co. gave her full credit on her general account for the amount realized from the stock, she would receive all that she could claim from the proceeds of the Winslow sale.

[2] It also appears that, while Mrs. Lewis is able to trace into the hands of Winslow & Co. the certificates of stock, which were delivered by her to her brother in order to help his needs and those of the firm of Stringer & Jewell, of which he was a member at the time the stocks were turned over by her, and which later remained in the hands of Winslow & Co. as collateral for transactions by Stringer & Co. (of which firm her brother became a member after the dissolution of the firm of Stringer & Jewell), and although these stocks were a part of those sold by Winslow & Co. in order to liquidate the indebtedness of Stringer & Co. to them, she has no right to the proceeds of that stock as against her brother's creditors, except in so far as this stock survived its use by her brother, or survived the possibility of application by him to his financial needs in the ordinary course of business.

In so far as the precise shares of stock or collateral have been traced into the hands of Winslow & Co., and back again into the hands of Stringer & Co. or of the trustee, and in so far as these particular shares which had come from Mrs. Lewis were unaffected by any acts which would constitute an estoppel against Mrs. Lewis and in favor

of the general creditors (that is, any acts from which the condition of the creditors had been improved through the right of Stringer & Co., to make use of this stock, but which benefit or improvement would be taken away from the general creditors if the stock were returned to Mrs. Lewis), it has already been held in the previous opinion that Mrs. Lewis would have been entitled to receive back her identical shares of stock from the trustee. But when Mrs. Lewis disposed of the control over her stock by giving it to her brother to use as collateral, and when this stock was so used, and when in the form of such collateral it was commingled with other stocks, or when the proceeds from these stocks were commingled and the total applied to the payment of indebtedness on behalf of Stringer & Co., then Mrs. Lewis loses the right to claim that her stock has (in its entirety) survived the risks of the transactions, or that she is entitled to claim more than a pro rata share of the proceeds of the transactions. She can claim these shares of stock only in the sense in which her brother might set them aside or hold them apart for her as against his general creditors. In this way she has a lien, to whatever extent she may be able to establish it, against the so-called Winslow surplus. But if her lien is defeated by the superior claims of other lienors, then her rights as against general creditors would make no difference.

[3] But when we come to consider the other four claimants, it is impossible and unnecessary to attempt to distinguish between them. Two of them signed a consent that Stringer & Co. might make use of any collateral held as security for the accounts of these customers. One of these creditors is the same creditor (Richardson) who has obtained a judgment in the state court in litigation which the trustee saw fit to conduct, upon a finding by that court that Stringer & Co. were wrongdoers and converted the stock of Richardson, when they used it as collateral with Winslow & Co. The other two claimants appear to have been indebted to Stringer & Co. (aside from the application of the stock in question) at certain times continuing down to the date when Winslow & Co. sold out the collateral, and when the proceeds of this sale were credited on Stringer & Co.'s books, so as to create a credit balance in favor of these customers on Stringer & Co.'s books.

Examination of the four accounts at earlier dates makes it apparent that at different times Stringer & Co. had the right to use the collateral then held in the hands of Winslow & Co. as security for the indebtedness of each of the four claimants. It would seem that a careful analysis of the books might show that at least two of these four claimants had a surplus, and that Stringer & Co. had no need to use their stock as collateral at the time it was deposited with Winslow & Co., but these are the claimants who consented to such use.

The effect of these consents signed by the claimants Richardson and Graff is seriously disputed by them, but all these questions can now be dismissed, for the stipulation entered into between the four makes it unnecessary to apportion the fund other than according to the amount of their claims, as they all are entitled to receive the fund as against the general creditors, in such proportions to the net balance of each creditor (after being credited with the amount of benefit received from

Stringer & Co. from that creditor's stock) as the surplus received from Winslow & Co. is to the total of these claims.

If any of these creditors had been indebted to Stringer & Co. for more than the value of their stock, at the time of the original deposits of their stock with Winslow & Co., or if the circumstances attending their claim had been such that the trustee in bankruptcy could defeat their alleged right to trace the proceeds of their stock and to claim those proceeds at the hands of the trustee, then he should have presented those facts, and the attorney for Mrs. Lewis certainly had the right to contest any of these claims in that sense. Even though by previous decision (as by the present memorandum) she was not given equal rights with the four claimants upon the basis on which their claims were reported by the special commissioner, she nevertheless had the right to attack each claim or to hold the trustee responsible if her own rights were affected by his action. She should have had notice of the various steps and hearings in the proceeding, and if she were able to defeat any of the four claimants, and there should be a surplus after the payment of the remaining claims, then she might be entitled to some interest therein as against the trustee and the general creditors.

It is contended by the attorney for Mrs. Lewis that these four claimants cannot trace their respective stocks as an entirety into the proceeds of the collateral by Winslow & Co., and that no one of these claimants can show that at all times Stringer & Co. were bound to hold it intact, and not to substitute other collateral in its place. These claims seem to be correct. It is also contended by the attorney for Mrs. Lewis that the four claimants have not only failed so to do, but it is also urged by her that these four claimants cannot claim the surplus of the entire fund as created by Winslow & Co. upon the sale of the collateral. She contends that each of the claimants must trace his particular stock as an entirety into the surplus, and also, if any particular stock were wiped out by Winslow & Co. and the proceeds applied to the general Stringer indebtedness, to the extent of paying it in full, that the remaining stock, which had escaped such application, would be free from the claims of those whose stock had been previously used.

These contentions were sufficiently disposed of in the previous memorandum, and the court sees no reason to change its opinion from that then expressed. The claimants will be held to have equal rights, in looking upon the surplus from the Winslow & Co. transaction as the proceeds of one sale of all the Stringer collateral, even though some of the items were disposed of upon succeeding days. The court will also hold that none of the four claimants (Graff, Nixon, Spooner, and Richardson) have been shown to have so lost the right to share in the surplus of their stock after application by Winslow & Co. that they cannot obtain the benefit of Mrs. Lewis' stock when used to make that collateral sufficient.

The proceeds in the hands of the trustee from the Winslow & Co. transaction will therefore be divided pro rata between the claimants Graff, Spooner, Nixon, and Richardson. Mrs. Lewis will be held to have only a general claim of debt from the sale of her stock against such funds as may be liable therefor.

SPENCER v. BABYLON R. CO.

(District Court, E. D. New York. May 18, 1916.)

1. RECEIVERS ⟸153—WAIVER OF OBJECTIONS—POWER OF COURT TO DETERMINE VALIDITY—RAILROADS.

Although a railroad company, by failing to take the steps prescribed by statute, has lost the right to question the validity of tax levies against its property, where its affairs are being administered by a federal court of equity through a receiver, that court has power to determine the validity of the claim for taxes, and if it appears that they were so erroneous in the methods of assessment, imposition, or computation as to be fraudulent to direct that only the proper amount shall be paid from the estate.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 276, 277; Dec. Dig. ⟸153.]

2. RECEIVERS ⟸153—RAILROADS—INSOLVENCY AND RECEIVERS.

Taxes levied upon the property and franchise of a railroad company whose estate was being administered in equity *held* so excessive, as compared with those levied on similar property of other companies, that their allowance in full would operate as a fraud on other creditors, and to require the court to reduce the same to a just amount.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 276, 277; Dec. Dig. ⟸153.]

In Equity. Suit by William B. Spencer against the Babylon Railroad Company. In the matter of claims for taxes. Claims allowed in part.

Percy L. Housel, of Riverhead, N. Y., for treasurer of Suffolk County.

Samuel P. Hildreth, of Amityville, N. Y., for Village of Amityville.

Haff & Farrington, of Jamaica, for Village of Babylon.

Arthur Carter Hume and Robert D. Ireland, both of New York City, for Babylon R. Co.

CHATFIELD, District Judge. The Babylon Railroad Company was organized in the year 1908 and has never paid dividends. In fact, its operations show a deficit each year. The present owners and officers assert that this deficit accords with an actual shortage in its net earnings, but admit that the problematical sale value of the property (including the intangible asset of franchise rights and current improvements) makes it impossible to decide whether this shortage represents an actual depreciation in total value.

Conditions were such that in the year 1911, this court appointed a receiver in a suit in equity, who was in possession of the property till December 12, 1913. On that day an order was made allowing the Babylon Railroad Company to pay its general creditors, to wind up the proceedings of the receivership, and upon consent of all the parties to turn the property back to the company itself, subject to any further order which might be found necessary in the action, and subject to the right to take the property again into the possession of a receiver, if the company did not fulfill the terms of its proposed set-

tlement and pay the debts for which the property would otherwise have to be sold.

The questions have been disposed of as to all these claims with the exception of those relating to taxes. It appears that taxes have been assessed by the village authorities of the villages of Babylon and Amityville and by the town and county authorities of Suffolk county. The company have paid none of these taxes since its beginning, except in the case of the village of Babylon, when, under application to this court at the time of a threatened sale for the payment of taxes, the company volunteered to pay the tax bills for 1909 and 1910, as a condition for a further adjournment of the application to allow the road to be sold for the payment of taxes due.

[1] The objection has all along been urged by the villages and by the county of Suffolk that the federal court had no jurisdiction to consider the granting of any relief against either the amount of the assessment or the claims for taxes, inasmuch as the company never resorted to its legal remedies by certiorari or otherwise, and never while the receiver was in possession, appeared before the grievance committee of the assessors to protest against the amount of the assessment.

It is admittedly impossible for the company, in the courts of the state, to now protest against the validity or amount of these taxes, or to seek to have the same reduced. But inasmuch as this court is proceeding to pay, in the equity action, the obligations due from the defendant, and (either by the sale of receivers' certificates or from the railroad's funds) to see that these priority claims are taken care of before the court loses its jurisdiction over the defendant, it appears that the amounts due to the state and to the villages as taxes can be considered by the court, and if not founded upon assessments in accord with the facts, or if so erroneous as to be fraudulent in the method of imposition or in computation, this court has the authority to direct that no more than the proper amount shall be paid.

[2] The defendant excuses itself for its failure to make any payment on account of these taxes by presenting letters from the various collectors and tax officials showing that in some instances the officers cannot ascertain in what way the tax was computed. Under these circumstances, the railroad, when it has attempted to secure bills showing the assessments and the amount of taxes due, has found disagreement or inconsistencies between one set of figures and the other.

The defendants seek to excuse their laches, while, on the other hand, the county and villages of Babylon and Amityville all contend that the defendants have used these matters merely as an excuse to cover up their absolute failure to seek legal remedies under the state law, or to protect themselves from the imposition of penalties and the collection of interest. The defendants argue that, so long as they could not find the exact amount upon which interest could be figured, they are justified in not paying either a part of the principal or any interest and penalty.

In so far as this raises the same question as is raised by the query as to what is the proper tax, the defendants would seem to be jus-

tified. But in so far as the defendants, when in the hands of the receiver, and since as well as before that time, have had the benefit of the amount which actually should have been paid as taxes, and when they have not attempted to attack the amount of these taxes until they were brought up in the present proceeding, the defendant company cannot object legally nor equitably to payment, upon such amount as may be actually found due as taxes, of the rate of interest provided by law for a mere failure to pay a tax. Any additional penalties or expenses should not be exacted and cannot be held valid.

The county of Suffolk has assessed the real property owned by the defendant upon the basis of $7,022 per mile of single track. Comparison with the rail and tracks of the Huntington Railroad, which intersects the property of the Babylon Railroad, and with the Suffolk Traction Company, which runs through a considerable portion of Suffolk county somewhat east of the properties of the Babylon Company and of the Long Island Railroad Company, indicates that either the valuation upon the land of those companies has been placed too low, or that excessive valuation was placed upon that of the Babylon Railroad Company, and that the taxes are therefore unjust.

The defendant has offered testimony as to the property of the Long Island Railroad Company, close by the route of the Babylon Railroad Company. It has pointed out that the Babylon tracks are made of lighter rails, with smaller ties, designed for a different purpose than that of the Long Island Railroad Company; that it has not so many fills, and no concrete bridges or other structures, such as occur in the line of each one of the other companies; and that, both from the standpoint of the original cost as well as the estimated cost of replacement, the defendant company is worth much less than any one of the other three per mile. These values enter also into the question of the amount fixed for the assessment of a special franchise, but that question will be discussed separately.

In the case of the assessment against the Long Island Railroad Company, it is shown that the property of the Long Island Railroad Company averages about eight acres per mile, while that of the Babylon Railroad Company averages less than one-third as much. But the real estate assessment of the Long Island Railroad Company is at the average rate of $13,000 per mile for double track, switches, and all other property.

The assessment of the Long Island Railroad Company is justified upon the theory that the road has been there since the middle of the nineteenth century, that its existence is the principal source of increase in value of the lands and properties of the towns through which it passes, and that the amount of real estate which the Long Island Railroad Company owns is not in direct proportion to the value of that property as land. All these bear upon the question as to whether the Long Island Railroad Company tax is too small. But in considering that the benefit to the community increases the value of the property (including its own) in the community equally, and that a railroad company is not supposed to receive a bonus upon its real estate (for the value which it imparts to the locality) by a reduction

of the amount which it as a landowner shares in the expenses of the community, it is difficult to reconcile the theories of the assessors.

The property of the railroad as property is worth what the land would bring if available for sale under the same circumstances as those under which the property is used for a particular purpose. If a factory brings business to a community, and should move to another factory site, the real estate tax upon the new site would certainly not be reduced upon the theory that the land was worth less, because the factory was instrumental in greatly increasing the total values of the neighborhood.

But we can only consider the amount by which this company appears to be made to pay more than its share of the burdens of the community; that is, in which the land is taxed at a greater amount than the average values for the neighborhood. The defendants have offered certain figures showing that the general rate of taxation for land is so much per acre, and viewing the increase of value for railroad construction, as estimated by the taxes against the Long Island Railroad Company, the Huntington Company, and the Suffolk Traction Company (which certainly is at least as expensive as that of the Babylon Railroad Company), it would appear that the real estate tax is so inequitable that no flat rate can be fixed by way of comparison.

It cannot be held that the Babylon Railroad Company should on this account be excused from a charge for taxes. It should pay the tax rate as a claim in this proceeding in favor of the county, for its proper share of the real estate taxes levied approximately upon that sum per mile of track, which bears the proportion to $13,000 which $2\,^{3}/_{16}$ bears to 8. This is based upon the figures showing that the Long Island Railroad Company is taxed at the rate of $13,000 per mile and occupies 8 acres to the mile, while the Babylon Railroad Company occupies $2\,^{3}/_{16}$ acres and hence is paying more than its share when assessed at $7,022 per mile. The total will be divided to each district in proportion to the assessors' division each year among those districts.

It is also contended that the real estate tax for the year 1912, as assessed by school districts, is void, in that it is not based upon an apportionment of valuations. But the various parcels making up the apportioned valuation were set forth and taxed, and the result is correct, as the total was set forth in each school district, instead of an apportionment of the entire valuation for each district after the total of the roll had been completed. Before the law was amended in 1912, the apportionment was to be made after the completion of the roll, and the way this tax was assessed in that year actually complied with the law in effect, even though the statute was not specifically followed in making up the tax. This objection is therefore overruled.

In the village of Babylon, the taxes for 1909 and 1910, as has been said, were paid in order to obtain further adjournments. It now appears that the amount due for these taxes was apparently a mistake of fact in copying the tax bills from the rolls. As these payments were made in accordance with the direction of the court, and in order to obtain a further adjournment, it would certainly be inequitable to

hold that the company could not point out the mistake in the total amount due, and have that payment credited upon all of the taxes for which they are liable.

The taxes in the village of Amityville seem to be open only to objection in the way the real estate tax was assessed and will be treated accordingly.

This leaves only the question of the franchise tax, and again comparison is made with the franchise tax paid by the Suffolk Traction Company, in order to show that a more valuable property was not assessed for as much as that of the Babylon Railroad Company. Here it is impossible to draw any conclusion from the rate of assessment of the Suffolk Traction Company, except in so far as it generally shows that the valuation was not based upon net earnings. The road, which had no net earnings, in the ordinary sense, was assessed higher than that which was paying dividends. In the case of People ex rel. Railroad Co. v. Tax Commissioners, 203 N. Y. 119, 96 N. E. 435, and People ex rel. Jamaica Water Supply Co. v. State Board of Tax Com'rs, 196 N. Y. 39, 89 N. E. 581, it was held that the rule of estimating franchise value by net earnings, or of concluding that no franchise value existed, if no net earnings at all could be shown, was not in all cases satisfactory, but in most instances defined the best test. But in cases where, even in the absence of net earnings, the franchise would have a large sale value, there could be no question that the net earnings rule would not be satisfactory.

In the present case the property has been sold for much less than its replacement value, and the value of the franchise in the sense of an abstract right is extremely problematical. The various town authorities have in some instances failed to make their total valuation as small as the state equalization, but it is evident that the amount fixed by the state board of equalization for the franchise tax was too large. Each of these assessments, including the equalization by the state, was based upon the guess of the assessors, without knowledge of the lack of earnings, and without any actual basis for determining what price might be obtained for the property. It would seem that the tax should have been limited to the cost of replacement, unless some intimation of the possibility of securing a market price for the mere right to operate the road could be shown. On the basis indicated, a fair valuation of the franchise for each year up to the year 1915 would seem to be in the neighborhood of $23,000. The claim of the assessors to a tax based upon this amount should therefore be allowed.

One other item is that of the car barn in the village of Huntington, which is shown to be of smaller value than other structures which are assessed for less. This assessment, if placed at $250, would seem to be in accord with the other valuations, and, as before, the claim for tax based upon this valuation will be allowed and ordered paid.

Claims for taxes over the amount indicated will be rejected, as either erroneous or based upon valuations which would involve unequal payments to the other creditors.

UNITED STATES v. BUSH.

(District Court, W. D. Washington, N. D. February 29, 1916.)

No. 68.

PUBLIC LANDS ⟸106(3)—SUIT TO ENJOIN TRESPASSES—DEFENSES.

To a bill seeking to enjoin trespasses on lands in a national forest reserve, an answer setting up that, before the land was set aside as a forest reserve, defendant made an actual and bona fide homestead entry on the land, but that the General Land Office and the Secretary of the Interior arbitrarily and illegally and upon false testimony rejected the application, on the ground that the land had been set aside as a forest reserve, is no defense, for the officers of the land department discharge quasi judicial functions, whose holdings on questions of fact with relation to the public land cannot be reviewed by the courts, though their determinations as to questions of law may be, and this being particularly true where the defendant, who asserted his homestead entry, made no application for any rehearing in the land department.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 104, 301; Dec. Dig. ⟸106(3).]

In Equity. Bill by the United States against Clarence N. Bush. On motion to strike affirmative defense. Motion granted.

Clay Allen, U. S. Atty., and Winter S. Martin, Asst. U. S. Atty., both of Seattle, Wash.

P. V. Davis and E. M. Comyns, both of Seattle, Wash., for defendant.

NETERER, District Judge. The United States has filed a bill in equity in which it alleges, in substance, that on the 18th of December, 1902, certain land in the bill described was withdrawn from entry by executive order, and on March 2, 1907, included in the boundaries of the Washington Forest Reserve, and subsequently changed to Snoqualmie National Forest; that the United States is the owner of the land, and the defendant, Clarence N. Bush, a citizen of the United States and resident of this district, without any authority or permission from the government, during the summer of 1904, wrongfully and unlawfully went upon the land and committed certain acts of trespass thereon from time to time, by cutting trees, and commenced preparation for making a homestead, and during the year 1915 committed similar acts of trespass; that the defendant threatens to continue such trespasses and occupation, which acts are wholly unauthorized by law, and that his continual presence within the confines of the National Forest Reserve is subversive of the rules and regulations of the Forest Service, and tends to invite the commission of other trespasses, all in violation of the rules and regulations; and that the government is without a speedy and adequate remedy at law, and asks that the defendant be enjoined from the commission of such wrongful acts in order to avoid multiplicity of suits.

The defendant answers, in which he sets up, in substance, that on the 21st of November, 1900, he made actual and bona fide settlement on the land; that at the time the land was unsurveyed; that the im-

provements and settlement were made in contemplation of official surveying of the land and filing of plat thereof; that the official plat was filed on the 14th of December, 1912, and on the same day he filed his application to enter the land under the government land laws, to carry out his original intention of location and settlement, which application was rejected by the local officials, and upon appeal was rejected by the Commissioner of the General Land Office, on April 22, 1913, for the alleged reason that the said land had been withdrawn from entry on November 18, 1902, and had been included in the Washington Forest Reserve by departmental order, March 2, 1907; that the honorable Secretary of the Interior confirmed the decision of the honorable Commissioner of the General Land Office, "all of which actions by said officials of said local land office, the Commissioner of the General Land Office, and the Secretary of Interior were arbitrary, unwarranted, unsupported by the evidence, contrary to law, illegal, and void, and were based upon false, fraudulent, and perjured testimony and evidence and a misconstruction of the law by the said respective officials"; that on the 18th of November, 1902, the land was illegally attempted to be withdrawn from entry, and thereafter was illegally attempted to be included in the Washington Reserve by certain illegal, executive, and departmental orders, "and that the Department of the Interior illegally attempted to adjudicate the rights of the defendant herein and to try the issues between the Agriculture Department and this defendant while the land was unsurveyed, and that said Department of Interior never acquired any jurisdiction to try any issues between the United States or any of its departments and this defendant until after the plat was filed and said land was identified by an official survey thereof; that all of the decisions of the officials of the local land office and the Secretary of the Interior were without jurisdiction, contrary to law, and unsupported by the evidence, and based and founded upon false, fraudulent, and perjured testimony of the special agents in the employ of the Department of the Interior of the United States and other witnesses, and said decisions were based and founded upon a misconstruction of the law by each and every one of said such officials of the United States, and all of said decisions were contrary to law, without jurisdiction, arbitrary, unwarranted, unsupported by the evidence, and in absolute disregard and contravention of this defendant's rights, who settled and commenced residence thereon, and made valuable improvements thereon, for the purpose of acquiring the same under the homestead laws of the United States, long prior to the time of said attempted and illegal withdrawal thereof from settlement and said illegal attempt to include the same within a forest reserve, which said settlement and residence and improvements have been continuous and bona fide up to the present time, and that said defendant has during all said time maintained his home and resides thereon, to the exclusion of all others."

The government has moved to strike all of the affirmative matter in the answer. I think the motion must be sustained. I think this case falls within the holding of the Supreme Court in United States

ex rel. Riverside Oil Co. v. Hitchcock, 190 U. S. 316, 23 Sup. Ct. 698, 47 L. Ed. 1074, and United States ex rel. Ness v. Fisher, 223 U. S. 683, 32 Sup. Ct. 356, 56 L. Ed. 610, and of this court in Reed v. St. Paul, M. & M. Ry. Co. et al., 234 Fed. 207, filed December 3, 1915, and cases cited. The defendant relies upon Stimson Land Co. v. Hollister (C. C.) 75 Fed. 941, United States v. Minor, 114 U. S. 233, 5 Sup. Ct. 836, 29 L. Ed. 110, Quinby v. Conlan, 104 U. S. 420, 26 L. Ed. 800, and Sullivan v. Damon, 202 Fed. 285. These cases do not throw any light upon the issue here. Mr. Justice Miller, for the court, in United States v. Minor, supra, said:

"It has been often said by this court that the land officers are a special tribunal of a quasi judicial character, and their decision on the facts before them is conclusive. And we are not now controverting the principle that where a contest between individuals, for the right to a patent for public lands, has been brought before these officers, and both parties have been represented and had a fair hearing, that those parties are concluded as to all the facts thus in issue by the decision of the officers."

And Justice Field, in Quinby v. Conlan, supra, at pages 425, 426, of 104 U. S., 26 L. Ed. 800, said:

"But independently of this conclusion there is a general answer to the alleged erroneous rulings of the officers of the Land Department as grounds for the interference of the court. Those rulings were upon mere matters of fact, or upon mixed questions of law and fact, which were properly cognizable and determinable by the officers of that department. The laws of the United States prescribe with particularity the manner in which portions of the public domain may be acquired by settlers. They require personal settlement upon the lands desired and their inhabitation and improvement, and a declaration of the settler's acts and purposes to be made in the proper office of the district, within a limited time after the public surveys have been extended over the lands. By them a land department has been created to supervise all the various steps required for the acquisition of the title of the government. Its officers are required to receive, consider, and pass upon the proofs furnished as to the alleged settlements upon the lands, and their improvement, when pre-emption rights are claimed, and, in case of conflicting claims to the same tract, to hear the contesting parties. The proofs offered in compliance with the law are to be presented, in the first instance, to the officers of the district where the land is situated, and from their decision, an appeal lies to the Commissioner of the General Land Office, and from him to the Secretary of the Interior. For mere errors of judgment as to the weight of evidence on these subjects, by any of the subordinate officers, the only remedy is by an appeal to his superior of the department. The courts cannot exercise any direct appellate jurisdiction over the rulings of those officers or their superior in the department in such matters, nor can they reverse or correct them in a collateral proceeding between private parties. * * * It is only when those officers have misconstrued the law applicable to the case, as established before the department, and thus have denied to parties rights which, upon a correct construction, would have been conceded to them, or where misrepresentations and fraud have been practiced, necessarily affecting their judgment, that the courts can, in a proper proceeding, interfere and refuse to give effect to their action. On this subject we have repeatedly and with emphasis expressed our opinion, and the matter should be deemed settled. Johnson v. Towsley, 13 Wall. 72 [20 L. Ed. 485]; Shepley v. Cowan, 91 U. S. 330–340 [23 L. Ed. 424]; Moore v. Robbins, 96 U. S. 530 [24 L. Ed. 848]."

In Sullivan v. Damon, supra, the court held that the decision of a contest for public land by the Land Department is conclusive upon the courts, in the absence of any claim of mistake in the department's

findings of fact, or that such findings were induced by fraud, which is not the case here. In Stimson Land Co. v. Hollister, supra, the title had passed from the government and had been transferred by mesne conveyances, and the court simply held that in such case, where the testimony was extorted from the witnesses by threats of criminal prosecution and promises of immunity in consideration of testimony satisfactory to the agent of the department, that a court of equity would entertain jurisdiction. But in this case the title has never passed from the government, and exclusive jurisdiction of the disposition of the public lands is given to the department and not to the courts, and until courts are given jurisdiction by Congress they cannot assume it. If the defendant was deprived of rights inaugurated prior to the withdrawal of the land from entry, then the forum in which to secure redress is before the land department, and it does not appear that application was made at any time to the department for a rehearing based upon the allegations set out in the answer.

The motion to strike is granted.

In re BRINCAT.

(District Court, S. D. Alabama. April 10, 1916.)

No. 1564.

1. BANKRUPTCY ⊂=408(3)—DISCHARGE—RIGHT TO.

To entitle a bankrupt to a discharge under Bankr. Act July 1, 1898, c. 541, § 14, 30 Stat. 550 (Comp. St. 1913, § 9598), denying a discharge where he has transferred, removed, destroyed, or concealed any of his property with intent to delay, hinder, or defraud his creditors, he must have acted in entire good faith and have surrendered all his property.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 735, 736; Dec. Dig. ⊂=408(3).]

2. BANKRUPTCY ⊂=408(3)—DISCHARGE—"CONCEALMENT."

For a bankrupt to be denied a discharge on the ground of concealment of his property, the concealment must have been knowingly and fraudulently done, and a mere omission to include property in the schedule, where innocent, does not operate as a concealment; but where a bankrupt omitted from his schedule considerable sums of money, which he had received very shortly before the bankruptcy and had either on his person or in his possession, such omission constituted a "concealment," and warranted the denial of a discharge under Bankr. Act, § 14b.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 735, 736; Dec. Dig. ⊂=408(3).

For other definitions, see Words and Phrases, First and Second Series, Concealment.]

3. BANKRUPTCY ⊂=414(1)—DISCHARGE—PRESUMPTIONS.

The failure of a bankrupt to account for property in his possession shortly before adjudication and not included in the schedule raises a presumption of concealment.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 720; Dec. Dig. ⊂=414(1).]

4. BANKRUPTCY ⟨⟩467—DISCHARGE—QUESTION FOR COURT.
The sufficiency of a bankrupt's explanation for the omission of property or funds from his schedule is a question for the bankruptcy court to which an application for a discharge is made.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 929; Dec. Dig. ⟨⟩467.]

5. BANKRUPTCY ⟨⟩408(3) — PROCEEDINGS — DISCHARGE — CONCEALMENT — EXPLANATION.
Where a bankrupt's explanation of his failure to include in his schedule considerable sums of money received shortly before adjudication was evasive, and applied only to the failure to account for some of the funds, the explanation is insufficient, and the bankrupt will be denied a discharge on the ground of concealment of assets; it appearing that for some time after adjudication he used the money in defraying his expenses, and only included the sums in his schedules when he discovered that the creditors had learned of his possession of such funds.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 735, 736; Dec. Dig. ⟨⟩408(3).]

6. BANKRUPTCY ⟨⟩32—PROCEEDINGS—SCHEDULES—AMENDMENT.
Under General Orders in Bankruptcy, title "Amendments" (89 Fed. vii, 32 C. C. A. vii), a voluntary petitioner in bankruptcy, in applying for leave to amend his schedules, must state the cause of the error in those originally filed.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 31–33; Dec. Dig. ⟨⟩32.]

7. BANKRUPTCY ⟨⟩408(3)—PROCEEDINGS—EXEMPTIONS.
Whether a specific item of property should go to creditors or be reserved by the bankrupt as an exemption is not for the bankrupt to determine, and a bankrupt cannot retain a sum of money as an exemption, regardless of the consent of the bankruptcy court.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 735, 736; Dec. Dig. ⟨⟩408(3).]

8. BANKRUPTCY ⟨⟩ 400(1)—PROCEEDINGS—EXEMPTION.
The schedule of the bankrupt must contain his claim of exemptions, and the trustee is required to set them apart and report to the court.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 671, 673; Dec. Dig. ⟨⟩400(1).]

9. BANKRUPTCY ⟨⟩414(3)—DISCHARGE—CONCEALMENT OF ASSETS.
A willful and fraudulent concealment of assets by a bankrupt need only be shown by a clear preponderance of the credible evidence.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 722; Dec. Dig. ⟨⟩414(3).]

10. FRAUD ⟨⟩50, 58(1)—PRESUMPTIONS—CIRCUMSTANTIAL EVIDENCE.
While fraud may not be presumed, it may be established by circumstantial evidence.
[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 46, 47, 55; Dec. Dig. ⟨⟩50, 58(1).]

11. BANKRUPTCY ⟨⟩408(3)—CONCEALMENT OF ASSETS—WHAT CONSTITUTES.
Concealment of assets of a bankrupt before the appointment of the trustee, continuing after such appointment, is a concealment in violation of the Bankruptcy Act, and precludes discharge under Bankr. Act, § 14b.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 735, 736; Dec. Dig. ⟨⟩408(3).]

12. BANKRUPTCY ⟨⟩413(4)—DISCHARGE—SPECIFICATIONS.
Specifications of objection to discharge must exhibit, and the evidence in support of them must establish, one of the objections to discharge specified in Bankruptcy Act.
[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. ⟨⟩413(4).]

In Bankruptcy. In the matter of the bankruptcy of John C. Brincat. On application for discharge. Application denied.

Francis J. Inge, of Mobile, Ala., for bankrupt.

Gregory L. Smith & Son, of Mobile, Ala., for objecting creditors.

TOULMIN, District Judge. On an application for a discharge and such proofs and pleas as may be made in opposition thereto by the trustee or other parties in interest the judge shall hear and investigate the merits of the application, and discharge the applicant, unless he has (among other grounds specified in the Bankrupt Law, not necessary to set out here under the objections and pleas in this case), at any time subsequent to the first day of the four months immediately preceding the filing of the petition, transferred, removed, destroyed, or concealed any of his property with intent to hinder, delay, or defraud his creditors. Section 14, Bankr. Act.

The special master reports that in his opinion the evidence wholly fails to sustain any of the specifications of objection to the granting of the petition for discharge by the bankrupt, except the first and eighth grounds. The two grounds mentioned are based on the fact that on April 19, 1915, there was paid to the bankrupt the sum of $347.50 by an insurance company on a loss by fire of certain property, consisting of a stock of goods and office furniture of said bankrupt, who on the 8th day of May, 1915, filed a voluntary petition in bankruptcy, and was on the same day adjudicated bankrupt. One of such specifications charged that the bankrupt fraudulently and knowingly concealed this money from his trustee, and the other that the bankrupt swore falsely to his original schedules, in that this same sum of money was omitted from his schedules.

[1-4] I agree with the special master in his finding and report that the specification of objection to the granting of the bankrupt's petition for discharge on the first and eighth grounds are sustained by the evidence. But I do not concur in his opinion that the evidence wholly fails to sustain any of the other specifications of objection to the discharge. I find several other specifications of objection assigned, and evidence to sustain them—evidence of the bankrupt himself. They are that the bankrupt sold to his brother, George Brincat, several pieces of office furniture and other furnishings of his store, named in said specifications, and not mentioned in his schedules, and for which, or at least some of which, said George Brincat bought from said bankrupt for $25. This item of $25 is not shown in the schedules as a cash asset, and said George Brincat is not named in the schedules as a debtor to the bankrupt estate, and the articles named as bought by George Brincat not scheduled. Some of the articles so sold to George Brincat, as testified to by the bankrupt, were a standing desk, hanging scales, chicken coops, and a typewriter desk.

While I agree with the special master in that the specifications of objection to the discharge of the bankrupt on the first and eighth grounds stated are sustained by the evidence, I do not concur in his inferences from said evidence, nor in his recommendations thereon. As stated by him, there is a good deal of conflict and some contradic-

tion in the evidence, and many suspicious circumstances developed in the evidence of the bankrupt. To entitle the bankrupt to the privilege of a discharge there must be entire good faith on his part; he must surrender his property fully; he may not retain or conceal any part thereof which should go to his creditors. Collier on Bankruptcy, p. 336; In re Breitling, 133 Fed. 146, 66 C. C. A. 212 (7th Circuit Court of Appeals); Barton Bros. v. Texas Produce Co. (Circuit Court of Appeals 8th Circuit) 136 Fed. 355, 69 C. C. A. 181.

To constitute a concealment of property it must be by the bankrupt, or by his procurement, after the filing of his petition, and from his trustee, or before such filing, and continued after such filing, and the appointment of the trustee, and such concealment must be knowingly and fraudulently done. If there is an entire absence of fraudulent intent, there is no offense. If there is an omission to include property in his schedule, and such omission is not satisfactorily explained, it will usually amount to a concealment. Seigel v. Cartel et al. (8th Circuit Court of Appeals) 164 Fed. 691, 90 C. C. A. 512. Presumption of concealment arises from failure to account for property in possession of the bankrupt shortly before adjudication, and not included in his schedules. The reasonableness of his story for its omission from his schedules, or the sufficiency of the explanation is in the judicial discretion of the judge. Seigel v. Cartel et al., supra. In the case just cited the court held that:

"Where a bankrupt fails to schedule or to surrender to his trustee goods shown to have been in his possession a short time prior to his bankruptcy, the burden rests upon him to account for the same, and if he fails to do so, the presumption is that he sold them and conceals the proceeds."

It is shown by the evidence that the bankrupt received on April 17, 1915, from an insurance company, as a fire loss on property (stock) contained in his store, $175; that on April 19, 1915, he received from the same company $347.50 on the same loss; and on April 20, 1915, he received from Norville Bros., agents, on a loss by same fire of office fixtures, $175, making a total of $697.50 in the course of four days. The bankrupt testified that he sold to his brother, George Brincat, a lot of office furniture and store fixtures for $25. The two sums of $175 each he testified he deposited in the bank. The name of the bank is not shown. It does not appear that the $347.50 or said $25 was deposited in bank. When asked what became of the $347.50, he stated that he spent some of it, paid his attorney $30 for bankruptcy proceedings, and gave Mr. Muscat $50 on April 27, 1915. It does not definitely appear when he paid his attorney, but his statements in reference to these payments would indicate that they were made about the same time. This was about 10 or 12 days prior to the petition in bankruptcy and the adjudication of the bankrupt. The bankrupt in this case not having scheduled or surrendered either the property or the money to the trustee, the concealment of the same, within the provisions of the statute, is presumed. In re Meyers, 96 Fed. 408; In re Finkelstein, 101 Fed. 418; In re Morgan, 101 Fed. 982.

[5] His explanation as to what disposition he made of the money he received from the insurance companies (the two $175 items he de-

posited in the bank) was that "it was used in paying some of the creditors." He did not introduce any evidence corroborative of the alleged payment of creditors. He failed to give the name of any creditor to whom he paid any of said money, or to whom he gave it, except to his attorney he paid $30, and to a person named Muscat he gave $50, both of which sums were, he testified, paid out of the $347.50 which he did not deposit in the bank. He gave no particular dates or particular sums paid, or given away, except the two mentioned—one to his attorney for bankruptcy proceedings, and the other to the said Muscat, whom he did not claim was either a creditor or borrower.

The bankrupt failed to include in his original schedules any of the money testified to by him as having been received by him and in his possession a short time before the filing of his petition in bankruptcy and his adjudication. His statement as to his having overlooked including in his schedules the amount of $347.50 for which he had received a check on the People's Bank, cashed by the bank, and by him kept either in his pocket or in the drawer of his dresser, as an explanation for his omission to schedule this money is incredible and unsatisfactory. He did not at any time deposit it in bank, and it appears that he was spending it for his own uses and purposes, concealed from his trustee, for more than 20 days after filing his petition and original schedules and his adjudication in bankruptcy.

Of the $350 deposited in bank, as stated by him, he schedules but $93 as on deposit in three banks. It is evident from facts and circumstances shown by the testimony that after the first meeting of the creditors and the appointment of the trustee the bankrupt knew that they had learned of his receipt of the insurance money mentioned. The fact that his brother saw Trustee Caffey and asked him what they were going to do about the insurance money, and the fact that bankrupt Brincat was asked on his examination as a witness in this case whether he sent his brother to Mr. Caffey to make this inquiry, failed to answer the question, but made this evasive reply, that "my brother went to buy some stuff," indicates that the bankrupt had a connection with or knowledge of this interview with Mr. Caffey.

A short time subsequent to said interview, the bankrupt filed an amended schedule A and B on May 31, 1915, containing a statement of his personal property by adding the following, "Cash on hand, $180," and claiming as exempt from the operation of the law relating to the same the said $180.

[6] In the application for leave to amend the schedule, the petitioner shall state the cause of the error in the paper originally filed. General Order 11, title "Amendments" (89 Fed. vii, 32 C. C. A. vii), which is made a part of the Bankruptcy Act. The original schedule filed May 8, 1915, does not contain the cash on hand scheduled in the amended schedule, which amended schedule does not state the cause of the error in that originally filed. It is not, therefore, in form and substance as required by the Bankruptcy Law.

[7] The bankrupt in his original schedule omits therefrom the $180 cash on hand, scheduled in his amended schedule, but asserts a claim to said $180 as exempted to him under the law of Alabama. He has

asserted a claim in his original schedule to an exemption, and has set out the articles claimed as so exempt. Moreover, he declined to pay over to his trustee the $180 scheduled, and it does not appear that he ever had the exemption set apart to him in accordance with the law of Alabama, but it seems that he himself has appropriated and retained the $180 as exempt. Whether a specific item of property should go to creditors or be reserved by the bankrupt, it is not for him to constitute himself the judge; but it is his duty to disclose the transaction, that the bankrupt court may determine the right. In re Gailey, 127 Fed. 538, 62 C. C. A. 336; In re Breitling, 133 Fed. 146, 66 C. C. A. 212.

[8] The schedules of the bankrupt must contain his claim of exemptions, and the trustee is required to set apart the bankrupt's exemptions and to report to the court as to the exemptions so set apart.

[9] A willful and fraudulent concealment of assets by a bankrupt need only be shown by a clear preponderance of credible evidence. It is not necessary to establish the concealment of assets beyond a reasonable doubt. In re Gaylord, 112 Fed. 668, 50 C. C. A. 415; Klein v. Powell, 23 Am. Bankr. R. 494, 174 Fed. 640, 98 C. C. A. 394; Garry v. Jefferson Bank, 26 Am. Bankr. R. 511, 186 Fed. 461, 10[illegible] C. C. A. 439.

[10] That fraud may not be presumed does not imply that it may not be proved by circumstances, since it may be apparent from the intrinsic nature and subject of the transaction itself. In re Walden Bros. Clothing Co., 199 Fed. 315; Lumpkin v. Foley, 204 Fed. 372, 122 C. C. A. 542. Direct evidence is not necessary to prove fraud, provided the circumstances relied on are convincing, and inconsistent with a presumption of honesty. Crowder v. Allen-West Commission Co., 213 Fed. 177, 129 C. C. A. 521; Goodman v. Curtis, 174 Fed. 644, 98 C. C. A. 398.

[11] Concealment of assets of a bankrupt before the appointment of the trustee, and continuing after such appointment, held a concealment from the trustee in violation of the Bankruptcy Act. Kaufman v. United States, 212 Fed. 613, 129 C. C. A. 149; United States v. Rhodes (D. C.) 212 Fed. 513.

[12] The specifications of objection must exhibit, and the evidence in support of them must prove, one of the objections specified in the law. Collier on Bankruptcy (9th Ed.) p. 334, § 14 (b), and authorities cited in note.

It is ordered and decreed that the application of the bankrupt for his discharge be and it is hereby denied, and that the costs of the proceeding for the discharge of the bankrupt be taxed against him.

In re SKAATS.

(District Court, S. D. Alabama, S. D. July 27, 1914.)

No. 1231.

1. BANKRUPTCY ⟸404(1)—DISCHARGE—APPLICATION.

The right to apply for a discharge in bankruptcy is personal to the bankrupt, and his failure or delay in applying therefor cannot affect the rights of third persons, other than in so far as he may fail to procure a discharge from subsequent liability on their claims.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 679, 681-691; Dec. Dig. ⟸404(1).]

2. BANKRUPTCY ⟸404(2) — DISCHARGE — ADJUDICATION — CONCLUSIVENESS —"RES JUDICATA."

Under Bankr. Act July 1, 1898, c. 541, § 14b, 30 Stat. 550, as amended by Act June 25, 1910, c. 412, § 6, 36 Stat. 839 (Comp. St. 1913, § 9598), providing that a bankrupt shall be discharged unless he has been guilty of certain offenses against the bankruptcy law, or has in a voluntary proceeding in bankruptcy been granted a discharge within 6 years, the failure of a bankrupt in a previous voluntary bankruptcy proceeding to apply within the 12-month period during which application for a discharge can be made does not operate as a conclusive adjudication, precluding, on subsequent bankruptcy within six years, a discharge of such claims, where they are scheduled and filed and the second bankruptcy is not a colorable attempt to continue the first, for the right to apply for a discharge is one personal to the bankrupt, and unless there is an application and a denial the matter is not "res judicata," which is a thing adjudged or judicially acted upon and decided, but the right is only denied by operation of the statute.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 690; Dec. Dig. ⟸404(2).

For other definitions, see Words and Phrases, First and Second Series, Res Adjudicata.]

In Bankruptcy. In the matter of the bankruptcy of Henry L. Skaats. On application for discharge. Discharge granted.

The report and findings of R. T. Ervin, referee in bankruptcy, on objections to discharge, are as follows:

The undersigned respectfully reports that, acting upon the reference to him in this cause, he did on Friday, July 17, 1914, hear the attorneys for the petitioner and the attorneys for the objecting creditor, and that he did thereafter investigate the question of whether or not the bankrupt in this case is debarred from the right to a discharge under the objections filed in this cause.

[1, 2] There are quite a number of cases holding that the failure to apply for a discharge within the 12 months named in the Bankruptcy Act constitutes a res adjudicata as to the right of the bankrupt in any subsequent bankruptcy proceedings filed by him. A brief consideration of some of the authorities will suffice to show this proposition.

In re Elby (D. C.) 157 Fed. 935: In this case the court says: "The failure of the bankrupt to apply for a discharge in the first bankruptcy proceedings, and the approval of the record by the court of such proceedings without granting a discharge, constitutes a judgment by default in favor of the bankrupt's then existing creditors, and a conclusive judgment in their favor that the bankrupt was not entitled to a discharge from their claims, and that judgment is conclusive in favor of such creditors."

Kuntz v. Young, 131 Fed. 719, 65 C. C. A. 477: A consideration of the

case of Kuntz v. Young will show that the court there held that a bankrupt who has failed to apply for a discharge within 12 months after his adjudication cannot obtain the discharge from the same debts there scheduled in a proceeding commenced *while the first proceeding is still pending.*

An examination of the facts in the Kuntz Case shows, further, that in the first proceedings of Kuntz there were objections filed to his application for a discharge, and it was undoubtedly the case that the second proceedings were filed by Kuntz in a manifest effort to avoid the objections which had been filed in his first bankruptcy proceedings, and that his first proceedings were still pending when Kuntz filed his second bankruptcy proceedings. These facts being shown to the District Court, that court denied the application for a discharge and dismissed the second proceedings.

In the case of Kuntz v. Young the court cites, in favor of the proposition that "the denial of an application for a discharge from debts provable * * * under one petition in bankruptcy under the act of 1898 renders the issue of a right to a discharge from those debts in a proceeding under a subsequent petition res adjudicata; a failure to apply for a discharge within 12 months after adjudication in an earlier proceeding has the same effect: Gilbert v. Hebard, 8 Metc. (Mass.) 129; In re Drisco, Fed. Cas. No. 4,086; In re Herrman (D. C.) 102 Fed. 753."

An examination of the case of In re Herrman, supra, will show that the court merely held that an order refusing to discharge a bankrupt under the act of 1867 does not estop a bankrupt from applying for a discharge as to the same debt under the act of 1898. This has nothing to do with the question for which it is cited.

In the case of Gilbert v. Hebard, supra, the case arose under the insolvency statutes of Massachusetts and did not involve in any sense the question of the failure of the bankrupt to apply for his discharge and the effect of such failure. The only headnote of the case is a correct summary of the decision, and is as follows: "After proceedings have been had against an insolvent debtor, and his discharge has been refused on his appeal to the Supreme Judicial Court, under St. 1838, c. 163, §§ 7, 8, he is not entitled to the benefit of that statute, on a new petition, unless he owes debts to the amount of $200 which were not provable under the former proceedings. And if, on proof of his owing such debts to that amount, proceedings are had against him on a new petition, and he obtains a certificate of discharge, such certificate will not discharge him from any debts that were provable under the former proceedings, unless those to whom such debts were due, elect to prove them under the new proceedings, which, it seems, they may do."

Upon examination of the case of In re Drisco, supra, it appears, first, that this case arose under the provisions of the Bankruptcy Act of 1867 (Act March 2, 1867, c. 176, 14 Stat. 517). It appeared that Drisco had been declared bankrupt, had applied for his discharge, and objection had been filed by certain creditors because of certain frauds practiced by Drisco. All parties seem to have conceded that the discharge should not be granted, but as a matter of fact no formal order denying the discharge was made. Thereafter Drisco was sued by his creditors in the state court. He then applied for a second adjudication in bankruptcy, which was granted. The creditors moved to dismiss his second proceedings, and on the hearing Judge Lowell, on the request of Drisco, entered an order nunc pro tunc denying the discharge in the first bankruptcy proceedings, and he then denied the motion to dismiss the second bankruptcy proceedings taken by Drisco. He discusses the matter in his opinion, and refers to the insolvency act of Massachusetts, where it had been held that, if a bankrupt later on contracted new debts, he could take the benefit of the insolvency law a second time, and could get a discharge against the new debts, but not against the debts proved in the first bankruptcy proceeding; and in discussing these Massachusetts cases he says: "It was taken for granted that the decree of discharge could not operate upon debts which were proved or provable under the earlier Bankruptcy Acts, because as to these it was res adjudicata that the bankrupt was not entitled to it; and it was said that the discharge in the new proceedings must be limited to the new debts, unless the old creditors, or some of them, elected to come in and share in the new assets." He then discusses the

provisions of the federal act and says: "By section 5116 of the Revised Statutes it is enacted that no person, who has once been discharged and becomes bankrupt again, upon his own petition shall be entitled to a discharge, unless his estate is sufficient to pay seventy per cent. of the debts proved, or unless three-fourths of his creditors assent; but a bankrupt who proves that he had paid all his old debts, or has been voluntarily released from them, may have a discharge as if he had not before been bankrupt."

From a careful reading of the opinion in the Drisco Case it clearly appears, first, that it applied solely to the provisions of the former Bankruptcy Act, and that these provisions are entirely different from those of the act of 1898, and that the provisions as to granting or refusing a discharge are so entirely separate that it has no application to the present Bankruptcy Act. It further appears that the contention made in that case was, not that Drisco, not having gotten his discharge in the first proceedings, could not get a discharge in the second proceedings; but that he, not having gotten a discharge in the first proceedings, could not be a second time *declared a bankrupt*, an entirely different question from that assumed by the cases citing the Drisco Case. This clearly appears from the opinion of Judge Clifford on appeal from the ruling of Judge Lowell. This opinion will be found in 7 Fed. Cas. No. 4,086, being in the same volume, but printed a few pages in advance of the opinion of Judge Lowell. In Judge Clifford's opinion, it is said in stating the case: "Clifford, Circuit Justice. Sufficient appears to show that the petitioners are creditors of the alleged bankrupt; and they allege in their petition, filed in this court, that the bankrupt, on the 14th of March, 1872, filed a petition in bankruptcy in the District Court, and that he was adjudged to be a bankrupt; that he afterwards applied to the District Court for a discharge from his debt, under the Bankrupt Act; that the present petitioners filed objections to his discharge, alleging that he had committed certain frauds against the provisions of the Bankrupt Act, and that the charges of fraud were sustained by the District Court, and that the petition for discharge was thereupon suspended; that a suit between the petitioners and the bankrupt, then pending in the state court was by agreement prosecuted to judgment, to ascertain the amount due the petitioners from the bankrupt, they having proved no claim in the bankruptcy proceedings against his estate; that no order refusing the discharge of the bankrupt was made at the hearing, nor did the bankrupt then ask or require that such an order should be made; that the petitioners subsequently recovered judgment, in the suit pending in the state court, for $2,100 and costs of suit; that the bankrupt, on the 13th of July, 1875 (his former petition being still pending, and their claim being still unpaid), filed a second petition in bankruptcy, and was again adjudged a bankrupt by the District Court; that the petitioners, being notified of the second petition, filed a motion in the District Court to dismiss the same, *upon the ground that, the bankrupt having, under his first petition, been proved guilty of frauds under the Bankrupt Act, and not having been discharged under the same, he could not again avail himself of the benefits of the Bankrupt Act; and that the former petition, inasmuch as he was not discharged under it, is a bar to any subsequent proceedings under that act.*" (Italics mine.) The ruling of Judge Lowell is then affirmed.

I feel quite sure, after tracing this matter back to the Drisco Case, and seeing the question that was presented there, and what was there said by these two judges, and seeing that the Drisco Case arose under the former Bankruptcy Act, that the later cases have entirely misapplied what was there said, and have misconstrued it in applying it to the application for a discharge under the present Bankruptcy Act in a second bankruptcy proceeding, when no application for a discharge had been made by the bankrupt in the prior one. This is especially emphasized by the decision in Re Herrman, supra, where it was held that the refusal to grant a discharge under the act of 1867 is no reason why a discharge should not be granted under the act of 1898, even where the same creditors shown in the proceedings under the act of 1867 are objecting to the case made under the act of 1898.

It will be observed in the Drisco Case that no application had been made for a discharge in the second bankruptcy proceedings. The court never had

that question before it; never considered it nor passed on it. The only question was whether or not the second adjudication of bankruptcy was proper, where the bankrupt had either been denied his discharge or had not applied for it in the first proceedings.

The later cases of In re Weintraub (D. C.) 133 Fed. 1000; In re Kuffler, 151 Fed. 12, 80 C. C. A. 508; In re Bramlett (D. C.) 161 Fed. 588; In re Schnabel (D. C.) 166 Fed. 383; In re Von Borries (D. C.) 168 Fed. 718; In re Pullian (D. C.) 171 Fed. 595; In re Stone (D. C.) 172 Fed. 947—are all based on the case of Kuntz v. Young, supra.

There are a number of other cases that hold the same proposition, namely, that a failure to apply for a discharge within 12 months constitutes a res adjudicata against the bankrupt in any subsequent proceedings, when he seeks to get a discharge in such subsequent proceedings. I have examined all of these I could get my hands on, and I cannot see how they reached the conclusion named. Res adjudicata is a thing adjudged; a thing judicially acted upon and decided; a thing or matter settled by jugment; a thing definitely settled by judicial judgment; the thing adjudged. 34 Cyc. 1666.

How can a failure of the bankrupt to ask and obtain a judgment upon his right to a discharge be declared to be a judgment that he has no such right. Here the court has rendered no judgment denying him the right to a discharge. The question of the right to his discharge has never been under investigation by the court, or considered in any manner by it, and no judgment or conclusion has been reached by the court on this question. I do not understand how any question can be res adjudicata, unless it is involved in the decision and determined by the court. "The doctrine of res adjudicata, the estoppel by judgment, as it is sometimes less accurately termed, is a rule of law founded upon the soundest consideration of public policy. It means that if an action be brought, and the merits of the question be discussed between the parties, and a final judgment be obtained by either party, the parties are concluded, and cannot * * * canvass the same question in another action." Wisconsin v. Torinus, 28 Minn. 175, 9 N. W. 725, quoted in 34 Cyc. 1666, note 56. All the cases agree that if the bankrupt has applied for his discharge, and this application has been denied by the court in the first proceeding, this constitutes res adjudicata, and denies to the bankrupt the right to a discharge in the second proceeding. It seems to me that in the decisions which I have criticized the courts overlooked the express terms of the Bankruptcy Act. Section 14, subd. "b," of the act, as amended June 25, 1910, reads as follows: "The judge shall hear the application for a discharge and such proofs and pleas as may be made in opposition thereto by the trustee or other parties in interest, at such time as will give the trustee or parties in interest a reasonable opportunity to be fully heard, and investigate the merits of the application and discharge the [bankrupt] unless he has * * * (5) in voluntary proceedings been granted a discharge in bankruptcy within six years."

It seems to me that, under this language, it is not sufficient to show merely that the bankrupt had filed a voluntary proceeding within six years previous and had failed therein to apply for a discharge. It must be shown that not only was there a voluntary proceeding, but that there was a discharge granted or a discharge denied by the court. This view, it seems to me, is distinctly laid down by the Supreme Court in the case of Bluthenthal v. Jones, 208 U. S. 64, 28 Sup. Ct. 192, 52 L. Ed. 390. There the court, on appeal from the ruling of the Supreme Court of Florida, affirmed the Florida court in holding that, if a discharge be granted in a second bankruptcy proceeding, it is effective to bar all debts, even though the discharge had been denied in the previous proceedings. The Supreme Court says: "There is no reason shown in this record why the discharge did not have the effect which it purported to have. Undoubtedly, as in all other judicial proceedings, an adjudication refusing a discharge in bankruptcy finally determines, for all time and in all courts, as between those parties or privies to it, the facts upon which the refusal is based. But courts are not bound to search the records of other courts and give effect to their judgments. If there has been a conclusive adjudication of a subject in some other court, it is the duty of him who relies upon it to plead it, or in some manner bring it to the attention of the court

in which it is sought to be enforced. Plaintiffs in error failed to do this. When an application was made by the bankrupt in the District Court for the Southern District of Florida, the judge of that court was, by the terms of the statute, *bound to grant it, unless upon investigation it appeared that the bankrupt had committed one of the six offenses which are specified in section 14 of the Bankruptcy Act as amended.* (Italics mine.) An objecting creditor might have proved upon that application that the bankrupt had *committed one of the acts* which barred his discharge, either by the production of evidence or by showing that in a previous bankruptcy proceeding it had been *conclusively adjudicated*, as between him and the bankrupt, that the bankrupt had *committed one of such offenses.* If that adjudication had been proved, it would have taken the place of other evidence and have been final upon the parties to it."

In the case of In re Claff (D. C.) 111 Fed. 506, it is held that a bankrupt who has been refused a discharge is not debarred from filing a second petition and obtaining a discharge thereunder. In this case it is also suggested that this discharge will be no bar to the claims scheduled in the first adjudication and not proven in the second. The case of In re Pullian (D. C.) 171 Fed. 595, states: "It is now well settled in the later federal decisions, overruling in some respects the case of In re Claff (D. C.) 111 Fed. 506, and the cases therein cited, that where, in a bankruptcy proceeding, the bankrupt fails to apply for a discharge within the time limited by the Bankruptcy Act, this has the same effect as a judgment denying his discharge from the debts therein involved," etc. And this case goes further, and holds that where new debts are created the bankrupt has a right to a discharge as against these debts. This same ruling seems to be laid down in Re Kuffler, 151 Fed. 12, 80 C. C. A. 508.

In some of the cases it seems the courts discuss the question of granting a limited discharge releasing a debtor from debts contracted since the former adjudication, but denying a discharge as to the debts scheduled in the former adjudication. One of these cases is In re Von Borries (D. C.) 168 Fed. 718; another is In re Pullian (D. C.) 171 Fed. 595. I find no authority in the Bankruptcy Act to limit a discharge when granted, or to grant a limited discharge, releasing a debtor as to certain debts and denying him a release as to other debts, and I seriously doubt if any such discharge could be granted. It is certainly the case that a discharge granted in a second bankruptcy case does release the debtor from all of his debts, including those listed in a former adjudication, if they are again listed in a second adjudication, since the decision by the Supreme Court in the case of Bluthenthal v. Jones, 208 U. S. 64, 28 Sup. Ct. 192, 52 L. Ed. 390.

The question as to whether the bankrupt will apply for a discharge, or not apply, is determined by himself alone. The court has no part in this determination. After the application has been filed, the court, for the first time, is called on to consider the matter, and I cannot conceive how the decision of the bankrupt as to whether he will or not apply can be held to be res adjudicata against him. The bankrupt may have his own reasons which move him in the decision of this question, or it may be a matter which he has overlooked until the time has passed within which the application is, by section 14, required to be filed. This is a personal matter of the bankrupt until the petition for a discharge is filed, and neither the creditors nor the court are called upon to act until the application is filed. The creditors neither get anything nor are they deprived of anything by the failure of the bankrupt to file the application. The position taken by these courts seems to me to be a court-made addition of a seventh ground of opposition to the provisions of the Bankruptcy Act, viz., "or (7) failed to apply for a discharge in any former bankruptcy proceeding." The provisions of the Bankruptcy Act contemplate that a man may be more than once declared a bankrupt. These successive proceedings are entirely separate and distinct. It therefore seems to me that neither the bankrupt nor the creditors are bound in one proceeding by a mere failure to do something in the prior one, when no one has changed his position for the worse thereby, or been deprived of anything or any right thereby. I recognize that, where one has obtained an advantage

or has induced another to act to his prejudice in a suit by setting up a certain state of facts that he will not in another suit be permitted to prove, a different state of facts. Caldwell v. Smith, 77 Ala. 158; Lehman v. Clark, 85 Ala. 109, 4 South. 651. But I have seen no case that one is estopped by failure to ask for something personal to himself in a suit when no one is prejudiced by such failure.

The right of the bankrupt to a discharge is a personal one, and if he unwittingly or carelessly fail to file within the prescribed time his application, no one is hurt; no one is caused to change his position for the worse; no one relying on such failure has done or omitted to do anything he would or would not have done except for such failure. The court has neither considered nor had submitted to it for consideration or decision anything concerning the bankrupt's right to a discharge. Suppose a person be forced by circumstances into bankruptcy; he does not owe many debts, and he thinks he may be able later to pay them, and so fails to apply for a discharge, but his estate is administered and distributed among his creditors. He later goes into business, but is again unfortunate, and in the course of several years is again declared a bankrupt, having incurred other debts. He then files in the second proceeding his application for a discharge. Is this to be denied, and he be left indebted to both classes of his creditors, merely because he failed to apply for a discharge in his first proceeding? If this be so, the effect is to deny to an honest debtor a discharge without the commission by him of any one of the six grounds named in the Bankruptcy Act; in fact, without the commission by him of any wrongdoing.

It will be noticed that all the named grounds for refusing a discharge, except the fifth, are because of some wrongdoing by the bankrupt. The fifth is where he has been granted a previous discharge within six years. I submit that the courts should not, and have no right to, add any additional grounds to the statute. I again call the court's attention to the language of the Supreme Court in the Bluthenthal Case, supra, the only case I have found where it has considered this question. Speaking of the application of the bankrupt in the second proceeding, it says: "An objecting creditor might have proved upon that application that the bankrupt *had committed one of the acts which barred his discharge*, either by the production of evidence or by showing that in a previous bankruptcy proceeding it had been conclusively *adjudicated as between him and the bankrupt* that the bankrupt *had committed one of such offenses.*" (Italics mine.) Does not this decision hold that in the absence of the commission by the bankrupt of one of the named statutory offenses such bankrupt must be discharged? If so, what is said by other inferior courts is of no concern. Certainly the failure to apply for a discharge in a previous bankruptcy case is not an offense named in the act, nor is such failure an adjudication of such fact.

It seems to me that this language of the Supreme Court in construing this section of the Bankruptcy Act is conclusive, in that there must be shown an adjudication by the court in the first proceeding that the bankrupt was not entitled to his discharge, and, if this be not shown, that this court, under the terms of the Bankruptcy Act, should now grant the bankrupt a discharge. I now call attention to the fact that the objecting creditor does not show that the first proceeding instituted by the bankrupt is still pending, nor does he show that the other creditors named by the bankrupt in the second proceeding were also shown by the schedules in the first proceeding. He merely contents himself by stating that his name was shown on the schedules in the first proceeding. Undoubtedly the rule laid down by the various courts that the failure to apply for a discharge in the first proceeding would bar the application in the second proceeding was founded upon the idea that the second proceeding was a mere dodge, and not a bona fide proceeding. An examination of these cases will show that in most of them there were facts and circumstances brought to the court's attention tending to show that the second proceedings were not taken in good faith. It is not surprising that under these circumstances the courts, for their own protection, will take advantage of their opportunity to prevent one from taking undue advantage of the courts.

In this case, under the objections of this creditor and the facts as they appear before me, I recommend that your honor grant the bankrupt a discharge.

TOULMIN, District Judge. It appearing to the court that on June 6, 1914, the bankrupt filed petition for a discharge, and that the same was duly set for hearing on July 10, 1914, that on July 9, 1914, the Georgia Loan Company, a creditor, filed objections to the granting of a discharge, which objections involved a question of law solely, and that on July 10, 1914, said objections were referred to R. T. Ervin, referee in bankruptcy, with directions to hear the same and report thereon to the court his findings and conclusions of law, that on July 27, 1914, said referee filed his findings and conclusions of law and recommended that the bankrupt be granted a discharge, and said findings, conclusions of law, and recommendation being duly considered by the court, it is ordered and decreed by the court that said findings and conclusions of law are hereby concurred in, and that the bankrupt be and he is hereby granted a discharge.

LUCAS v. VULCAN IRON WORKS et al.

(District Court, M. D. Pennsylvania. January Term, 1916.)

(No. 774.)

1. PLEADING ⟸350(3)—MOTIONS—AFFIDAVIT OF DEFENSE—EXCEPTIONS TO—RULE FOR JUDGMENT.

On exceptions to affidavits of defense and rule for judgment, the court is confined to the pleadings, consisting of the statement of claim and the affidavits of defense filed.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1075, 1077; Dec. Dig. ⟸350(3).]

2. JUDGMENT ⟸822(1)—FULL FAITH AND CREDIT CLAUSE—EFFECT OF.

Const. U. S. art. 4, § 1, declares that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state, while Act May 26, 1790, c. 11, 1 Stat. 122 (Comp. St. 1913, § 1519), declares that the records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given them in every court within the United States as they have by law or usages in the courts of the state from whence the records are taken. *Held* that, save for the question of jurisdiction, which may be raised, a judgment of a foreign court is as conclusive in the court of another state as though it were a domestic judgment, and no question regarding the conduct of the trial can be raised.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1454, 1488, 1489, 1496, 1497; Dec. Dig. ⟸822(1).]

3. JUDGMENT ⟸929—FINAL JUDGMENT—WHAT CONSTITUTES.

Where the exemplification of the record showed that in an Arkansas action defendants' attorneys, who had filed an appearance, failed to appear for trial, and plaintiff waived a jury trial, in accordance with Kirby's Dig. Ark. § 6212, findings and conclusions by the court, ordering that plaintiff should recover a fixed sum of money from defendants, constitute a final judgment, authorizing action thereon in another state.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1758; Dec. Dig. ⟸929.]

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4. ATTACHMENT ⟸276—DISSOLUTION—EFFECT.
Where an action against nonresidents was begun by attachment, and their counsel filed an appearance, so that judgment in personam might be rendered, the nature of the case was changed from one in rem to one in personam, and dismissal of the attachment did not operate as a discontinuance.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 973–978; Dec. Dig. ⟸276.]

5. APPEARANCE ⟸15—AUTHORITY OF COUNSEL—EFFECT.
Where counsel without authority entered appearance for nonresident defendants, the defendants are not in court, and the court is without jurisdiction.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. §§ 68, 69; Dec. Dig. ⟸15.]

6. JUDGMENT ⟸939—ACTIONS ON—AFFIDAVIT OF DEFENSE.
In an action on a foreign judgment against nonresidents, based on defendants' appearance by counsel, the attachment having been dismissed, an affidavit of defense that counsel appearing of record as attorneys for defendants were not authorized to appear generally, but only specially in the attachment proceeding, is sufficient to raise the defense that the judgment was bad for want of jurisdiction over defendants.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1775–1778; Dec. Dig. ⟸939.]

At Law. Action by M. A. Lucas against the Vulcan Iron Works and others. On exceptions to affidavits of defense and rule for judgment. Exceptions overruled, and rule dismissed.

Watson, Diehl & Watson, of Scranton, Pa., for plaintiff.

Thos. H. Atherton and Benj. R. Jones, both of Wilkes-Barre, Pa., and John J. Toohey, of Scranton, Pa., for defendants.

WITMER, District Judge. [1] An action in assumpsit has been instituted, founded on a recovery against defendants in the circuit court of Johnson county, Ark. Affidavits of defense have been filed, which the court is requested to declare as insufficient and direct judgment for plaintiff notwithstanding. In the solution of the matters presented the court is confined to the pleadings, consisting of plaintiff's statement of claim, with exemplification of record of the suit forming the basis of this action, and the affidavits filed. From this record it appears, that the original suit was begun in the Johnson county court in January, 1911, by writ of attachment, returnable the May term following; that the defendants formally appeared by attorneys, and at their request the time for answer was extended 60 days; and that in due time they answered, taking defense on the merits. Afterwards the cause, being then at issue, was regularly listed for trial, whereupon on June 21, 1915, the court made the following entry:

"Now, on this day, this cause being reached on the regular call of the docket for trial, the plaintiff appeared in person and by attorneys and announced ready for trial, and the defendants, although duly and legally summoned to appear herein more than 20 days before the first day of the present term of this court, and having previously appeared in this cause and filed an answer to the complaint of the plaintiff herein, came not, and, after hav-

ing been called in the manner required by law, this cause is submitted to the court upon the complaint of the plaintiff and exhibits thereto, the affidavit for attachment, the answer of defendants, the warning order filed herein, and the proof adduced in this cause upon the part of the plaintiff. Upon consideration of which the court finds the issues in favor of the plaintiff, viz.: That the defendants are indebted to the plaintiff in the principal sum of $3,089, and were so indebted when this suit was commenced; that there is now due to plaintiff as interest upon said indebtedness the sum of $937.51, or a total of $4,026.51. That defendants were at the commencement of this suit and still are nonresidents of the state of Arkansas. That the above-named defendants on the 1st day of May, 1911, by and through their attorneys, entered their several appearances in this cause and, submitting themselves to the jurisdiction of this court, filed their answer herein. That since the commencement of this suit, defendants Peter F. Reilly and Thomas W. Haines having died, this cause has been in the manner provided by law revived and ordered to proceed in the names of the above-named Nora E. Reilly, administratrix of the estate of P. F. Reilly, deceased, and Reese Lloyd, J. Mac Haines, and Thomas W. Haines, Jr., executors of the estate of Thomas W. Haines, deceased, and that due and lawful notice of said order has been served upon the aforesaid administratrix and executors. And the court being otherwise sufficiently advised in this cause it is therefore by the court considered, ordered, and adjudged that the plaintiff, James K. Gearhart, do have and recover of and from the defendants, Vulcan Iron Works, E. Hoog, C. P. Swisher, R. M. Tubbs, George Fegley, Victor Burschell, Mark Cahill and Alfred F. Stokes, Reese Lloyd, J. Mac Haines, and Thomas W. Haines, Jr., executors of estate of Thomas W. Haines, deceased, and Nora E. Reilly, administratrix of the estate of Peter F. Reilly, deceased, the sum of $4,026.51, and that said sum draw interest from this date at the rate of 6 per cent. per annum; that plaintiff also have judgment for all his costs in this behalf laid out and expended. It is further ordered that the attachment in this cause is dismissed."

This judgment was, on June 23, 1915, assigned by the plaintiff of record to M. A. Lucas, his heirs and assigns, without recourse, who has instituted the present suit.

The affidavits generally set forth the following defense:

"That the proceeding in Arkansas was a proceeding in rem, and not in personam, and therefore no suit can be sustained upon such a record in the state of Pennsylvania. That Atkinson & Jacobs, whose names appear of record as attorney for defendants, were never authorized or employed to appear for the defendants generally, but only specifically in the attachment proceedings. That suit was instituted by M. A. Lucas in his own right, whereas he was simply the assignee of said judgment, and therefore cannot maintain a suit only as assignee of James K. Gearhart, plaintiff in the original judgment. No verdict or any judgment was rendered in the original suit, but simply an order that plaintiff should have and recover of and from the defendant certain moneys."

Other reasons are assigned why the action cannot be sustained, directed to the regularity of the proceeding, which cannot be reviewed here, and need not be noticed.

[2, 3] Article 4, § 1, of the Constitution of the United States declares:

"Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state, and the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved and the effect thereof."

By Act May 26, 1790, c. 11, 1 Stat. 122 (Comp. St. 1913, § 1519; 2 Purd. Dig. 1484, pl. 1), Congress prescribed the manner of authentication, and further declared:

"The said records and judicial proceedings authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States as they have by law or usages in the courts of the state from whence the said records are or shall be taken."

The judgment of the court of another state is thus put on the same footing as a domestic judgment with this qualification: That it does not prevent an inquiry into the jurisdiction of the court in which the judgment was given to pronounce it, or the right of the state itself to exercise authority over the persons or subject-matter. Story's Com. 483, 1307; Bissell v. Briggs, 9 Mass. 462, 6 Am. Dec. 88; Shumway v. Stillman, 4 Cow. (N. Y.) 292, 15 Am. Dec. 374; Borden v. Fitch, 15 Johns. (N. Y.) 121, 8 Am. Dec. 225; Benton v. Burgot, 10 Serg. & R. (Pa.) 240; Steel v. Smith, 7 Watts & S. (Pa.) 447; Campbell v. Steele, 11 Pa. 394; Baxley v. Linah, 16 Pa. 241, 55 Am. Dec. 494.

Defendants question the proceedings in the court leading up to the final entry, which they insist is not such a judgment as will sustain this action. Regarding the accuracy of the record or the conduct of the case in the Arkansas court, no inquiry shall be made here, in view of the degree of faith and credit to be given it under the constitutional mandate; however, in determining whether the judgment is final, it will be noted that under the Arkansas statutes:

"Trial by jury may be waived by the parties in actions arising on contracts by failing to appear at the trial." Kirby's Digest of Arkansas Statutes, § 6212; Ladd v. Watkins & Vinson, 113 Ark. 261, 168 S. W. 138.

In this case the defendants' attorneys, upon the call of the list, failed to appear. The plaintiff's attorney waived jury trial. The case was tried by the court without jury, and it follows that, in the absence of a verdict, there could be no final entry of judgment upon the verdict; however, the court, following its findings and conclusions, "ordered and adjudged that the plaintiff, James K. Gearhart, do have and recover of and from the defendants [naming them] the sum of $4,026.51, and that said sum draw interest from this date at the rate of 6 per cent. per annum, that plaintiff also have judgment for all * * * costs," and dismissed the attachment. There being no appeal, the judgment of the court appears to be final, and in my opinion is a sufficient adjudication of a subsisting indebtedness on the alleged contract between the parties to sustain this action, barring all other consideration.

[4] The dismissal of the attachment did not operate as a discontinuance or dismissal of the suit, as suggested by counsel. It merely indicates the change of front, as stated by the court. The action instituted was by attachment, in rem, which the defendants, by their own conduct in appearing and answering to the merits, changed to one of debt, in personam. The judgment that followed was apparently to their own seeking. It resulted from their own conduct, if the defend-

ants were truly and authoritatively represented through counsel interposing the defense appearing of record.

[5, 6] And this brings us to the defense offered, that counsel acted without authority. If this be true, the defendants were not in court, and the court was without jurisdiction. The affidavits are somewhat evasive upon this point, but taking all that has been alleged and regarding the numerous defendants sufficient has been made to appear so as to prevent judgment for the plaintiff.

The rule for judgment is dismissed.

SKAGGS et al. v. KANSAS CITY TERMINAL RY. CO. et al.

(District Court, W. D. Missouri, W. D. May 12, 1916.)

No. 66.

1. COURTS ⟸361—RULES OF DECISION—STATE LAWS.
Congress having undertaken by the Anti-Trust Acts (Act Feb. 4, 1887, c. 104, § 3, 24 Stat. 380 [Comp. St. 1913, § 8565]; Act July 2, 1890, c. 647, 26 Stat. 209; Act Oct. 15, 1914, c. 323, 38 Stat. 730), to deal with monopolies affecting interstate commerce, and having conferred jurisdiction of questions arising thereunder on the federal courts, in determining such questions those courts exercise an independent judgment, unaffected by the decisions of the courts of the state.
[Ed. Note.—For other cases, see Courts, Cent. Dig. § 954; Dec. Dig. ⟸361.]

2. CARRIERS ⟸14—REGULATIONS AT STATIONS—HACKMEN AND BAGGAGE CARRIERS.
Under the rule of the federal courts, a railroad and depot company may lawfully exclude some hackmen or carriers of baggage from entering its grounds or station for the purpose of soliciting patronage and plying their vocation, while it gives to others the exclusive privilege of doing so.
[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 29; Dec. Dig. ⟸14.]

3. COURTS ⟸366(1)—FEDERAL COURTS—AUTHORITY OF STATE DECISIONS.
It is only the highest court of a state whose decisions construing the state constitution or statutes are binding on the federal courts.
[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 956, 957, 967; Dec. Dig. ⟸366(1).]

In Equity. Suit by Joseph Skaggs and others against the Kansas City Terminal Railway Company, the Shaw Transfer Company, and others. On defendants' motion to dissolve injunction, and for temporary injunction on cross-bill. Motions granted.

Russell Garnett, of Kansas City, Mo., for plaintiffs.

Samuel W. Sawyer and R. J. Ingraham, both of Kansas City, Mo. (Lathrop, Morrow, Fox & Moore, of Kansas City, Mo., of counsel), for defendants.

VAN VALKENBURGH, District Judge. The plaintiff, Joseph Skaggs, for himself and such other persons as are jointly interested and may join in seeking the same relief, filed this bill in the circuit

court of Jackson county, Mo., against the Kansas City Terminal Railway Company, the Shaw Transfer Company, both Missouri corporations, and Hiram W. Hammil, chief of police of Kansas City, Mo., to restrain the defendants from depriving the plaintiff or plaintiffs of the use of the Union Station Plaza, adjacent to said Union Station, by forcing them to remove their hacks therefrom while waiting for passengers, and from interfering with plaintiffs in any way while thereon; also praying that plaintiffs be allowed free access to and use of said premises in the employment of their business as hack drivers and collectors of passengers. A temporary restraining order was granted, and plaintiffs dismissed as to defendant Hammil. Thereafter an amended bill was filed, charging that the defendants Terminal Company and Transfer Company had entered into an unlawful conspiracy and agreement for the purpose of fixing prices and monopolizing and controlling the transfer and baggage business to and from the new Union Station in Kansas City, Mo., as evidenced by a certain contract set out in full, whereby the Terminal Company granted the Transfer Company the exclusive privilege of soliciting patronage for its cabs, carriages, and baggage service upon the grounds and premises of the Terminal Company at said Union Station. In said contract the carriage provided for was between said Union Station and any part of Kansas City, Mo., or Kansas City, Kan. Upon the filing of the amended bill, containing allegations of an unlawful contract, conspiracy, and agreement in restraint of trade, and for the creation of a monopoly affecting commerce, both interstate and intrastate, the defendant Terminal Company seasonably filed its petition and bond for removal. The case was transferred to this court, the restraining order being retained in force. In this court the defendant Terminal Company has filed answer and cross-bill, praying affirmative relief by injunction on its behalf. The plaintiffs filed a motion to remand, but later joined in the hearing upon this motion, and thereafter filed reply to defendant Terminal Company's answer, and an answer to said defendant's cross-bill.

[1] The primary question, of course, is as to the jurisdiction of this court. Plaintiffs at the hearing practically abandoned the motion to remand and no question of jurisdiction is urged in the briefs of counsel. Pleadings have been filed amounting to an acceptance of this forum, but, inasmuch as diversity of citizenship is not present, such implied consent would be inoperative unless jurisdiction is otherwise affirmatively disclosed. However, the allegations of the petition clearly and sufficiently bring the case within the acts of Congress. Act Feb. 4, 1887, c. 104, § 3, 24 Stat. 380 (Comp. St. 1913, § 8565); Act July 2, 1890, c. 647, 26 Stat. 209; Act Oct. 15, 1914, c. 323, 38 Stat. 730. Congress has, therefore, entered and appropriated this field.

[2] Under such conditions, the rule in federal jurisdictions is controlling; and that rule is the later and better reasoned doctrine and is supported by the undoubted weight of authority. A railroad and depot company may lawfully exclude some hackmen or carriers of baggage from entering its grounds or station for the purpose of soliciting patronage and plying their vocation, while it gives to others the exclusive privilege of doing so. Donovan v. Pennsylvania Company, 199 U. S.

279, 26 Sup. Ct. 91, 50 L. Ed. 192; Depot Carriage & Baggage Co. v. Kansas City Terminal Ry. Co. (C. C.) 190 Fed. 212; Oregon Short Line R. R. Co. v. F. T. Davidson et al., 33 Utah, 370, 94 Pac. 10, 16 L. R. A. (N. S.) 777, and note, 14 Ann. Cas. 489. The latter case is selected for citation because of its exhaustive and convincing reasoning, and of the complete presentation of doctrine and authorities in the attendant footnote.

Plaintiffs rely upon the contention that the contrary doctrine prevails in this state, and that this case should be governed by the law of the jurisdiction in which the station is situated. The decision in Donovan v. Pennsylvania Co., supra, seems, on first impression, to be conditioned upon the absence of valid state legislation to the contrary; but such is really not the case as applied to the doctrine generally. In that case, so far as appears from the record, the federal jurisdiction was founded solely upon diversity of citizenship, and so the existence or nonexistence of local prohibitions became pertinent and was discussed; but such considerations lose their force in a case in which Congress, by entering the field, has drawn to the courts of the United States paramount jurisdiction and authority. The subject is then one of general law, in respect of which the courts of the United States are entitled to exercise their independent judgment in light of the settled principles that must always control the determination of the legal rights of parties. Donovan v. Pennsylvania Co., supra, 199 U. S. loc. cit. 300, 26 Sup. Ct. 91, 50 L. Ed. 192. The rule announced by the Supreme Court of the United States must be determinative of the present controversy.

But, even though it were to be conceded that the local law controls, nevertheless, after careful examination, I am of opinion that the decisions of the highest courts of this state do not sustain plaintiffs' position. Reliance is placed upon section 23 of article 12 of the Missouri Constitution, to wit:

"*Discrimination Between Companies and Individuals.*—No discrimination in charges or facilities in transportation shall be made between transportation companies and individuals, or in favor of either, by abatement, drawback or otherwise; and no railroad company, or any lessee, manager or employé thereof, shall make any preference in furnishing cars or motive power."

And upon sections 3174 and 3184, R. S. Mo. 1909, which read as follows:

"Sec. 3174. *Railways Declared Public Highways, and Companies Common Carriers — Discrimination Prohibited — Penalty.* — Railways heretofore constructed, or that may hereafter be constructed in this state, are hereby declared public highways, and railroad companies common carriers. No railway company, corporation or association shall hereafter make any discrimination in charges or facilities in the transportation of freight or passengers between transportation companies and individuals, nor in the transportation of freight between commission merchants or other persons engaged in the transportation of freight and individuals, in favor of either, by abatement, drawback or otherwise, nor shall any such company, corporation or association, nor any lessee, manager or employé of any such company, corporation or association make any preference between the parties aforesaid in furnishing cars or motive power, for the purpose aforesaid. Any company, corporation or association, or manager, lessee or employé, violating the provisions of this section shall forfeit and pay to the party injured the whole amount of

such transportation charged, to be recovered before any court of competent jurisdiction: Provided, that excursion or commutation tickets may be issued at special rates. (R. S. 1899, § 1127.)"

"Sec. 3184. *Discrimination Between Persons or Localities Prohibited.*—It shall be unlawful for any such common carrier to make or give any undue or unreasonable preference or advantage to any particular person, company or firm, corporation or locality, in the transportation of goods, wares and merchandise of any character, or to subject any particular person, firm, corporation or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage with respect to such transportation; and all such common carriers shall afford equal facilities for the interchange of traffic between their respective lines, and for receiving, forwarding and switching cars and delivering property to and from their lines, and to and from other lines and places connected therewith, and shall not discriminate in their accommodation, rates or charges between such connecting lines and places. But this provision shall not be construed as requiring such common carriers to give the use of their tracks or terminal facilities to other common carriers engaged in a similar business. (R. S. 1899, § 1133.)"

Counsel cite the following Missouri cases in support of their contention: Cravens v. Rodgers, 101 Mo. 247, 14 S. W. 106; Christie v. Missouri Pac. Ry. Co., 94 Mo. 453, 7 S. W. 567; Home Telephone Co. v. Neosho Telephone Co., 147 Mo. App. loc. cit. 237, 126 S. W. 773; Tie Company v. Stone, 135 Mo. App. 438, 117 S. W. 604.

It seems obvious that the sections of Constitution and statutes quoted apply only to those doing business with carriers in connection with railroad transportation; that is to say, patrons or would-be patrons who sustain a contractual relation with them. Hack drivers generally stand in no such a relation to the defendant Terminal Company. It is true that in Cravens v. Rodgers, 101 Mo. 247, 14 S. W. 106, the Supreme Court of Missouri, in a case between two transfer lines to which the railroad company was not a party, held, in effect, that such an exclusive privilege cannot be given, as against public policy and the spirit of the state Constitution (article 12, section 23, supra); but the Supreme Court of Missouri did not undertake in that case to construe this article of the Constitution. It said that such an agreement was against its spirit, not its terms; and it based its ruling upon its conception of public policy and general law. In such cases, as we have seen, local decisions are not controlling. Donovan v. Pennsylvania Co., supra. It should further be remarked that sections 3174 and 3184 were upon the statute book when Cravens v. Rodgers was decided, and no mention is made of these sections as affecting the subject now under discussion.

[3] I do not find that these sections have been held applicable to a state of facts such as is here presented. But if decisions of the state Courts of Appeals are so viewed, we are reminded that, while entitled to respectful consideration, they are not the decisions of the highest judicial tribunal of the state, which alone are binding on the federal courts in their construction of local statutes. Federal Lead Company v. Swyers, 161 Fed. 687, 88 C. C. A. 547.

However, it may be profitable to make brief examination of such cases cited. In Tie Company v. Stone, 135 Mo. App. 438, 117 S. W. 604, the court limits its ruling to railroad transportation affecting patrons of the carrier in this respect, which is in agreement with the

views herein expressed. In Telephone Company v. Telephone Company, 147 Mo. App. 216, 126 S. W. 773, the majority opinion, while indirectly supporting the general contention of plaintiffs, does not attempt to construe the sections of statute under discussion. The dissenting opinion, however, is in full accord with the doctrine announced by this court. In Home Telephone Company v. Sarcoxie Telephone Co., 236 Mo. 114, 139 S. W. 108, 36 L. R. A. (N. S.) 124, the Supreme Court reverses the ruling of the Court of Appeals just referred to, and expressly declares the dissenting opinion of Judge Reynolds to be the law of the case. Judge Graves refers to section 3106 of the railroad act (R. S. Mo. 1909), which reads:

"All railroad corporations may contract with each other, or with other corporations, in any manner not inconsistent with the scope, object and purpose of their creation and management"

—and cites with approval Wiggins Ferry Co. v. Railroad Company, 73 Mo. 389, 39 Am. Rep. 519; Id., 128 Mo. 224, 27 S. W. 568, 30 S. W. 430, in which it was held to be proper for a railway company to enter into a contract with a single ferry company to handle its trade, and further that such contract is not viewed as violative of public policy, nor as being a contract in restraint of trade or creating a monopoly. These rulings supersede the Missouri cases cited by counsel for plaintiffs, in so far as the same may seem to be in conflict with the doctrine here announced. In any aspect, therefore, the matter is thus left for the independent judgment of this court, which must be governed by considerations of general law and by the pronouncements of federal courts of last resort.

It should be added that by stipulation, as well as by the proofs, the property of the Terminal Company is to be deemed in every legal sense private property as between it and those of the general public who have no occasion to use it for purposes of transportation. The right of the company to the exclusive use and enjoyment thereof is as perfect and absolute as that of an owner of real property not burdened with public or private easements or servitudes. Furthermore, the rights of the public are not impaired by the grant by a railroad company of the exclusive privilege to solicit patronage for hacks and baggage transferring within its depot grounds, where the recipient of the privilege and the facilities furnished are subject to legislative regulation. Oregon Short Line R. R. Co. v. Davidson et al., 33 Utah, 370, 94 Pac. 10, 16 L. R. A. (N. S.) 777, 14 Ann. Cas. 489. It is conceded in the present case that the transfer companies' rates and fares are subject to such regulation.

It appears convincingly that the limitation of the station transfer privileges to a single responsible party is in no sense unreasonable. While the matter of revenue is concededly involved, nevertheless the station company is no doubt actuated by experience thus to eliminate, to great extent, the possibility of abuses which are known to have been present in the past at the old station. Adequate provision is made in the contract for all the needs of the traveling public in this regard. Manifestly, out-going passengers are in no wise affected, because plaintiffs and others have the conceded right to enter upon the premises of

the Terminal Company for the purpose of actual delivery of passengers and baggage. They also have the right to receive passengers and baggage for whose transportation they shall have already received orders. The freedom of all parties to take their stands upon appropriate public places outside the limits of the premises of defendant Terminal Company affords to the public generally, including all in-coming passengers, every opportunity to avail itself of their services, should it so desire. The new Union Station has been built with a view to affording every convenience and comfort to travelers. The interests of the public demand that the Terminal Company should be given every opportunity to keep its approaches cleanly and attractive. The presence of horses in considerable numbers near its principal entrance, and in close proximity to the very high class restaurant maintained, detracts much from the comfort of patrons. No doubt the plaintiffs and those similarly situated make effort to render their stands as unobjectionable as possible, but common experience teaches that such efforts cannot be wholly successful. However, this case is decided upon the property rights involved independently of such considerations.

It follows that the restraining order heretofore granted against defendants should be dissolved, and the temporary injunction, restraining plaintiffs, and every other person or corporation similarly situated who has become party or privy to this proceeding, their agents, servants, and employés under their authority and control, from standing their horses, teams, and vehicles of every kind or description upon the Union Station Plaza, and from soliciting the custom and patronage of passengers or other persons upon the Union Station Plaza, or premises of defendant and cross-complainant Terminal Company, should be granted. An order may be prepared in conformity with the views herein expressed.

PUGET SOUND NAV. CO. v. CARTER. SAME v. MURRAY. SAME v. CARTER et al.

(District Court, W. D. Washington, N. D. February 1, 1916.)

No. 3175.

1. LIBEL AND SLANDER ⟸7(2)—LIBELOUS CHARGES—OFFENSES.
Laws Wash. 1911, c. 117, § 21, prohibits discrimination by common carriers, either in favor of persons or localities, while section 94 makes a violation of the act an offense. Defendant published in a newspaper a statement that he believed the county to be fully 10 years behind what it should be because of unjust discrimination in the freight and passenger rates charged by the plaintiff navigation company. *Held*, that the statement was not libelous, as charging the navigation company with an offense under the laws, but should be treated merely as a severe criticism of the company's methods.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 18, 35; Dec. Dig. ⟸7(2).]

2. LIBEL AND SLANDER ⟸9(1)—"LIBEL"—WHAT CONSTITUTES.
Rem. & Bal. Code Wash. § 2424, declares that published words are actionable if they directly tend to prejudice or injure a person or corpora-

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

tion in his or its business. Defendant published, concerning plaintiff navigation company, that it had driven competitors from the field, had robbed the people of the locality for years, but now protested when they sought to dictate rates. *Held* that, as words not actionable may become so if they contain a covert and hidden meaning, such publication was libelous as tending to injure the navigation company in its business; the innuendo showing the charge of robbery meant, not a technical robbery, but the imposition of rates which were so exorbitant that they deprived patrons of the navigation company of their money without just return.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 80, 90; Dec. Dig. ⊂⊃9(1).

For other definitions, see Words and Phrases, First and Second Series, Libel.]

3. LIBEL AND SLANDER ⊂⊃89(1)—ACTIONS—LIBEL OF CORPORATION.

A corporation may sue for libel, reflecting on the management of its trade or business, without alleging or proving special damages; but, if the publication is not one tending to injure its business, special damages should be alleged and proved.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 213; Dec. Dig. ⊂⊃89(1).]

4. LIBEL AND SLANDER ⊂⊃9(1)—COMPETITION—STATEMENTS.

While competition is right and proper, yet, in the exercise of the right of competition, libels must not be published.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 80, 90; Dec. Dig. ⊂⊃9(1).]

At Law. Actions by the Puget Sound Navigation Company against L. B. Carter and against one Murray, and against one Carter and others. On demurrer to the complaint. Demurrer sustained as to the first cause, and overruled as to the second.

Bronson, Robinson & Jones, of Seattle, Wash., for plaintiff.
Peterson & Macbride, of Seattle, Wash., for defendant.

NETERER, District Judge. The complaint alleges, in substance, that the plaintiff is a foreign corporation doing business in this district, and operating vessels for the carriage of passengers and freight for hire upon Puget Sound, the Straits of San Juan de Fuca, and operating a line of vessels throughout a group of islands in San Juan county; that there is sharp competition with other lines of vessels operating throughout the same territory; that on November 4, 1915, the defendant caused to be published in the Friday Harbor Journal, a paper of general circulation throughout San Juan Islands and San Juan county, an article over his signature, "urging the public to patronize a vessel operated by a competitor of the plaintiff," in which the following language was employed:

"I fully believe San Juan county to be fully ten years behind what it should be by the unjust discrimination in passenger and freight rates charged the people of San Juan county by the Puget Sound Navigation Company under the management of Joshua Green of Seattle."

It is stated that said statement was made of and concerning the plaintiff with respect to the conduct of its business, and was maliciously libelous, in that it falsely charged the plaintiff with unjustly discriminating against the locality, to wit, San Juan county, thereby

violating the provisions of chapter 117 of the Session Laws of Washington of 1911, and that it has been damaged in the sum of $7,500. And in a second cause of action it is alleged that the defendant published in the same paper about the 25th of November, over his own signature, the following statement:

"We sincerely hope every reader will think this matter over carefully and put their shoulder to the wheel and with a good strong boost show that we can and will stick together, for we certainly are under no obligations to the Puget Sound Navigation Company. They shed no tears when they drove Capt. Newhall with the steamer Islander from the run and sent him to his grave, broken in spirit and purse; but now they make an awful holler when the people, whom they have robbed all these years, take matters into their own hands and dictate some of the rates to be charged and services rendered."

It is then alleged that said statement was made of and concerning the plaintiff in the conduct of its business, and was maliciously libelous, in that it falsely charged that the plaintiff's business was conducted—

"in an unfeeling and abhorrent manner, as therein set out, and * * * charged the plaintiff with robbing the people for a period of years, meaning thereby that the plaintiff had for a period of years exacted from its patrons in the conduct of its business rates so grossly excessive, and so exorbitant, and so disproportionately high with relation to the services rendered, that the plaintiff in fact robbed the people and conducted its business in the method and manner of robbery."

[1] The defendant has demurred to each cause of action. I think the demurrer to the first cause of action must be sustained. It is contended that since section 21, p. 555, Laws Wash. 1911, provides "that no common carrier shall make or give any undue or unreasonable preferences or advantage to any person or corporation or to any locality or to any particular description of traffic in any respect whatsoever, or subject any particular person or corporation or locality or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever," and section 94 of the same act provides that "any public service company which shall violate or fail to comply with any provision of this act * * * shall be subject to a penalty of not to exceed * * * $1,000.00 for each and every offense," that the plaintiff is charged with the commission of crime and falsely charged with acts which injured it in its business. The language employed is of a general nature, and I do not think charges the defendant with the violation of law. It may be that it is a criticism which is emphatic, and if written under certain circumstances and conditions, and in connection with other statements, might be prejudicial and injurious to the plaintiff's business. I do not think, however, that this expression, as set out in this cause of action, states facts sufficient upon which to predicate relief, and the demurrer to this cause of action is sustained.

[2-4] The demurrer to the second cause of action should be overruled. Published words are actionable, if they directly tend to prejudice or injure another in his business (25 Cyc. 326), and when they tend "to injure any * * * corporation * * * in * * * [its] business" (Rem. & Bal. Code Wash. § 2424), and a corporation may sue for libel reflecting on the management of its trade or busi-

ness without alleging or proving special damages (Newell, Slander & Libel, § 448). If the publication would not tend to injure its business, special damages should be alleged and proved. Judge Lacombe, in Astruc v. Star Co., 193 Fed. 631, 113 C. C. A. 499, 40 L. R. A. (N. S.) 79. And to the same effect is Gross Coal Co. v. Rose, 126 Wis. 24, 105 N. W. 225, 2 L. R. A. (N. S.) 741, 110 Am. St. Rep. 894, 5 Ann. Cas. 549; Sternberg Mfg. Co. v. Miller, D. B. & P. Mfg. Co., 170 Fed. 298, 95 C. C. A. 494, 18 Ann. Cas. 69. It is contended that, since a corporation could not commit the crime of robbery, it cannot sue in respect to the imputation of robbery, and that the language employed before the innuendo does not sound in libel, as no meaning produced by the innuendo will make the action maintainable, as the innuendo cannot beget an action. Grand v. Dryfus, 122 Cal. 58, 54 Pac. 389.

The word "robbed," here employed, does not purport to charge a specific crime, but rather a course of dealing on the part of the agents and employés of the plaintiff which takes from the persons of the community money or value, not forcibly, by violence and putting in fear, but by compulsion or coercion—by charging rates which are so exorbitant as to amount to robbery. Words in themselves not actionable may become so if they contain a covert or hidden meaning, and must be understood in their concealed sense by those who read them. Hanchett v. Chiatovich, 101 Fed. 742, 41 C. C. A. 648. Competition is necessary, right, and proper, and is for the public good; but in its exercise the right of another must not be violated through malice or ill will. As was said by Judge Ross in Hanchett v. Chiatovich, supra, 101 Fed. 746, 41 C. C. A. 652:

"It is, in our judgment, a clear violation of the right pertaining to every person engaged in an industrial enterprise for any other person, through malice, ill will, or revenge, to command or induce other persons to withdraw or withhold their custom from him, or otherwise maliciously interfere with his business. Motive does not count where one merely exercises his own right without violating any right of another, but when he does violate the right of another the motive of the act enters largely into the problem."

The demurrer is overruled as to the second cause of action.

The same reasoning applies to the demurrer in Puget Sound Navigation Co. v. Murray (No. 3176), and Puget Sound Navigation Co. v. Carter et al. (No. 3177). Orders may be presented.

In re BRAUS.

(District Court, S. D. New York. June 14, 1916.)

1. BANKRUPTCY ⇐350—LIEN—LANDLORD'S LIEN.

Under Landlord and Tenant Act N. J. (3 Comp. St. 1910, p. 3066) § 4, declaring that no chattels lying upon the leased premises shall be liable to be taken by any process unless before removal the accrued rent shall be paid, and giving the landlord the right to distrain the goods of the tenant on the demised premises for rent, and Bankr. Act July 1, 1898, c. 541, § 64b, subd. 5, 30 Stat. 563 (Comp. St. 1913, § 9648), allowing priority

⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

to debts due and owing to any person who by the laws of the states or the United States is entitled to priority, a New Jersey landlord, though he had not perfected his lien by distraint of the goods on the demised premises, retains a priority after bankruptcy which can be asserted subject to the payment of the costs of the proceeding.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 537; Dec. Dig. ⟸350.]

2. BANKRUPTCY ⟸350—PROCEEDINGS—ANCILLARY PROCEEDINGS—COSTS.

In bankruptcy instituted in New York, which was the domicile of the bankrupt, ancillary proceedings were had in New Jersey, where goods of the bankrupt were located on demised premises. These, not having been distrained by the New Jersey landlord, were sold; but, after payment of the costs of the ancillary proceedings, the amount remaining was insufficient to satisfy the claim of the New Jersey landlord, who had priority. *Held* that, as there was only one bankruptcy proceeding, the general assets were liable for all the costs of the principal and ancillary proceedings, the New Jersey assets being subject only to the payment of cost in an amount proportional to the value which those assets might bear to the general assets; hence, though for convenience the whole cost of the New Jersey administration was deducted from the assets taken from the demised premises, the landlord, who had not perfected a lien on the goods on the demised premises, may, where a greater percentage of the costs was satisfied out of the New Jersey assets than they were liable for, assert his priority against the general assets.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 537; Dec. Dig. ⟸350.]

In Bankruptcy. In the matter of the bankruptcy of Arthur L. Braus. From an order of the referee, who allowed a claim of rent of New Jersey premises as a prior claim against the balance of New Jersey assets, but disallowed any further preferential payment of the claim, the claimant appeals. Order modified.

Cohen & Cohen, of New York City (Carl Saenger, of Newark, N. J., of counsel), for claimant.

Myers & Goldsmith, of New York City, for trustee.

AUGUSTUS N. HAND, District Judge. This is an appeal from the referee, who allowed a claim of rent of New Jersey premises as a prior claim against the balance of New Jersey assets turned over by the receiver in that jurisdiction to the New York estate, but disallowed any further preferential payment of the claim.

[1, 2] The New Jersey Landlord and Tenant Act (3 Comp. Stat. N. J. p. 3066) provides that no chattels lying upon leased premises shall be liable to be taken by any process unless before the removal the accrued rent shall be paid. The landlord is given the right to distrain the goods of the tenant on the demised premises for rent. Section 64b, subd. 5, of the Bankruptcy Act, allows priority to:

"Debts [due and] owing to any person who by the laws of the states or the United States is entitled to priority."

Section 64b, supra, furthermore states the order in which debts which have priority shall be paid, and provides in substance that the expenses of the estate shall be paid first. After the expenses of the New Jersey estate were paid out of the New Jersey assets, a suffi-

cient amount was not left to pay in full the debt owing to claimant, since that debt as allowed amounted to $471, and the net proceeds transferred by the New Jersey receiver to the trustee in New York amounted to only $292.

New York was the domicile of the bankrupt, and here the only adjudication was had. The New Jersey administration was ancillary. While that court had the power to, and did, pay the expenses of its receiver from the local assets, it held that the claim for priority asserted by this claimant should be presented to this court. Judge Sanborn in Fidelity Trust Co. v. Gaskell, 195 Fed. 865, 115 C. C. A. 527, said:

"It is * * * no longer true that one court, the court making the adjudication in bankruptcy, takes exclusive jurisdiction and alone collects and determines the titles to and liens upon the property wherever situated claimed as part of the estate of the bankrupt."

But it is still true that while the place of actual administration of assets is in bankruptcy, as it is in the case of decedents' estates, largely a matter of convenience, yet the administration, whether in the ancillary or original jurisdiction, is for the estate as a whole. Despard v. Churchill, 53 N. Y. 192. Judge Philips, in the case of In re Granite City Bank, 137 Fed. at page 822, 70 C. C. A. at page 320, said in the Court of Appeals of the Eighth Circuit:

"Under the scheme of the Bankrupt Act, the District Court of the domicile of the bankrupt takes exclusive jurisdiction of the bankrupt and his property, wherever situated, to administer it and distribute the proceeds pari passu among the creditors according to their respective rights and priorities. Only one court—the court making the adjudication—collects, marshals, administers, determines priorities of the parties, and directs the distribution of the assets."

This language perhaps pushes the argument too far, and Judge Sanborn expressed himself, in the same court, in the case of Fidelity Trust Co. v. Gaskell, above quoted, in some respects differently. Neither judge, however, would dispute, I think, that both courts are administering the assets for a single estate. That being so, when the New Jersey court in the case at bar ordered expenses paid out of the New Jersey assets, it did this because they were the only assets available to it when it desired to pay its own receiver. But the payment of these expenses was for account of the entire estate, and only for convenience came out of the New Jersey assets. The New Jersey court could have remitted the gross assets found in New Jersey to New York, and left this court to deal with the expenses of the ancillary proceeding, although that would have been an unusual practice. What I desire to emphasize, however, is that the expenses paid by the New Jersey court were, though local expenses, yet proper charges to the general estate.

Judge Haight has just held in the case of In re Spies-Alper Company, 36 Am. Bankr. Rep. 470, 231 Fed. 535, that a landlord, though a distress warrant is necessary under the New Jersey statute to perfect his lien, may yet under section 64b (5) of the Bankruptcy Act retain a right to a priority after the bankruptcy, though he has not distrained for his rent. In McCann v. Evans, 185 Fed. 93, 107 C. C. A. 313, and In re Federal Biscuit Co., 218 Fed. 753, 134 C. C. A. 431, a

statute in Pennsylvania resembling the New Jersey Landlord and Tenant Act was similarly construed by the Circuit Court of Appeals of the Third and Second Circuits, respectively.

Now, it is true, that the priority given is limited to the value of the New Jersey chattels lying on the demised premises, and such priority is made by section 64b (5) subject to payment of expenses. The expenses to which it is made subject are, however, that proportion of the total expenses of the estate of the bankrupt, wherever situated, which the value of the chattels lying upon the demised premises when the petition in bankruptcy was filed bore to the value of the gross estate. Such a method of marshaling the assets is equitable, and will not leave the priority to be determined by the mere amount of the New Jersey expenses. If the claimant had prior to bankruptcy perfected his lien by a distress warrant, he would have been able to have the chattels on the leased premises applied to his claim so far as these chattels had any value. He should be in as good a position now, subject only to his obligation to pay his share of the general expenses of the estate to which his claim is made subordinate by section 64b, supra.

If, as I suppose, there remained, after paying the proportion of the total expenses chargeable against the proceeds of the chattels upon the demised premises, a sufficient balance to pay the claimant in full, he may take an order for payment out of the assets of the general estate, and the order of the referee is modified accordingly.

NATIONAL CITY BANK OF SEATTLE v. TITLOW.

(District Court, W. D. Washington, N. D. February 16, 1916.)

No. 67-E.

1. BILLS AND NOTES ⇐151—NEGOTIABLE INSTRUMENTS—CERTIFICATE OF DEPOSIT.

   A certificate of deposit is a negotiable instrument.

   [Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 380–387; Dec. Dig. ⇐151.]

2. BILLS AND NOTES ⇐343—BONA FIDE HOLDER—DUE COURSE—INFIRMITIES ON FACE OF INSTRUMENT.

   Rem. & Bal. Code Wash. § 3443, declares that a holder in due course is one who has taken a negotiable instrument, complete and regular on its face, without notice, at the time of negotiation, of any infirmity in the instrument or defect in title of person negotiating it. Section 3574 declares that, where a note is drawn to the maker's own order, it is not complete until endorsed by him, while section 3440 declares that, where the holder of an instrument payable to his order transfers it for value without indorsing it, the transfer vests in the transferee such title as the transferror had, and for the purpose of determining whether the transferee is a holder in due course the negotiation takes effect as of the time when the indorsement is actually made. The insolvent bank requested plaintiff bank to carry a bag company, and plaintiff bank offered to do so on the credit of the insolvent institution. Thereupon, though no deposit was actually made, the insolvent bank issued to the bag company a certificate of deposit which appeared regular on its face, and which the bag company indorsed to plaintiff. *Held*, that as the

certificate of deposit was not signed by the insolvent bank, and as plaintiff had notice that the insolvent bank was furnishing credit for the bag company, it had sufficient knowledge to put it on inquiry as to whether the deposit was actually made, and, none having been made, recovery could be defeated for want of consideration.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 853–855, 864, 865; Dec. Dig. ⊂⊃343.]

3. BANKS AND BANKING ⊂⊃152—LIABILITY OF BANKS—CERTIFYING CHECKS. A bank which certifies a check, though the depositor is without funds, is not liable to any one, save a bona fide holder for value; and that rule applies where a bank issues a certificate of deposit, though none has been made.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 336, 465–482; Dec. Dig. ⊂⊃152.]

In Equity. Suit by the National City Bank of Seattle against A. R. Titlow, receiver of the United States National Bank of Centralia. Decree for defendant.

Herr, Bayley & Wilson, of Seattle, Wash., for plaintiff.

Robert P. Oldham and Robert C. Goodale, both of Seattle, Wash., for defendant.

NETERER, District Judge. Plaintiff has commenced an action against the defendant receiver, in which it alleges, in substance: That on the 8th of July, 1914, the United States National Bank, of which the defendant is the receiver, issued to Winkleman Bag Company a certificate of deposit as follows: "Winkleman Bag Company has deposited in this bank $3,000.00, payable to the order of ourselves, on return of this certificate properly indorsed." That on the back of the certificate was indorsed: "On or after October 8, 1914, pay to the order of the National City Bank of Seattle, Washington. [Signed] Winkleman Bag Company, by R. Winkleman." And it alleges: That the words "to the order of ourselves" were understood between the United States National Bank and Winkleman Bag Company to mean that the certificate was to be payable to the order of Winkleman Bag Company, and that such was the intention and agreement of the parties, and states that for value this certificate was negotiated on July 9th to the plaintiff, who paid in good faith a valuable consideration. That the United States National Bank became insolvent, and the defendant was appointed receiver. That claim was made to the receiver and rejected. And it asks that the certificate be reformed or corrected, so as to have the word "ourselves" changed to the word "themselves," and then asks that it be allowed as a claim against the insolvent bank and permitted to participate in dividends.

The defendant admits the issuance of the certificate, denies there was any mistake, and makes some affirmative defenses, in which it states that at the time the Winkleman Bag Company was indebted to the United States National Bank in a sum greater than the amount named in the certificate, and that the certificate was issued without any consideration, etc.

The plaintiff replies, taking issue with the affirmative matters of the answer.

Upon the trial it appeared that on and prior to July 8, 1914, the Winkleman Bag Company was indebted to the United States National Bank in the sum of $20,000 for money loaned and on letters of credit for $75,000, and had an overdraft of something over $4,000. On June 8th Winkleman Bag Company desired to purchase some burlap from a client of the plaintiff bank. Winkleman Bag Company was a client of the United States National Bank, as already appears. On this day the insolvent bank asked the plaintiff bank to carry the Winkleman Bag Company for 90 days on the burlap which it was negotiating to buy from a client of the plaintiff bank, saying: "We will see that it is paid promptly when due." This letter evoked conversation by phone between the officers of the banks; the plaintiff bank stating that it would carry the obligation upon the credit of the insolvent bank, and that if the insolvent bank issued its certificate of deposit it would carry it for the time named. On June 23d the plaintiff bank answered by letter, saying that the matter was satisfactorily arranged, and further said: "We are carrying the account along the line of your letter." On July 8th the insolvent bank issued the certificate of deposit above mentioned, and on July 9th Winkleman Bag Company forwarded this certificate of deposit to the plaintiff bank, with indorsement upon it as above indicated, together with a check for $60, interest upon the certificate of deposit for 90 days. The Winkleman Bag Company had not in fact deposited any money for the certificate of deposit, but had promised to pay such sum into the bank before the expiration of 90 days, and had promised to secure this by bills of lading with draft attached for portions of the burlap which was being purchased, assigning such bills of lading and draft to the bank.

[1-3] The only issue in this case is: Was the plaintiff a holder in due course? A certificate of deposit is properly held a negotiable instrument (Miller v. Austen, 13 How. [54 U. S.] 218, 14 L. Ed. 119); and the rights of plaintiff must be determined by the Negotiable Instrument Act of Washington. Section 3443, Remington & Ballinger's Code Wash., a part of such act, provides that:

"A holder in due course is a holder who has taken the instrument under the following conditions: First. That it is complete and regular upon its face. * * * Fourth. That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it."

And section 3574, supra:

"* * * Where a note is drawn to the maker's own order, it is not complete until indorsed by him."

I think, from the evidence in this case, that the plaintiff must be held to notice of the infirmity of the instrument. While it appears regular on its face, it was not complete within these statutory provisions, because it was not indorsed by the maker, and therefore not taken in due course of business. Section 3440, Rem. & Bal. Code Wash.; Central Trust Co. v. First Nat. Bank, 101 U. S. 68, 25 L. Ed. 876; Goshen Nat. Bank v. Bingham, 118 N. Y. 349, 23 N. E. 180, 7 L. R. A. 595, 16 Am. St. Rep. 765; Lancaster Nat. Bank v. Taylor, 100 Mass. 18, 1 Am. Rep. 71, 97 Am. Dec. 70; Hughes & Co. v. Flint,

61 Wash. 460, 112 Pac. 633. The plaintiff also knew that it was the intention of the insolvent bank to become surety for the Winkleman Bag Company. The letter and all the conversations in testimony indicate that, and that act was ultra vires. Morse on Banks and Banking, § 65; Commercial Nat. Bank v. Pirie, 82 Fed. 799, 27 C. C. A. 171; Bowen v. Needles Nat. Bank, 94 Fed. 925, 36 C. C. A. 553. The issuance of the certificate was a method adopted to meet the exigency, and the certificate being issued to "ourselves," and the indorsement of Winkleman Bag Company, "Pay on or after October 8, 1914," strongly emphasizes the situation, notwithstanding the Gilchrist testimony, with which the plaintiff bank, under the circumstances, is charged to know at its peril that the deposit was actually made or secured. I am satisfied the plaintiff bank acted in good faith and was misled; but it had such knowledge of the transaction which, with the manner in which the certificate was issued and the indorsement by Winkleman Bag Company, does not show it a holder in due course. Washington Finance Corporation v. Glass, 74 Wash. 653, 134 Pac. 480, 46 L. R. A. (N. S.) 1043; Chaflin v. Farmers' & Citizens' Bank, 25 N. Y. 293; Bowen v. Needles Nat. Bank, supra. It has been repeatedly held that a bank certifying a check without funds is not liable thereon, except to a bona fide holder for value. Bowen v. Needles Nat. Bank (C. C.) 87 Fed. 430, affirmed 94 Fed. 925, 36 C. C. A. 553. The plaintiff does not stand in any stronger position than the Winkleman Bag Company, and the fact that the certificate was issued without consideration must defeat the plaintiff.

Scales v. Ashbrock, 1 Metc. (Ky.) 358, has no application. That suit was between the immediate parties. The liability was one founded on money had and received, and the note was merely evidence of such fact. The other cases cited are to correct contracts in no sense negotiable, and are therefore foreign to this issue.

Decree for defendant.

In re JOHNSON.

(District Court, S. D. Alabama, at Mobile. April 20, 1916.)

No. 1709.

1. BANKRUPTCY ⊂=404(2)—VOLUNTARY BANKRUPTCY—DISCHARGE.

Though Bankr. Act July 1, 1898, c. 541, § 14b, 30 Stat. 550 (Comp. St. 1913, § 9598), precludes more than one discharge in voluntary bankruptcy within a period of six years, an insolvent may have more than one adjudication within the period, and his property distributed among his creditors, though he can obtain but one discharge.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 690; Dec. Dig. ⊂=404(2).]

2. BANKRUPTCY ⊂=391(3)—BANKRUPTCY ACT—ACTIONS IN STATE COURT.

Where, within less than six years after he had obtained a discharge in voluntary bankruptcy, the former bankrupt filed another voluntary petition and was adjudicated a bankrupt, a creditor will not, where his suit does not interfere with the administration of the assets in the hands of the bankruptcy court, be restrained from proceeding with the suit in the

state court, for the bankrupt is not entitled to a second discharge under Bankr. Act, § 14b.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 649–654; Dec. Dig. ⊂⊃391(3).]

3. BANKRUPTCY ⊂⊃391(3)—BANKRUPTCY ACT—ACTIONS IN STATE COURT.

In such case, as the debtor cannot obtain a discharge, and as the bankruptcy court may proceed with the administration of his estate, the creditor will not be restrained from proceeding with his suit in the state court until the bankrupt applies for his second discharge, for such a restraint would give the bankrupt an unconscionable advantage and might defeat the creditor's rights.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 649–654; Dec. Dig. ⊂⊃391(3).]

In Bankruptcy. In the matter of the bankruptcy of Earley Johnson. From an order of the referee, authorizing a creditor to proceed with his action in the state court, the bankrupt appeals. Order affirmed.

Foster K. Hale, Jr., of Mobile, Ala., for bankrupt.

Stevens, McCorvey & McLeod, of Mobile, Ala., for creditor.

HENRY D. CLAYTON, District Judge. The appellee, Holt, filed with the referee his petition, alleging the pendency of his suit in the inferior civil court of Mobile, in which he is plaintiff and Earley Johnson, the bankrupt here, is defendant, and that, upon the suggestion in that court of the bankruptcy proceedings in this court, the suit there against the defendant was stayed. The petition further showed that on September 24, 1912, within six years prior to the institution of the present bankruptcy proceedings, Earley Johnson, the bankrupt here, obtained from this court his former discharge in bankruptcy upon his voluntary petition. The facts stated in the petition were found by the referee to be true, and they are not now controverted. The referee granted the prayer of the petition, and made an order on March 13, 1916, allowing Holt, the creditor of the bankrupt, to further prosecute his suit against the bankrupt in the inferior civil court of Mobile "in all manner and respects as though the bankruptcy proceedings herein had not intervened."

This cause is now submitted for decree on the appeal from such order of the referee. Holt contended before the referee, and now insists, that the bankrupt will not at this time be again discharged in this bankruptcy proceeding, and that his (Holt's) claim will be prejudiced if he be required to wait until such time as the bankrupt may see fit to apply for his discharge. On the other hand, the bankrupt contended, and now insists, that although the pending bankruptcy proceeding was begun on his voluntary petition, and also that although his former discharge in bankruptcy was begun upon his voluntary petition, and six years have not elapsed since such former discharge, he is, nevertheless, entitled to have the suit in the state court stayed until his application for discharge, which has not yet been made, is presented and acted upon by this court.

In the instant case the bankrupt has been accorded on his voluntary petition the right to be adjudicated a second time within six years and

to have his estate distributed by the bankrupt court. The assets consisted of about $25 wages earned by him as fireman for a railroad company. The estate was administered by the bankrupt court by applying said amount as far as it went to the payment of the costs of the pending bankruptcy proceedings. The creditor, Holt, did not file any proof of his claim, nor did he seek to share in the assets surrendered to the bankrupt court.

The argument for the bankrupt is that to allow the creditor to prosecute his suit in the state court would be to deprive the bankrupt of immunity from such suit, which immunity he insists is his present right under the bankruptcy law. In these circumstances the question is whether the bankrupt has such right of immunity, and consequently whether this court should stay the suit in the state court.

[1, 2] It seems to me that to adopt the view urged in behalf of the bankrupt would be to enlarge by judicial construction the act of Congress, and to graft into that law a benefit to a bankrupt debtor and a corresponding curtailment of the right of his creditor to collect his debt by legal process, a benefit to one, a deprivation to the other, that was never intended by the Congress. Of course, in the case at bar the court would be compelled to deny a discharge to the bankrupt. Section 14b of the Bankrupt Act provides:

"The judge shall hear the application for a discharge * * * and investigate the merits of the application and discharge the applicant, unless * * * in voluntary proceedings been granted a discharge in bankruptcy within six years."

Undoubtedly a bankrupt may have more than one adjudication in six years—more than one distribution of his estate through the bankrupt court. But by the terms of the act itself he can have only one discharge under his voluntary proceedings within the six years. Manifestly it was the belief of the lawmaking body that to allow only one discharge within six years would discourage a bankrupt from the repeated filing of voluntary petitions, which constitute by far the larger number of bankruptcy proceedings. In re Neely (D. C.) 12 Am. Bankr. Rep. 415, 134 Fed. 667. It may be said it was believed that if a bankrupt knew, notwithstanding he was adjudicated a second time, he could not be discharged from the payment of his debts oftener than once in six years, he would be deterred from filing a second petition within the proscribed period. If, however, he does file his second petition and is adjudicated thereunder, and the administration of his assets by the bankrupt court is had, then he has been accorded every right to which he is entitled under the law. His right to have suits of creditors stayed must rest upon the ground that either he would be subsequently discharged from their payment, or that to allow the suits to be prosecuted would embarrass the bankrupt court by attempting to subject to the process of the state court property or assets in the custody of the bankrupt court. Neither result can be had in the present case, for none of the debts existing against the bankrupt at the time of his second adjudication can be discharged, and, further, because the assets in the custody of the bankrupt court will in no wise be affected by the suit in the state court.

[3] The contention that the bankrupt has the right to have this court delay the creditors' suit in the state court until such time as the bankrupt may see fit to make his application for a discharge is untenable. In this case the bankrupt has no right to a discharge and should application therefor be made it would be, as before stated, denied. It is well stated in 3 Remington, Bankruptcy (2d Ed.) § 2579, that:

> The bankruptcy court has jurisdiction to administer a debtor's estate, although he has been granted a discharge within six years, whether a discharge is or is not applied for, or can or cannot be granted. Indeed, this bar does not prevent the filing of any number of successive petitions in bankruptcy within the six years. It only prohibits petitions for discharge.

It is not debatable that a bankrupt, having been granted a discharge in his voluntary proceedings, cannot have another discharge either in voluntary or involuntary proceedings in that measure of time between the first discharge and the filing of the application for the second discharge. In re Neely, supra. And in this connection it is my opinion that a bankrupt has no right, by delaying the final hearing upon his second application, to overcome a valid bar existing at this time against his discharge. The rights of the bankrupt and the creditor, respectively, should be determined as they now exist.

The prime purpose of the bankruptcy law is beneficence toward unfortunate debtors—is to relieve them of burdensome financial obligations in those instances deemed proper by the lawmaking power; and, again, it may be said that this law carries with it the other, perhaps secondary, idea that creditors have some rights which must be respected. Clearly it was not the purpose of Congress to afford a debtor, however unfortunate, relief from his debts oftener than once in the six years. It is equally true that Congress did not intend that by resort to bankruptcy the debtor should be allowed indirectly to defeat his creditors of their claims oftener than once within the time prescribed by the law. It is apparent that, if the bankrupt in this case can delay the suit against him in the state court until such time as he may see fit to ask for a discharge, then the bankrupt would be allowed by this court to hinder and probably defeat the creditor in his effort to collect his debt. Neither of these has the bankrupt here the right to do, and he has no just complaint in law or morals against the order of the referee.

Accordingly the findings and order of the referee heretofore made in this matter must be approved. The appropriate decree will be entered.

In re GERROW.

(District Court, E. D. Pennsylvania. June 29, 1916.)

No. 4378.

1. BANKRUPTCY ⊂=345—LIENS—DISTRAINT BY LANDLORD FOR RENT—LIEN OBTAINED.

Where, after levy on the bankrupt's goods, which were in rented premises, and before the filing of the petition in bankruptcy, the landlord distrained the same goods for rent, the landlord, while he did not acquire a lien, was, under Act Pa. June 16, 1836 (P. L. 777) § 83, entitled to priority as to his claim for rent over the general creditors, and such priority prevails in the subsequent bankruptcy proceedings.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 531, 532, 534, 539, 540; Dec. Dig. ⊂=345.]

2. BANKRUPTCY ⊂=353—MARSHALING ASSETS AND SECURITIES—FUNDS—DISTRIBUTION.

Where, on bankruptcy, wage-earners had priority as to all assets realized, while the landlord had priority only as to the proceeds from sale of goods on the demised premises, and the two claims exceeded the whole of the assets, claims of the wage-earners should first be satisfied out of those assets as to which the landlord had no lien, and should not in the first instance be prorated between the several funds, so that, after satisfaction of their claims, a surplus with respect to book accounts would be left subject to the claims of general creditors, while the landlord's priority would be largely defeated.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 541–544; Dec. Dig. ⊂=353.]

In Bankruptcy. In the matter of the bankruptcy of John Gerrow. On certificate of referee concerning claim for rent. Referee's order reversed, and distribution directed.

Julius C. Levi, of Philadelphia, Pa., for trustee.
Henry A. Hoefler, of Philadelphia, Pa., for landlords.

McPHERSON, Circuit Judge. The bankrupt carried on business in a rented building. On April 11, 1912, when the creditors' petition was filed, his goods on the premises had for several days at least been under levy by the sheriff. Moreover, on April 10 the landlords had distrained for rent upon the same goods, although, of course, the distraint was of no effect, as the property was then in the hands of the law.

[1] Nevertheless, the Pennsylvania act of 1836 (P. L. 777, § 83) preserved the priority of the claim (Longstreth v. Pennock, 20 Wall. [87 U. S.] 575, 22 L. Ed. 451; Re Gerson [D. C.] 8 Pa. Dist. R. 277; Re West Side Paper Co. [C. C. A. 3d] 162 Fed. 110, 89 C. C. A. 110, 15 Ann. Cas. 384; Re Keith-Gara Co. [C. C. A. 3d] 213 Fed. 450, 130 C. C. A. 96; Re Kuhn Co. [C. C. A. 3d] 225 Fed. 15, 140 C. C. A. 473; Re Hayward, 130 Fed. 720); and, although the distraint gave no lien, the statute would have preferred the claim over the execution creditors in distributing the proceeds of the sheriff's sale. On April 15 the District Court restrained the execution creditors and the landlords, preserving such claims as they might respectively have upon

the fund to be realized from the sale of the goods, and directed the sale to be made by a receiver. About $4,000 was thus obtained, and afterward the receiver collected book accounts amounting to about $1,000. When these two funds came to be distributed by the referee, their respective totals were reduced by allowances now undisputed to about $2,300 and $800. To these balances there were three classes of claimants—wage-earners, the landlords, and general creditors—and the referee distributed the money in accordance with the following paragraph from his opinion:

"We now have two funds for distribution, the first or landlords' fund, amounting to $2,297.21, and the second or book account fund, amounting to $802.04. As against these two funds the claims of the wage-earners have priority. The landlords contend that they should be paid in full out of the assets of the estate before the payment of any of the wage claims; the trustee in bankruptcy maintains that inasmuch as the claims for wages are entitled to priority over the landlords' claim, both under the law of Pennsylvania and under the Bankruptcy Law, the assets of the estate not subject to the bankrupt's (landlords'?) claim should not be solely chargeable with the payment of the claims for wages, but that the same should be apportioned as against the two funds now in the hands of the trustee, who has succeeded the receiver as the custodian of the assets. I am of the opinion that the contention of the trustee is sound, and that distribution should be made accordingly. The claims for wages certainly have priority over the claim of the landlords. Had the assets been sold by the sheriff, the wages would have been paid out of the fund in his hands prior to any payment to the landlords. The landlords' levy at the time when the goods were in the hands of the sheriff gave them no lien, and secured to them no priority which would now entitle them to rights higher than those of the wage claimants. The fund to which they must look for payment of their claim as a claim entitled to priority of payment out of the bankrupt's assets is also subject to the priority claim of the wage-earners, and the latter are first in the order of priority. It is true that the other assets of the bankrupt estate, to wit, the fund realized from the collection of the book accounts, are also subject to the priority claim of the wage-earners, and are not subject to the priority claim of the landlords, but under the facts as above it would be manifestly inequitable to charge the wage claims against the book accounts and discharge the fund realized from the tangible assets entirely from their payment. * * * I am disposed, therefore, to apply the same method of apportionment in this instance as in the apportionment of the costs, etc. The amount of the wage claims is $1,559.29, and should be paid out of the two funds in the following proportion:

As against the landlords' fund being the balance of.....	$2,297.21
Deduct three-fourths of the claim of wages, amounting to.....	1,169.46
Leaving a net balance on account of landlords' fund of.....	$1,127.75
As against the balance of the fund from book accounts as above..	$802.04
Deduct one-fourth of the amount of the wage claims, amounting to	389.83
Leaving a net balance of the book account fund of.....	$412.21"

[2] This net balance of $412.21 was awarded to the general creditors, among whom the landlords were allowed to participate on the basis of the amount of their claim still unpaid. They complain of the referee's plan of distribution, and contend that the whole of the two funds should have been divided among the wage-earners and themselves—the book accounts going to the wage-earners (whose claim is paramount upon both funds), and the other fund going then to the balance of the wage claims, and afterward to the claim for rent.

In my opinion this position is correct. The wage-earners are preferred on both funds, while the landlords are preferred to the general creditors, but preferred on the larger fund only. As the rent and the wages are sufficient to exhaust both funds, the only question to be decided by the referee was how the funds should be marshaled between these two classes. Here I think the rule is well-settled: The wages had a paramount lien on two funds, while the claim of the rent could only be paid out of one; equitably, therefore, the wages must first exhaust the book accounts, and take the balance only out of the other fund. On what was left, the rent was the first claim under the Pennsylvania statute, and as this claim was larger than the remainder nothing could be awarded to other creditors.

The referee's order of June 4, 1914, is reversed, and distribution is hereby directed in accordance with this opinion.

Ex parte THURSTON.

(District Court, W. D. Washington, N. D. January 6, 1916.)

No. 3128.

1. CRIMINAL LAW ⇐999(1)—COMMITMENT—WARRANT—NECESSITY—RETENTION OF PRISONER.

Where petitioner was delivered by the United States marshal, as directed in the order of sentence, to the United States penitentiary in which he was sentenced to be confined, and a certified copy of the order and record of the conviction was delivered to the warden, the prisoner was properly retained, though no warrant or mittimus was delivered.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2550, 2553; Dec. Dig. ⇐999(1).]

2. HABEAS CORPUS ⇐30(3)—CONVICTION—SENTENCE.

Where the crime for which accused was convicted, and all the proceedings thereon, through trial and verdict up to the conviction and sentence, appear of record, the fact that the judgment of sentence merely sentenced accused to imprisonment in a federal penitentiary, but did not recite the crime of which he was committed, will not warrant his release on habeas corpus, for the whole record, taken together, showed the crime.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 25; Dec. Dig. ⇐30(3).]

At Law. In the matter of the petition of Thomas L. Thurston for writ of habeas corpus. Writ denied.

J. Henry Denning, of Seattle, Wash., for petitioner.

Clay Allen, U. S. Dist. Atty., of Seattle, Wash., for government.

NETERER, District Judge. Petitioner was indicted in the District Court for the District of the Territory of Alaska, Fourth Judicial District, for violation of section 195 of the Criminal Code (Act March 4, 1909, c. 321, 35 Stat. 1125 [Comp. St. 1913, § 10365]), was arraigned, pleaded not guilty, and upon trial before a jury was found guilty as charged in the indictment. The defendant was sentenced to one year and three months imprisonment in the federal prison at McNeil

Island, in this district. He has filed his petition for a writ of habeas corpus, alleging that he is unlawfully restrained of his liberty by the warden of the prison, and prays that he be released and discharged. He claims: First, that no commitment was issued upon which he can be legally held (section 1028, Revised Statutes U. S. [Comp. St. 1913, § 1694]); and, second, that no judgment was entered upon which he could be legally sentenced.

[1] The first objection is answered by the Supreme Court, in Re Wilson, 114 U. S. 417, 5 Sup. Ct. 935, 29 L. Ed. 89, in which the court held that a certified copy of the record of sentence to imprisonment is sufficient to authorize the retention of the prisoner without any warrant or mittimus. In the instant case the United States marshal was directed in the order of sentence to take the prisoner in custody and deliver him to the United States penitentiary at McNeil Island, in which he was sentenced to be confined for the time given, and a certified copy of the order and record of conviction was delivered to the warden of the prison.

[2] The second objection is disposed of by the Supreme Court in Pointer v. U. S., 151 U. S. 396, 14 Sup. Ct. 410, 38 L. Ed. 208, which holding was followed in Sandy White v. U. S., 164 U. S. 100, 17 Sup. Ct. 38, 41 L. Ed. 365. The specific objection of the petitioner is that the order of sentence does not state the offense of which he was convicted or that he was guilty of any crime. Judgment entered recites as follows:

"And the court having asked the defendants and each of them if there was any reason or cause why judgment should not be pronounced, and it appearing to the court that no reasonable cause exists why judgment should not be pronounced: Now, therefore, it is the judgment of the law and the sentence of this court that the defendant, Thomas L. Thurston, be confined in the United States Penitentiary at McNeil Island for a period of one year and three months, and that he be committed to the United States marshal for the Fourth division, territory of Alaska, for the execution of this sentence, and said marshal is hereby ordered to take said defendant, Thomas L. Thurston, in custody and deliver him to the United States penitentiary at McNeil Island, state of Washington, as in this judgment provided."

This judgment is certified by the clerk of the court. From the facts as disclosed by the record in this case, it is clear that the crime for which the prisoner was indicted, and all the proceedings thereon through trial and verdict up to conviction and sentence, fully appear in the record, and all parts of the record must be considered together, and, if a deficiency in one place can be made up by giving effect to other portions of the record, it must be done (1 Bishop, Criminal Procedure, §§ 1347, 1348; Pointer v. U. S., supra), and the failure in the sentence to name the crime for which the prisoner is sentenced is not fatal, where this is supplied by reference to other parts of the record of the trial (Pointer v. U. S., supra), and this manifestly appears from the record in this case.

The petition for writ will be denied.

GOLD HUNTER MINING & SMELTING CO. v. JOHNSON.

(Circuit Court of Appeals, Ninth Circuit. July 3, 1916.)

No. 2667.

1. MASTER AND SERVANT ⟸118(1)—INJURIES TO SERVANT—SAFE PLACE OF WORK.

Where miners were required to use ladders going through tunnels to the levels on which they worked, it is the duty of the mine operator to use reasonable care in furnishing and keeping the ladders in a safe condition, so that the miners might reach their place of work.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 209; Dec. Dig. ⟸118(1).]

2. MASTER AND SERVANT ⟸127—INJURIES TO SERVANT—DUTIES OF SERVANT.

A miner, whose duties consisted of drilling, is not required to repair ladders necessary to enable him to reach the level on which he worked.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 252; Dec. Dig. ⟸127.]

3. MASTER AND SERVANT ⟸289(16)—INJURIES TO SERVANT—JURY QUESTION.

Whether a miner, injured while walking on the lagging in a manway leading from one level to the other, was guilty of choosing the most dangerous way merely for his own convenience, instead of using other ways, *held* under the evidence for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1107; Dec. Dig. ⟸289(16).]

4. TRIAL ⟸139(1), 140(1)—PROVINCE OF COURT AND JURY—CREDIBILITY OF WITNESSES.

The credibility of witnesses and the weight of their testimony is for the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332, 333, 334, 338–341; Dec. Dig. ⟸139(1), 140(1).]

5. MASTER AND SERVANT ⟸221(4)—INJURIES TO SERVANT—ASSUMPTION OF RISK.

Ladders in a manway in a mine leading from one level to another were broken, and plaintiff, a miner, was injured while making his way from one level to another by walking on lagging or planks in the manway. He had pointed out the defect to his boss, and had been assured it would be remedied, and was told in the meantime to use such planks. *Held* that, as it was the only practical way furnished, he did not, during the interim, assume the risk of injury from the use of such way.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 642; Dec. Dig. ⟸221(4).]

6. MASTER AND SERVANT ⟸289(34)—INJURIES TO SERVANT—JURY QUESTION.

Whether a miner was negligent in carrying his drill with him as he made his way by planks from one level of the mine to the other *held* under the evidence for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1126; Dec. Dig. ⟸289(34).]

7. MASTER AND SERVANT ⟸288(15)—INJURIES TO SERVANT—JURY QUESTION.

What is a reasonable time for a master to make needed repairs to a ladder used in a mine *held* under the evidence for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1085; Dec. Dig. ⟸288(15).]

8. MASTER AND SERVANT ⟸289(15)—INJURIES TO SERVANT—JURY QUESTION.
Whether the danger of using planks in a manway in a mine in place of the ladder, which had been broken, was so obvious that the miner was guilty of contributory negligence, though repairs had been promised, *held* for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1106; Dec. Dig. ⟸289(15).]

9. TRIAL ⟸260(8)—INSTRUCTIONS—REFUSAL.
Where, in a servant's action, the jury were charged that he assumed the risk of injury from dangerous conditions in his place of work, unless he continued work in reliance on a promise of repairs, the refusal of an additional instruction that the servant assumed such risks was not error; it being covered by the one given.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 657; Dec. Dig. ⟸260(8).]

10. TRIAL ⟸252(1)—INSTRUCTIONS—ERRORS.
In a servant's action, where assumption of risk was relied on it is not improper for the court, in explaining the matter to the jury, to illustrate the doctrine by references to more simple employments and the most simple appliances.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 596, 612; Dec. Dig. ⟸252(1).]

In Error to the District Court of the United States for the Northern Division of the District of Idaho; Frank S. Dietrich, Judge.

Action by Edward Johnson against the Gold Hunter Mining & Smelting Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

James A. Wayne, of Wallace, Idaho, and J. F. Ailshie, of Cœur d'Alene, Idaho, for plaintiff in error.

Walter H. Hanson, of Wallace, Idaho, and John P. Gray, of Cœur d'Alene, Idaho, for defendant in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge. Edward Johnson, defendant in error here, but who, for convenience, will be called the plaintiff, recovered verdict and judgment against the Gold Hunter Mining & Smelting Company, plaintiff in error here, but who will be called the defendant, for injuries received while he was working in the defendant's mine in Shoshone county, Idaho, on October 17, 1914. Writ of error is brought by the defendant company.

Plaintiff was a machine man on the night shift on the 400-foot level of the mine. He alleged that, finding his drill out of repair, it became his duty to take the drill to the level, and along the level to the shaft, and thence to the main station in the mine on a higher level, and exchange it for another drill; that in order to reach the shaft he had to go down from one floor to another of the 400-foot level; that manways had been provided for reaching the floors above the 400-foot level, and that to enable employés to go from the level to the floors above ladders were constructed and installed; that in the stope were two manways, one extending from the 400-foot level in the westerly end of the stope forward to the third floor, and the other extending

from the 400 level toward the easterly end forward to the fourth floor; that the manway in the westerly end of the stope had not been extended to the fourth floor, and because of a large chute extending from the third floor down to the 400 level, and a slide chute from the bottom of the third floor to the fourth floor, which covered the width of the floors, and because of the opening at the top of the chute on the floor of the third floor, and a large broken floor area, plaintiff found it impossible to go from where he was working to the manway in the west part of the stope, and the only way to reach the 400 level was downward in the easterly end of the stope and east of the large chute; that the stopes on the floors had been extended somewhat easterly from the manway, and the face of the solid ground on the east extended somewhat beyond the timbering on the floors; that ordinarily the way to go from the fourth floor down to the 400 level would be by the manway in the easterly end of the stope; that plaintiff, after taking down his machine, took it to the manway and down from the fourth to the third floor by the ladder; that the ladder from the second to the third floor had been broken by a rock fall two or three days before, and had not been repaired, and there was no way of going by the manway from the third to the second floor in the east end of the stope except by way of a plank or lagging 8 inches in width, which had been laid by the defendant at the easterly end of the floor, then walking along the plank from the third floor to the face of the stope in an easterly direction, and then back in a westerly direction along the slope of the face of the stope to the second floor; that the lagging was inclined downward from the third floor toward the face, and was insecure, with no rails or guards; that under the lagging the second floor had not been timbered out to the solid ground, but had an opening from the lagging downward to the first floor or solid ground; that plaintiff, having no other way provided by defendant, went along the third floor to the lagging or plank, and while walking along the plank, and because of the negligence of the defendant in providing such unsafe way, plaintiff either slipped, or the lagging turned slightly, throwing plaintiff off and downward 20 feet to the first floor, with the steel drill falling on top of him and injuring him; that on the shift before that on which plaintiff was hurt plaintiff called the attention of the shift boss to the fact that the ladder between the second and third floors was broken and that it was necessary to repair it, and that the shift boss promised plaintiff that he would cause the same to be repaired and replaced, and would speak to the foreman of the mine, and that it would be replaced, and gave assurances to plaintiff to that effect; that he told plaintiff to use the way which plaintiff was going at the time of his injury until the ladder was replaced and the manway repaired; and that plaintiff, relying upon the promise of the shift boss to repair, continued in the employ of the defendant.

The defendant admitted that by falling from the lagging plaintiff was injured, but denied all charges of negligence or carelessness. Its contention was that the so-called east manway was not permanent, but was built for use of miners to permit them to get to the chute near

the east manway to clean the same; that defendant furnished its employés with a safe manway, provided with proper ladders, near the west end of the stope, and the only proper way for Johnson to have descended from the place where he was working on the fourth floor to the sill floor on the night he was injured was to use the ladder from the east end of the stope from the fourth to the third floor, then go along the third floor, passing the timber slide, ore chute, and inclined chute, to the west manway, and go down by means of this west manway upon the ladders. Defendant also pleaded that it did not know of the existence of this plank until after the accident, and denied that plaintiff had ever notified the shift boss of the existence of the plank, or made any complaint whatever, and further alleged that it had provided a rope and windlass in the timber slide for the purpose of sending machines up and down between floors, and that plaintiff ought to have used this timber slide in sending down his machine, rather than to have carried it. Contributory negligence and assumption of risk were also pleaded.

Upon the trial John Holmi, a mucker, working on the 400, or highest, level in the stope with Johnson on the night of the accident, described the four floors in the mine, and said that he was standing on the muck pile, that there was an ore chute extending through the second and third floors down onto the level, and that there was a slide chute diagonally from an old chute to the fourth floor. Holmi said that he was mucking ore down the slide chute; that there was a hole in the fourth floor, and that the ore ran down into the ore chute; that the slide chute was not very wide, but was filled up between the posts, about 8 feet long, 4 feet or less; that the top of the ore chute was open approximately 3 feet across the drift, and that the opening of the ore chute extended across the stope of the floor, he thought, the whole way; that there was muck about the opening; that he saw the ladders extending to the third floor; that the manway on the west side extended up to the third floor; that the ladder between the second and third floor on the east side was broken several nights before Johnson was hurt; that on the night Johnson was hurt he could not get up the ladder, because it was broken to pieces; that there was muck and rock around it; that on the night of the accident he went to the first floor by the ladder, and to the second floor by the ladder, and then went over to the face and went up by the lagging from the face onto the third floor, and then went up a ladder to the fourth floor; that that was the best way, as the other manway was so dangerous a man might kill himself going over the chute; that between the posts and the wall about the slide chute on the night of the accident it was full of muck; that Johnson started to drill holes, and, saying he had to get a better machine, took his machine to go down the way Holmi says he (Holmi) had come up; that the next thing he knew was a call from Johnson, who had fallen to the first floor; and that he found Johnson on the first floor with the machine on one side of him. Witness said that the plank from the third floor was about 6 feet long and 3 inches thick and 8 inches wide; that there was no rope or railing or guard; that he helped himself down with

his hand, and walked along and came to the second floor; that the first night he worked there he went from the second floor up to the third floor on the ladder, which was afterwards partly broken; that he knew there was a west manway completed from the sill floor to the third floor, but that he never went in that way, except on the first night; that on the night Johnson was hurt he could have gone up the west manway to the third floor, but that he could not walk along the third floor past the slide chute to the wall near the easterly end of the slope and up that ladder to the fourth floor, because they had to come between the posts over the slide and the hole was open. Witness then attempted to describe the space between the walls or the side of the stope on the third floor and the timber slide, but it is difficult to apply his descriptions, because he referred to a diagram and evidently used his hands to illustrate his meaning. But, as we understand it, he said there was nothing on one side of the wall, and on the other side there was some space down near the bottom—about 8 inches wide. Witness said that the side or wall of the stope went upward on a slant; that the first night he worked there he stooped and went sidewise, but passed between the side of the stope or the wall of the stope and posts; that the lagging was 6 feet long, with the upper end on a cap, the lower end on a rock edge of the stope, the decline being 2½ to 3 feet.

Johnson, the plaintiff below, after stating that he was 33 years old and was an experienced miner, testified that he had worked several weeks on the fourth floor on the 400 level; that Steve Shaw was his shift boss; that he started to drill, but that his machine leaked, and that, in accordance with the general order of the shift boss, previously given, he was taking the machine to the station to get another one; that when he went to work that night he went up the ladder on the east end of the stope from the drift to the first floor and out, and then up to the second floor; that the ladder from the second to the third floor was broken; that the plank was there, and the rocks had come down out of the hole through the manway and broken the way; that he went over to the face and walked upon the plank or lagging onto the third floor; that he then went up the ladder to the top floor; that the ladder was partly broken the third night before; that the night before the injury the hole was blocked up, and he went up by the face and the plank; that the only way he could go up was that way, because the slide chute was across the stope on the third floor, and the men could not come by the slide chute, because behind it it was filled up with muck. Johnson, continuing, said:

"There was a little hole between the post—the posts was laying straight here (indicating), but there was a little hole down on the bottom of the posts, between the ground and this post, but that was all filled up with muck the night before I got hurt already. I couldn't get by that nohow. I don't see no chance to get by."

He said that Shaw, the shift boss, came up and asked him how he (Johnson) got up; that he said to Shaw, "You have to go like a rabbit on the timbers here, but you better get a ladder here," and that Shaw said:

"Yes, I get the timber men to put the ladder over there. * * * You go that way now, on that plank, so long as the timber men come up here. I get the timber men up here as quick as I can, to put that ladder there."

Witness said it was the duty of the timber men to put the ladders up; that timber men worked on the night shift at that time. This question was then asked:

"Q. Was there anything else said about ladders? A. No; he said he go and fix that. He said he give the foreman orders already the day before; that he sent the ladder in, you know; that he gave orders to make the ladder and send in the ladder."

The ore chute was described by Johnson as made between the posts and the wall. He said that they had to open up the floors, and then the rock broke the floor more, and the whole floor was up, and that the sides filled up with muck, about eight inches on the side along the wall; that there was muck on the plank, the muck going over the chute on each side; that the slide chute extended from post to post; that the ore chute was open across the drift, with only a narrow plank on one side, the other side being broken to the hanging wall; that around the top of the ore chute there was rock lying around; that there was about eight inches of space on the hanging wall side; that the manway on the west end only came up to the third floor; that he had to use the way he did the night he was hurt the night before for the first time; that when his machine leaked he took it on his shoulder and walked as long as he had room to walk with the machine on his shoulder, and then he took it in his hand when the ground was too low and had to bend down and "pack" it in his arms; that he went on the ladder down to the third floor and walked through the third floor to the end and walked a little ways on the plank, "and then I don't know how it happened: I don't know if that plank turned a little and my foot slipped—everything happened so quick that I couldn't tell which way it went there." On cross-examination Johnson said that he had worked on the second and third floors, and after stoping out rock and ore for the height of a floor, they had put in a manway and put a ladder in; that he knew there was a manway to the third floor provided with ladders; that the ladder in the east manway was broken; that he had previously gone up the west manway; that the timber slide extended from the sill floor clear to the fourth floor, the fourth floor being filled up with muck; that the timber slide came to the third floor and had a hoist apparatus—a hand hoist with a chain for fastening to objects, which plaintiff himself had used at times, but that he had always carried his drill, which weighed about 75 pounds, on his shoulder; that the "nipper," who often took machines down, had gone by already that night, and that he might have had to wait all night for him to come around again and to help him; that the only way he could go was that which he used; that after the ladder was broken he had been over the plank a few times in getting steel; that there were no lights, except the candle he used; that he saw no ladder in the stope.

On the defense, the shift boss denied that he had any conversation with Johnson concerning the broken ladder, denied that Johnson had

ever complained to him of any broken ladder, and said that he did not know of the plank which Johnson said he was upon when he fell; that he was in the fourth and third floors soon after the accident, and there was at least 2 feet of space between the wall and ore chute in which to walk by the ore chute on the third floor, and that it was not difficult to go in that way; that the top of the slide chute was 3 to 3½ feet wide, and the bottom where it goes to the ore chute about 2 feet or a little more; that the slide chute was made by Holmi and another man two shifts before the accident; that the way for a man to go was the west end, where there were ladders to the third floor, then east past the timber slide, and then up a ladder at the east end; that the timber slide was used to take machines and such things up to the third floor, and the men were told to take them up the timber slide; that it was clean about the ladder in the east end, when he was there soon after the accident; that he knew the men had gone by way of the east manway; that the east manway was to come up to the rock chute on the second floor; that the rock chute extended from wall to wall on the third floor; that the slide chute was about 2 feet or more on the third floor, and that a man could not get behind the post there; that there had been a ladder from the second to the third floor before the accident; that it was partly covered at the top that night, and the manway was partly covered.

Lamberton, the nipper, testified that he went up and back by the plank on the night of the accident, but that there were ways on the west by which one could go to the third floor, and then by the chute to the east, and then up; that a man could pass the chute with a drill in his arms; and that there was a windlass in the timber chute.

Another witness, the car man, testified that he had been up to the fourth floor the night before the accident, and that he got there by going up on the west end to the third floor, and then up the ladder at the east end to the fourth floor; that he had built the slide chute with the help of Holmi about two nights before the accident; that it was about 2½ feet wide at the bottom and a foot or more wider at the top; that when he passed it he went on the footwall side and had about 2 feet of space on the footwall; that there was lagging below at the bottom and dirt on top; and that a man could go by with a drill machine.

Ashland, a practical miner, who worked in the mine after Johnson was hurt, testified that he took Johnson's place after the accident, and that he found no ladder from the second to the third floor, and climbed up on a bench and up on a plank upon the fourth floor; that he found the plank or lagging lying flat on top of the cap and down to the bench against the face, with the lower end about a couple of feet below the upper end; that he came down past the slide chute to the west manway, and had no trouble to go by the slide chute, as there was over 2 feet between the slide chute and the wall of the stope; that in walking by the slide chute he walked on plank and some timbers they put over the ore chute; that there was very little muck or rock—about a foot thick on the floor.

The defendant seeks a reversal: (1) Because the court erred in submitting the question of negligence to the jury; (2) because the court

refused to instruct as defendant requested in relation to ways by which plaintiff could have walked; (3) because the court refused to instruct as defendant requested with relation to assumption of risk and appreciation of danger; (4) because the court erred in referring in its charge to the jury to instructions which had been given in a preceding trial; (5) because the court erred in the use of an explanation employed in its instruction upon the use by an employé of a defective implement or dangerous place; and (6) because the court erred by charging the jury in part as follows:

"The plaintiff cannot recover unless the defendant was negligent, and unless such negligence contributed to or caused the accident."

[1, 2] Adverting to the points 1, 2, 3, and 6: In our judgment the case was one well within the principle which made it the duty of defendant to use reasonable care to provide the plaintiff with a safe place in which to work, and to inspect the places where plaintiff was working, and to keep such places and the entrances thereto in reasonably safe condition, and by the indisputable evidence it was no part of the work or duty of the complaining servant to repair or replace defective or broken ladders, which would enable him to go from one place to another.

[3, 4] Whether or not plaintiff could reasonably have used the west manway from the third floor, and in doing so have followed a way to the east manway, yet, merely for his own convenience, and carelessly, chose to use the plankway, involved a consideration of all the evidence in the case, and called for fair deductions from the evidence as matters of fact and not of law. Reference to the evidence shows that Johnson stated that the floor over the ore chute on the third floor was open from one wall over to a place within 8 inches of the other wall, and that in the 8-inch space muck and rock had accumulated, and that there was no chance to get through that way with his drill. It is true the testimony of the defendant was to the effect that there was little or no muck between the slide chute and the wall, and that there was from 2 to 2½ feet of open passageway between the slide chute and the wall. These statements demonstrate serious conflict upon material points. There was also a sharp conflict as to whether Johnson and Shaw, the shift boss, had had any conversation concerning the ladder from the second to the third floor. Johnson says it was broken, and that he told Shaw it was broken, while Shaw says nothing at all was said about the matter. It was for the jury to say which witness was accurate. Gila Valley Railway Co. v. Hall, 232 U. S. 94, 34 Sup. Ct. 229, 58 L. Ed. 521. There was also direct contradiction in the evidence concerning knowledge by the shift boss of the use of the plank at the east end of the stope extending from the bench up to the third floor. Plaintiff's evidence tended to show that he and Holmi used the plank the night before plaintiff was injured, and on the night of the injury, and also that Shaw, the shift boss, went up to the fourth floor that way the night before the accident. On the other hand, Shaw, in effect, said that he did not know that there was a plank, such as plaintiff's witnesses described, and, if there was, he did not know who put it in.

[5, 6] The court, in its instructions, directed the attention of the jury to the fact that there was evidence tending to show that there was another way of going to and coming from the place in the fourth floor where Johnson was at work, and, after stating to the jury that there was a conflict of evidence upon the point, instructed that if the jury found that going by the rock chute or slide was a reasonably safe way, and that plaintiff knew of its existence, and instead of using it, for his own convenience, carelessly used the more dangerous way, then he could not recover, because his injuries would, upon that assumption, be the result of his own carelessness in taking a dangerous way, when one reasonably safe was open for his use. Undoubtedly the more immediate, direct cause of the injury to Johnson was the use of the plank. The theory of the plaintiff, however, is that the ladder having been broken, and having become useless, and having been assured that it would be repaired, plaintiff, in the performance of his duty, had to take his drill down for repair, and having found the rock chute way practically impassable, and having been told to use the plankway, was not careless in going that way, and had a right to assume that his employer had used reasonable care to make the way it directed him to take a safe one. If the defendant was negligent in not furnishing him a safe way—and by a safe way we mean, of course, a way safe, considering the dangers normally incident to the hazardous employment plaintiff was engaged in—plaintiff is not to be regarded as having assumed the risk from a faulty construction or way that is attributable to his employer's lack of proper care, unless he knew of such defect, or unless it was so plainly observable that we must presume he knew of it.

In Seaboard Air Line v. Horton, 239 U. S. 595, 36 Sup. Ct. 180, 60 L. Ed. 458, we have one of the latest expressions of the Supreme Court upon the law applicable to the assumption of risk by an employé who uses a defective appliance under an assurance by his employer that it would be repaired:

"'When the employé does know of the defect (arising from the employer's negligence), and appreciates the risk that is attributable to it, then if he continues in the employment, without objection, or without obtaining from the employer or his representative an assurance that the defect will be remedied, the employé assumes the risk, even though it arise out of the master's breach of duty. If, however, there be a promise of reparation, then during such time as may be reasonably required for its performance, or until the particular time specified for its performance, the employé, relying upon the promise, does not assume the risk, unless at least the danger be so imminent that no ordinarily prudent man under the circumstances would rely upon such promise.'"

In Southwestern Brewery v. Schmidt, 226 U. S. 162, 33 Sup. Ct. 68, 57 L. Ed. 170, the Supreme Court said:

"It is the well-settled law that for a certain time a master may remain liable for a failure to use reasonable care in furnishing a safe place in which to work, notwithstanding the servant's appreciation of the danger, if he induces the servant to keep on by a promise that the source of trouble shall be removed."

For this doctrine the Supreme Court cites its earlier opinion in Hough v. Texas & Pacific Railroad Co., 100 U. S. 213, 25 L. Ed.

612. And in the very late case of Chesapeake & Ohio Railway Co. v. De Atley, 241 U. S. 310, 36 Sup. Ct. 564, 60 L. Ed. 1016 (May 22, 1916), the Supreme Court said:

"According to our decisions, the settled rule is, not that it is the duty of an employé to exercise care to discover extraordinary dangers that may arise from the negligence of the employer or of those for whose conduct the employer is responsible, but that the employé may assume that the employer or his agents have exercised proper care with respect to his safety until notified to the contrary, unless the want of care and the danger arising from it are so obvious that an ordinarily careful person, under the circumstances, would observe and appreciate them."

We agree with the defendant in its argument that plaintiff could not recover under the facts, unless he brought himself within the exception discussed by the Supreme Court, by showing that the defendant company assured him it would replace the broken ladder and that plaintiff continued his work and used the plankway necessarily and in reliance upon such assurance. Regard must be always had to the situation Johnson was in. It was his duty to do his work, and in doing it he had to take his drill, which weighed about 75 pounds, to another level to be repaired. In effect he says he found one way impassable, another out of repair, and that the plankway was the one he had been directed by the shift boss to use. He had been over the plankway himself before he was hurt, and it was for the jury to say whether he was reckless or negligent in taking his drill that way on the night he was hurt. Upon this matter the court charged in part as follows:

"Suppose that you are convinced, first, that at the time of the accident and for a few days prior thereto the defendant had provided no reasonably safe way for the plaintiff and others to use in going to and coming from their place of work, I say, suppose you find such to be the situation, and, second, suppose that the plaintiff was aware of this condition, and, by reason of his age, intelligence, and experience as a miner, he was able to appreciate the perils, then the general principle or rule is that by continuing to use the dangerous way, or one of the dangerous ways, so appreciated, he assumed the risk of injury; that is, by continuing in the employment, he, in effect, said to the defendant that he would not hold it responsible for any accident which might occur from such use. But—and here is the exception heretofore stated in general language—if, under such circumstances, the plaintiff (that is, Mr. Johnson) called the dangerous condition to the attention of the defendant's representative, its shift boss, and the defendant, through the shift boss, thereupon promised to remedy the defect or to provide a safe way, and, in reliance upon such promise, the plaintiff continued to work, and therefore necessarily used a way of getting to his work or coming from it which involved a measure of peril for a time, not of unreasonable duration, and consequently suffered injury on account of such unsafe way, then he is not necessarily debarred from recovering by the general rule of assumption of risk; that is, if there was a promise to provide a safe way, it is for you to say whether under all the circumstances and in view of such promise the plaintiff was wanting in reasonable care in continuing in the employment of the defendant, and, in the course thereof, using the way which he did use in getting to and from his work."

In Kane v. Northern Central Railway, 128 U. S. 91, 9 Sup. Ct. 16, 32 L. Ed. 339, the Supreme Court said:

"It is undoubtedly the law that an employé is guilty of contributory negligence, which will defeat his right to recover for injuries sustained in the

course of his employment, where such injuries substantially resulted from dangers so obvious and threatening that a reasonably prudent man, under similar circumstances, would have avoided them if in his power to do so. He will be deemed in such case to have assumed the risks involved in such heedless exposure of himself to danger. * * * But in determining whether an employé has recklessly exposed himself to peril, or failed to exercise the care for his personal safety that might reasonably be expected, regard must always be had to the exigencies of his position, indeed, to all the circumstances of the particular occasion."

Defendant argues that the complaint made by Johnson to the shift boss was insufficient, and that the assurance of the shift boss, if made at all, was not enough to relieve plaintiff of the assumption of risk incident to the use of the plank. But if the story of the plaintiff was credible, and the jury has accepted it, in very definite way he called the attention of the shift boss to the condition of the ladder, and was told by him that it would be renewed, and was given to understand that renewal would be had very soon, and that until it was replaced or repaired the plank was the proper way to get down to the lower floor.

[7] Defendant urges that the plaintiff assumed the risk by continuing to work after the expiration of a reasonable time within which to replace the ladder between the second and third floors. We believe, however, that under the evidence the question of what was a reasonable time was one for the jury. Without recapitulating the testimony, it is very clear to us that it was not for the court to say that, under all the circumstances, a reasonable time between the assurance to repair and the accident had elapsed. In this respect the case is quite unlike that of Coulston v. Dover Lumber Co. (Idaho) 154 Pac. 636, cited by defendant.

What we have said meets to a great extent the argument of the defendant that a promise to repair does not relieve the servant of assuming the risks incident to the use of instrumentalities of simple construction. We must not lose thought of the fact that Johnson had not complained of any defect in any tool or instrumentality that he was using and which caused his injury. His complaint was that the way by which he reached the point where he had to do his work was not safe. By all logical reasoning, the doctrine of promise to repair or make a way safe applies. As Judge Taft, in Narramore v. Cleveland, etc., R. Co., 96 Fed. 298, 37 C. C. A. 499, 48 L. R. A. 68, said, in referring to the doctrine of assumption of risk, in relation to dangers which the servant agreed, expressly or impliedly, to assume:

"It makes logical that most frequent exception to the application of doctrine by which the employé who notifies his master of a defect in the machinery or place of work, and remains in the service on a promise of repair, has a right of action if injury results from the defect while he is waiting for the repair of the defect, and has reasonable ground to expect it. * * * From the notice and the promise is properly implied the agreement by the master that he will assume the risk of injury pending the making of the repair."

See Labatt on Master and Servant (2d Ed.) § 1345; Highland Boy Gold Mining Co. v. Pouch, 124 Fed. 148, 61 C. C. A. 40; Hermanek v. Chicago & N. W. Railway Co., 186 Fed. 142, 108 C. C. A. 254;

Myhra v. Chicago, M. & P. S. Railway Co., 62 Wash. 1, 112 Pac. 939.

[8] To the contention that the danger in using the plankway was so imminent that the assurance of the shift boss cannot aid the plaintiff's case, the answer is that whether plaintiff was guilty of contributory negligence was a question to be answered by the jury under the full instructions which were submitted to them. Again we quote from Seaboard Air Line v. Horton, supra, where the court said:

"There is a substantial difference in the attitude of the employé towards the known dangers arising out of defects attributable to the employer's negligence, depending upon whether there has or has not been a promise of repair. It was clearly expressed in a well-reasoned opinion by the Supreme Court of New Jersey (Dowd v. Erie R. R. Co., 70 N. J. Law, 451, 455 [57 Atl. 248, 249]) thus: 'To the rule that the servant assumes the obvious risks of the employment, an exception is made where the master has promised to amend the defect or to make the place safe, and the servant continues the work in reliance upon the promise. * * * The master is exempted from liability in the case of obvious risks for the reason that the servant, by continuing in the employment with knowledge of the danger, evinces a willingness to incur the risk, and upon the principle "volenti non fit injuria." But when the servant shows that he relied upon a promise made to him to remedy the defect, he negatives the inference of willingness to incur the risk.' To relieve the employer from responsibility for injuries that may befall the employé while remaining at his work in reliance upon a promise of reparation, there must be something more than knowledge by the employé that danger confronts him, or that it is constant. The danger must be imminent—immediately threatening—so as to render it clearly imprudent for him to confront it, even in the line of duty, pending the promise."

See Chesapeake & Ohio Ry. Co. v. Proffitt, 241 U. S. 462, 36 Sup. Ct. 620, 60 L. Ed. 1102.

[9] Point 4 in the assignments of error is based upon the refusal of the court to give a requested instruction, substantially as follows: An employé who knows and appreciates the hazard of his service, and the risk which is apparent to ordinary observation, assumes the risk incident to the same, and where the defect is as obvious and well known to the employé as well as to the employer, the employé assumes the risks thereof as one of the ordinary risks of business or employment; and if Johnson was found to have known that the defect or danger was one which he knew and appreciated as well as the defendant, then it was such a risk as he, as an employé, assumed. Careful examination of the charge shows that the court told the jury that if an employé, knowing of a dangerous condition, and by reason of his age and intelligence and experience is able to appreciate the peril from such dangerous conditions in the place where he works, then the general rule is that he impliedly agrees to take the chance and to relieve his employer from responsibility. The jury were again told that if the plaintiff, knowing of the dangerous condition complained of, went ahead and worked and used a dangerous passageway, he could not, under general principles, recover, unless he brought himself within the exception to the rule of assumed risk; the exception being a promise to remedy the defect, or to provide a safe way, and reliance upon such promise.

[10] Error is assigned (5) because the court in its charge to the jury by way of illustration stated that if one of the jurors, being a farmer, employed a farmhand and put into his hands an ax or pitchfork with a cracked handle, and the employé knew nothing about it, and used the device ignorant of the weakness of the handle, and was injured as a consequence, then the employer is held responsible for his negligence in not furnishing him with a reasonably safe device; but if, placing the ax or pitchfork in the hands of his employé, he calls his attention to it, and the employé is able to appreciate, as is the employer, the danger of using the pitchfork or ax in that condition, then, if he goes on and uses it, he can make no complaint if he suffers injury, because he impliedly agrees to take the chance. The illustration by the court was to make plain to the jury the principle that if the plaintiff knew of the dangerous condition of the place, and went ahead and worked there and used a dangerous passageway, he could not recover, unless, as fully explained, he brought himself within the exception to the rule included within the doctrine of assumed risk. We cannot see how the illustration could in any possible way prejudice the rights of the defendant.

What we have said disposes of the more material points in the case. Our conclusion is that the case was properly submitted under correct instructions, and that there was no prejudice to defendant's rights.

Affirmed.

POLLACK v. MEYER BROS. DRUG CO. et al.

(Circuit Court of Appeals, Eighth Circuit. May 4, 1916.)

No. 145.

(Per Smith, Circuit Judge.)

1. BANKRUPTCY ⊂=417(4)—PLEADING—APPLICATION OF EQUITY RULES.

A court of bankruptcy is an equity court, and subject to new equity rule 29 (198 Fed. xxvi), abolishing demurrers in equity suits.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 871; Dec. Dig. ⊂=417(4).]

2. PLEADING ⊂=406(3)—DEMURRER—WAIVER BY PLEADING OVER.

The filing by a bankrupt of an answer to a petition by creditors to reopen the estate was a waiver of any error in a prior order overruling his demurrer, conceding that a demurrer could properly be entertained in such case.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1358; Dec. Dig. ⊂=406(3); Action, Cent. Dig. § 564; Replevin, Cent. Dig. § 208.]

Sanborn, Circuit Judge, dissenting.

3. BANKRUPTCY ⊂=417(4)—REOPENING ESTATE—HEARING BEFORE REFEREE.

On the hearing of a petition to reopen a bankrupt estate, the referee may properly take judicial notice of facts appearing in his own records of the original case.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 871; Dec. Dig. ⊂=417(4).]

4. BANKRUPTCY ⟸20(1)—PROPERTY PASSING TO TRUSTEE—FUND HELD IN TRUST.

That a fund in which a bankrupt had an interest was held in trust during the life of another by a trustee appointed by a state court did not deprive the court of bankruptcy of jurisdiction to administer such interest subject to the trust.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. ⟸20(1).]

5. BANKRUPTCY ⟸30—SCHEDULES—PROPERTY TO BE INCLUDED.

Under the form for schedule prescribed by General Orders in Bankruptcy No. 38 (18 Sup. Ct. iv), which requires a bankrupt to report "property in reversion, remainder, or expectancy," it is his duty to schedule any interest he has in property, real or personal, either in remainder, vested or contingent, or in expectancy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 27–29; Dec. Dig. ⟸30.]

Sanborn, Circuit Judge, dissenting.

(Per Trieber, District Judge.)

6. BANKRUPTCY ⟸143(10)—PROPERTY PASSING TO TRUSTEE—TRANSFERABLE INTEREST.

Any interest of a bankrupt in property or a fund which he could by any means have transferred passes to his trustee, although it may not have been subject to seizure on execution against him.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 224; Dec. Dig. ⟸143(10).]

7. BANKRUPTCY ⟸143(1)—REMAINDERS ⟸12—PROPERTY PASSING TO TRUSTEE—VESTED REMAINDER.

By decree of a state court a fund was placed in trust, the income to be paid to the mother of the bankrupt during her natural life, and any deficiency in the income below a sum sufficient to give her a reasonable and comfortable living to be made up out of the principal. On her death the remaining principal, after paying expenses of her last illness and funeral, was to be equally divided between her children named, of whom bankrupt was one. At the time of the bankruptcy the mother was still living and the principal of the fund was intact. *Held*, that bankrupt's interest in the fund was a vested remainder, which passed to his trustee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 194, 204; Dec. Dig. ⟸143(1); Remainders, Cent. Dig. § 3; Dec. Dig. ⟸12.]

Sanborn, Circuit Judge, dissenting.

Petition to Revise Order of the District Court of the United States for the Eastern District of Missouri; David P. Dyer, Judge.

In the matter of Joseph Pollack, bankrupt. Petition by the bankrupt to revise an order made on petition of the Meyer Bros. Drug Company and other creditors, reopening the estate. Order affirmed.

Benj. J. Klene, of St. Louis, Mo., and Charles B. Selby, of Oklahoma City, Okl., for petitioner.

Anthony F. Ittner, of St. Louis, Mo., for respondents.

Before SANBORN and SMITH, Circuit Judges, and TRIEBER, District Judge.

SMITH, Circuit Judge. The petitioner, Joseph Pollack, on July 1, 1907, was, on his voluntary petition, adjudged a bankrupt by the District Court of the United States for the Eastern District of Missouri.

A trustee was appointed, who took possession of the bankrupt's property as scheduled and converted it into cash and paid nearly 16 per cent. upon the claims proved and allowed. Among the claims so allowed were claims in favor of all the respondents. The estate was closed and the trustee discharged on June 2, 1908, and on September 14, 1908, the bankrupt was granted his final discharge. On September 24, 1913, the respondent filed a petition to reopen the matter, alleging that at the time of the bankruptcy the bankrupt had an interest in a one-ninth share in a trust fund of $18,000; that he failed to schedule said property, and the same was fraudulently concealed by the bankrupt, and the respondents failed to discover the facts until within a few days of the filing of the present application to reopen the bankrupt estate, and asking also that an injunction issue against the St. Louis Union Trust Company of St. Louis, Mo., trustee, restraining it from paying over to the said Joseph Pollack the interest in the said trust fund, or any part thereof, or in any other matter deposited or held in trust for the said Joseph Pollack, pending the further order of court. The court on the same day ordered the matter referred to Hon. Walter D. Coles, a referee in bankruptcy, with full power to reopen the said bankruptcy estate. The referee issued an order to Joseph Pollack and to the St. Louis Union Trust Company to appear and show cause why the orders prayed should not be granted. The petitioner appeared, and filed on October 6, 1913, a demurrer to the petition of the respondents which was overruled. He then filed a return and answer to the pending application, to which respondents filed reply. The case was heard upon the issues and the referee made the following order:

That he "doth find that the bankrupt, Joseph Pollack, at the time he filed his petition in bankruptcy, and was adjudicated a bankrupt, to wit, on July 1, 1907, had a vested title and interest, subject to the life estate therein of his mother, one Mary Pollack, in a certain trust fund held by the St. Louis Union Trust Company as trustee under a decree rendered by the circuit court of the city of St. Louis, state of Missouri, in the case of 'Mary Pollack, Plaintiff, v. Phillip Pollack, Joseph Pollack, et al., Defendants'; that said trust fund amounted to the sum of approximately $18,000, and that the said bankrupt was entitled, and is now entitled, to a one-ninth interest in said fund; that said bankrupt, at the time he filed his petition in bankruptcy, and was adjudicated a bankrupt, failed to schedule his interest in said trust fund, but knowingly and fraudulently concealed his interest therein from his creditors and his trustee in bankruptcy, for the purpose of preventing the said fund from being administered by his trustee under said bankruptcy; that the existence of said trust fund was not known to the trustee in bankruptcy of said bankrupt, or to his creditors, while the bankrupt estate was under administration in bankruptcy, and that said fund was not administered in the bankruptcy proceedings, and that knowledge of the existence of said trust fund was not acquired by the petitioners herein until shortly before the filing of their petition. The referee further finds that the interest of Mary Pollack, the mother of the bankrupt, in the trust fund before mentioned, has terminated by her death, and that the bankrupt's interest in said fund now amounts to approximately $2,000, and that the St. Louis Union Trust Company, trustee, is about to pay over to the bankrupt his interest in said fund. The referee further finds that the creditors of the bankrupt are entitled to have the bankrupt's interest in said trust fund administered in this bankruptcy proceeding, and the referee accordingly orders that the administration of the bankrupt estate of Joseph Pollack be, and the same is, hereby reopened for the purpose of administering the trust fund aforesaid, and for

any other proper and appropriate purpose; and it is further ordered that, until the further order of the referee, the St. Louis Union Trust Company, trustee, be, and it is, hereby restrained and enjoined from paying over to the bankrupt, Joseph Pollack, or in any other way disposing of the interest of said Joseph Pollack in and to the trust fund held by said trustee under the decree of the circuit court of the city of St. Louis entered in the case of 'Mary Pollack, Plaintiff, v. Phillip Pollack, Joseph Pollack, et al., Defendants'; and it is further ordered that a meeting of the creditors of said Joseph Pollack, bankrupt, be held at the office of the referee on December 2, 1913, at 11 o'clock in the forenoon, for the purpose of appointing a trustee and transacting such other business as may properly come before such meeting, and that due notice of said meeting be given to the creditors of said bankrupt as required by law."

Thereupon the bankrupt filed a petition for the review of said order by the United States District Court. The District Court upon hearing said application ordered:

"That the finding and order of the referee reopening said estate be and the same are in all things hereby approved and confirmed, and that the petition of said bankrupt for a review of the same be and the same is hereby denied and dismissed on the merits."

And this is a proceeding to revise the said order of the District Court. This was not an application to set aside the order of discharge under Bankr. Act July 1, 1898, c. 541, § 15, 30 Stat. 550 (Comp. St. 1913, § 9599), but was an application to reopen the estate under section 2, and particularly subdivision 8 thereof, which is as follows:

The courts of bankruptcy are hereby invested with such jurisdiction at law and in equity as will enable them to—

"(8) Close estates, whenever it appears that they have been fully administered, by approving the final accounts and discharging the trustees, and reopen them whenever it appears they were closed before being fully administered." Comp. St. 1913, § 9586.

[1, 2] The first point made here is that the referee erred in overruling the demurrer to the application to reopen the bankruptcy case. The court of bankruptcy is an equity court (section 2 of the Bankruptcy Act), and demurrers in such cases were abolished by rule 29 of the new equity rules, which became effective February 1, 1913, and this demurrer was not filed until October 6, 1913. It could have been well overruled on this ground. After the demurrer was overruled the bankrupt pleaded over in an answer which covers four pages of the printed record. Such action upon his part was a waiver of any error in the ruling on demurrer. Eau Claire National Bank v. Jackman, 204 U. S. 522, 535, 27 Sup. Ct. 391, 51 L. Ed. 596; Campbell v. Haverhill, 155 U. S. 610, 612, 15 Sup. Ct. 217, 39 L. Ed. 280; Stanton v. Embry, Adm'r, 93 U. S. 548, 553, 23 L. Ed. 983; Marshall v. Vicksburg, 15 Wall. 146, 149, 21 L. Ed. 121; Railroad Co. v. Harris, 12 Wall. 65, 84, 20 L. Ed. 354; Campbell v. Wilcox, 10 Wall. 421, 423, 19 L. Ed. 973; Watkins v. United States, 9 Wall. 759, 761, 19 L. Ed. 820; Young v. Martin, 8 Wall. 354, 357, 19 L. Ed. 418; Aurora City v. West, 7 Wall. 82, 92, 19 L. Ed. 42; Bell v. Railroad Co., 4 Wall. 598, 602, 18 L. Ed. 338; Clearwater v. Meredith, 1 Wall. 25, 42, 17 L. Ed. 604; United States v. Boyd, 5 How. 29, 50, 12 L. Ed. 36; Evans v. Gee, 11 Pet. 80, 85, 9 L. Ed. 639. But as Judge SANBORN, who dissents from this

opinion, thinks the petition stated a cause of action, and there was no error in overruling the demurrer, we will not consider this question further.

[3] Complaint is made that the referee took judicial notice of what the record showed in the original bankruptcy case. That was before the same referee, and there was certainly no error in his considering anything that appeared in the record in that case, as that was the same case in which the application was pending. The motion to strike parts of the report of the referee in the District Court was therefore without merit, and properly disregarded by the District Court.

It appears that prior to and in February, 1899, there was pending in the circuit court of the city of St. Louis a case entitled "Mary Pollack v. Phillip Pollack, Samuel Winter, Henry Pollack, Joseph Pollack, St. Louis Safe Deposit & Savings Bank, Charles Pollack, Martin Pollack, Hannah Goodman, Lotta Hart, Harrietta Freefield, and Lilly Drukker"; that in said action a decree was entered on March 6, 1899, that the court—

"doth find, that the ten (10) bonds of one thousand dollars each with coupons attached, issued by the city of Greenville, Texas, and the cashier's check issued by the St. Louis National Bank, dated December 7, 1896, for the sum of eight thousand dollars, payable on demand to the order of Phillip Pollack and by him indorsed in blank, mentioned in the pleadings, together constitute the capital of a trust fund which was on June 1, 1891, set aside and appointed by the defendant Phillip Pollack upon the following express trusts: The entire annual income and increase of said trust fund was appointed and appropriated by said Phillip Pollack to the use and for the support of his mother, the plaintiff, Mary Pollack, for the term and period of her natural life. The capital of said trust fund remaining at the death of said Mary Pollack was appointed and appropriated by said Phillip Pollack to be divided and distributed to Harrietta Freefield, Lilly Drukker, Hannah Goodman, Lotta Hart, Martin Pollack, Phillip Pollack, Henry Pollack, Charles Pollack, and Joseph Pollack, the children of the said Mary Pollack, in equal shares, and in full title discharge of said trust. And the court doth further find: That said trust was upon the further condition that the said Mary Pollack should receive a reasonable and comfortable support from said fund, and that if the necessity should arise, and the income at any time prove to be insufficient, that then resort might be had to the capital of said trust fund to supply such deficiency. That said trust fund was at the commencement of this suit, and is now, deposited in a safe deposit box in the vault of the defendant the St. Louis Safe Deposit & Savings Bank in the names of defendants Phillip Pollack, Samuel Winter, Henry Pollack, and Joseph Pollack as trustees for plaintiff, and custodians of said box, and its contents. That from June 1, 1891, to December 7, 1896, all the income of said trust fund was collected by the defendant Phillip Pollack, and has been fully and faithfully paid over and accounted for by him to the plaintiff, Mary Pollack, the beneficiary thereof, according to the terms and requirements of said trust. That from and after December 7, 1896, differences and disagreements arose among said trustees in regard to the management and investment of said trust fund, so that they were no longer able, and are not now able, to act in harmony in carrying out the purposes of said trust, and that their removal from their office as trustees has become necessary. The court further finds that the United States bond for the sum of one hundred dollars, with coupons attached, now in said safe deposit box, is not a part of the capital of said trust fund, but belongs to the plaintiff, Mary Pollack, and that the other papers, receipts, and vouchers now in said safe deposit box belong to the defendant Phillip Pollack. The court further finds from the evidence that the plaintiff, Mary Pollack, has failed in establishing the right and title claimed by

her to the possession of said fund as her absolute property, and that she is not entitled to the relief prayed for in her amended petition.

"It is therefore ordered, adjudged, and decreed by the court: That said trust in said capital fund of eighteen thousand dollars, and the income thereof, be established and confirmed for the uses, to the persons, and upon the terms hereinabove found and declared. That the defendants Phillip Pollack, Samuel Winter, Henry Pollack, and Joseph Pollack be discharged and removed from their offices as trustees of said fund and shall recover nothing for their services as trustees. That the St. Louis Trust Company be and is hereby appointed sole trustee of said trust, to take possession of and hold said trust under the direction of this court, and to preserve, manage, invest, reinvest, collect, account for, and pay over the income and principal thereof at the times, to the persons, and in the proportions provided for in this decree. That the defendant the St. Louis Safe Deposit & Savings Bank and the said Phillip Pollack, Samuel Winter, Henry Pollack, and Joseph Pollack are ordered and directed, upon demand of the St. Louis Trust Company, to permit said trustee to open said safe deposit box, and to take possession of all the contents thereof. That said St. Louis Trust Company, after taking possession of said property as trustee, shall deliver to the plaintiff, Mary Pollack, upon demand, the United States bond for one hundred dollars, with its coupons attached, taking her receipt therefor, and shall deliver to the defendant Phillip Pollack, on demand, the other papers, receipts, and vouchers found in said box, taking his receipt therefor. That said St. Louis Trust Company, as trustee, shall take into its possession and hold the ten bonds, for one thousand dollars each, with coupons attached, issued by the city of Greenville, Texas, together with said cashier's check for eight thousand dollars, as the principal of said trust fund. That said trustee shall collect and invest and keep invested said sum of eight thousand dollars upon good security, and shall collect and pay over to the plaintiff, Mary Pollack, taking her receipt therefor, the entire net income from said bonds and money, in monthly installments of not less than seventy-five dollars each, payable on the first day of each calendar month, as long as she shall live. If at any time the net income from said trust fund shall be insufficient to pay said monthly payments as they fall due, then said trustee may take from and pay over to said Mary Pollack such sum from the principal fund as may be necessary to make up the deficiency of the income. The court reserves the right upon motion in this cause of the plaintiff or of the trustee from time to time to order the payment of such further sums to plaintiff out of the principal of said trust estate as the court may deem necessary to pay for plaintiff's necessaries, maintenance, and support, and such order shall be made upon such notice to the parties interested in the fund as the court may require. Upon the death of the said Mary Pollack said trustee is ordered and directed to pay the expenses of her last illness and funeral, and to also expend a reasonable sum, not exceeding two hundred dollars, for a monument at her grave, and is then ordered and directed to pay over the balance of the principal fund, and unexpended income, if any, to the defendants Phillip Pollack, Henry Pollack, Joseph Pollack, Charles Pollack, Martin Pollack, Hannah Goodman, Lotta Hart, Harrietta Freefield, and Lilly Drukker, or their heirs or legal representatives, in equal shares, discharged of this trust, and said trustee may sell any securities on hand for such purpose."

Subsequent to that decree, and before the filing of the application to reopen this case, the said Mary Pollack departed this life. It will be observed that in the decree—

"the court further finds from the evidence that the plaintiff, Mary Pollack, has failed in establishing the right and title claimed by her to the possession of said fund as her absolute property, and that she is not entitled to the relief prayed for in her amended petition."

In Mr. Pollack's schedules filed with his petition in voluntary bankruptcy he did not enumerate any interest in the trust funds referred

to in the state court case, and if such interest should have been reported the failure to report it was a concealment, and as it appears that at least a portion of the respondents had never heard of his having any interest under the decree until a few days before their application was made to reopen the case, the action of the court below should be sustained; that is, the sole question is whether he had such interest in the trust fund as should have been scheduled by him.

[4] It is strenuously contended that the property was in custodia legis. As already stated a bankruptcy court is a court of equity. The fact that this property could not be reached by execution has no force, as the court in which the proceeding was pending is clothed with full equity powers. It may for the purposes of this case be conceded that a bankruptcy court would not, under the circumstances, have interfered with the possession of the state court of the property until it had disposed of the trust under which it was held; but when the court which had obtained possession had completed the execution of its powers the bankruptcy court was entitled to the possession of the balance undisposed of. Carling v. Seymour Lumber Co., 51 C. C. A. 1, 113 Fed. 483. The writ of certiorari was denied in this case by the Supreme Court May 5, 1902. 186 U. S. 484, 22 Sup. Ct. 943, 46 L. Ed. 1261; In re English, 62 C. C. A. 572, 127 Fed. 940.

[5] There has been elaborate discussion as to whether the interest of Pollack, the bankrupt, in this fund, was a vested or a contingent remainder. Some confusion exists from the attempt to apply legal terms having their primary application to real estate to personal property.

"The term 'estate' is properly applicable only to real property. * * * While, however, the term 'estate,' in its original and proper use, applies only to real property, it is frequently employed to designate personal property." Smith on Personal Property, 24 and 25. "Contrary to the ancient common-law doctrine, it is now well established that there may be an interest in expectancy in personal property." Id. 27.

But the order as to the schedules is that the bankrupt must report property in reversion, remainder, or expectancy. The form does not distinguish between vested and contingent remainders, but it requires the listing of an interest in both realty and personalty in remainder or in expectancy.

November 28, 1898, the Supreme Court adopted the General Orders and Forms in Bankruptcy. 172 U. S. 653, 18 Sup. Ct. iv. By General Order No. 38 the forms were especially adopted. By form 3, schedule B (4), headed "Property in Reversion, Remainder or Expectancy," the bankrupt is required to report such property. What was meant by the word "expectancy," and does it include the property here in question? In Pearsall v. Great Northern Railway Co., 161 U. S. 646, on page 673, 16 Sup. Ct. 705, on page 713 (40 L. Ed. 838), the Supreme Court had said:

"A vested right is defined by Fearne, in his work upon Contingent Remainders, as 'an immediate fixed right of present or future enjoyment,' and by Chancellor Kent as 'an immediate right of present enjoyment, or a present fixed right of future enjoyment.' 4 Kent, Com. 202. It is said by Mr. Justice Cooley that 'rights are vested, in contradistinction to being expectant

or contingent. They are vested when the right to enjoyment, present or prospective, has become the property of some particular person or persons as a present interest. They are expectant when they depend upon the continued existence of the present condition of things until the happening of some future event. They are contingent, when they are only to come into existence on an event or condition which may not happen or be performed until some other event may prevent their vesting.' Principles of Const. Law, 332."

Eight of the Supreme Judges who rendered that decision were still on the Supreme bench when General Orders in Bankruptcy were promulgated. The only change in the court was the appointment of Mr. Justice McKenna in lieu of Mr. Justice Field. It is scarcely within the range of possibility that all the eight Judges who concurred or dissented in Pearsall v. Great Northern Railway, and least of all that Mr. Justice Brown, who wrote the opinion of the court, had, when they used the word "expectancy" in the General Orders and Forms, forgotten what they said in the Pearsall Case as to its meaning. It is not unusual to require a report of property which cannot be utilized by the trustee. For example, a bankrupt is required to report all the property which he claims is exempt, although all that can be done with it is to set it off to him. Again, he is required to report what portion of the bankrupt estate has passed under assignment for benefit of creditors, although, if it was more than four months before the bankruptcy, it cannot be recovered by the trustee. Other provisions might be cited, but this is sufficient for our purpose. In other words, the rule requires the reporting of much property that may or may not be held by the trustee that the courts may determine its liability for the payment of debts. Such determination is a part of the administration of the estate. Bearing this in mind, the rules required the bankrupt to report any interest he had in remainder, vested or contingent, or in expectancy, and that he had an interest either in remainder or in expectancy in this state court trust is beyond dispute.

If a trustee be now appointed, it will be his duty to apply to the state court for this fund, and if it refuses to turn it over to then apply to the United States District Court for an order. Carling v. Seymour Lumber Co., supra. It will be for those courts to then determine the exact nature of the interest held by Pollack in the fund, and it would be improper for this court to prejudge that matter for either state or federal court. Revised Statutes, § 720, provides:

"The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

Under this section the court was clearly right in granting the injunction in this case. Without either approving or disapproving the special finding of the referee that Pollack had a vested interest in remainder in the trust fund in question, he was clearly bound to report it in his schedules, in place of reporting, as he did, that he had no such interest, and it was clearly, not only within the power of the court, but it was its duty, to reopen this case, because it appears it was "closed before being fully administered"; and the petition to revise is denied.

TRIEBER, District Judge (concurring). As all of us concur that the demurrer to the petition to reopen the bankruptcy proceedings was properly overruled, I do not deem it necessary to pass on the question whether the petitioner, by filing an answer after his demurrer had been overruled, waived any error in the ruling on the demurrer, and therefore do not concur in what is stated on that point by Judge SMITH.

[6] The fact whether a fund or any other property of the bankrupt is subject to seizure under execution at the time bankruptcy proceedings are instituted against him is not the test whether the interest of the bankrupt in the fund or property passes to the trustee. Under section 70a(5) of the Bankruptcy Act (Comp. St. 1913, § 9654), all property, which prior to the filing of the petition he could by any means have transferred, passes to the trustee. As stated in Re Wright, 157 Fed. 544, 85 C. C. A. 206, 18 L. R. A. (N. S.) 193:

"If they are property which can by any means be transferred, the creditors of the bankrupt are entitled to the benefit of them, however little they may bring. Marketability and assignability are quite distinct."

There are many equitable interests which, if owned by the bankrupt, may be of value and increase the assets of the estate, and yet not be subject to seizure on execution; but, being transferable, they will pass to the trustee. Thus it has been held that a seat on the Stock Exchange, which can only be transferred with the consent of the officers of the Exchange, will pass to the trustee, if it has a value. Page v. Edmunds, 187 U. S. 596, 601, 23 Sup. Ct. 200, 47 L. Ed. 318. A liquor license, if of any value and transferable, although it requires the consent of some official board, will pass to the trustee. Fisher v. Cushman, 103 Fed. 860, 43 C. C. A. 381, 51 L. R. A. 292. Life insurance policies payable to some other person, but with the right of the bankrupt to change the beneficiary, and endowment or tontine policies payable to the bankrupt, if living when it matures, but in case of his death to some member of his family, have all been held to pass to the trustee of the bankrupt. In re Coleman, 136 Fed. 818, 69 C. C. A. 496; In re White, 174 Fed. 333, 98 C. C. A. 205, 26 L. R. A. (N. S.) 451; In re Orear, 178 Fed. 632, 102 C. C. A. 78, 30 L. R. A. (N. S.) 990. That vested remainders pass to the trustee seems to me beyond question. In re Arden (D. C.) 188 Fed. 475.

[7] The question for determination, therefore, is whether the bankrupt's interest in the trust fund as created by the decree of the circuit court for the city of St. Louis, and set out in the opinion of Judge SMITH, was a vested remainder. In Doe v. Considine, 6 Wall. 474, 18 L. Ed. 869, the court defines vested and contingent remainders as follows:

"The vested remainder is where a present interest passes to a certain and defined person but to be enjoyed in futuro. There must be a particular estate to support it. The remainder must pass out of the grantor at the creation of the particular estate. It must vest in the grantee during the continuance of the estate, eo instante that it determines. A contingent remainder is where the estate in remainder is limited either to a dubious or uncertain person, or upon the happening of a dubious or uncertain event."

See, also, Johnson v. Washington L. & T. Co., 224 U. S. 225, 237, 238, 32 Sup. Ct. 421, 56 L. Ed. 741.

And this is the rule established by the Supreme Court of Missouri. Collier's Will, 40 Mo. 287; Buxton v. Kroeger, 219 Mo. 224, 117 S. W. 1147. Fearne on Remainders lays down the rule to be that:

"The uncertainty of remainders ever taking effect in possession does not make the remainder contingent, if in other respects it has the essential requisites of a vested remainder."

On page 216 the same author says:

"It is not the uncertainty of ever taking effect in possession that makes a remainder contingent, for to that every remainder for life on entail must be liable, as the remaindermen may die, or die without issue before the death of the tenant for life. The present capacity of taking effect in possession, if the possession is to become vacant, and not the certainty that the possession will become vacant before the estate limited in remainder determined, universally distinguishes a vested remainder from one that is contingent."

See also Ætna Life Insurance Co. v. Hoppin, 214 Fed. 928, 131 C. C. A. 224.

The fact that the trustee is authorized to pay a greater sum to the mother than $900 per annum, if it becomes necessary, and that he is to pay the cost of her last illness, burial, and for a monument over her grave, at a cost not to exceed $200, does not make the estate contingent, although it is uncertain what amount there will be for distribution among the remaindermen, but not uncertain as to who is to participate in the distribution, though the amount be uncertain.

The fund consisted of $18,000. Invested at 5 per cent., the income would be $900 per annum; but, if the trustee should find an investment at a higher rate, it would produce a greater income than the $900 provided for. On the other hand, if the investment is at less than 5 per cent., it would produce a smaller sum than the $900, and would necessitate the use of some of the principal. If these facts would make a remainder contingent, then very few would be vested. A testator may leave a large fund to trustees to be held in trust for the suitable maintenance of the widow, and for the maintenance and education of the children, and after the widow's death the fund to be divided among his children. What a suitable allowance to the widow and the maintenance and education of the children will cost is uncertain, and no one can tell what the fund will amount to when the distribution is made, but this would not make the ultimate remainder contingent.

The New York cases relied on are not in point. In Hobson v. Hale, 95 N. Y. 588, the language used in the will was that until the time of the death of the last annuitant the donees could not be ascertained, as it was to be "divided among my grandchildren per stirpes," and the court held that, as it could not be ascertained how many grandchildren would be then living, the remainder was contingent. In Vincent v. Newhouse, 83 N. Y. 505, the testator bequeathed certain lands to his wife for life, and at her death the executor was directed to sell the lands and divide the proceeds among three of his children and the children of others, share and share alike, and it was held that until the land

was converted into money the subject-matter of the devise did not exist, and there could therefore be no vested remainder. In Shipman v. Rollins, 98 N. Y. 311, the facts were like those in Vincent v. Newhouse, and the same conclusion was reached.

Remainders can only take effect on the happening of a certain event, usually the demise of the life tenant, or first taker, and, if this makes them contingent, there would never be any vested remainders. In this case the decree, establishing the rights of the parties, specifically provides that upon the death of Mary Pollack the trustee is to pay the expenses of her last illness, the funeral expenses, and a reasonable sum, not exceeding $200, for a monument at her grave, and pay over the balance of the principal fund and unexpended income to the nine children named, in equal shares; the bankrupt being one of them. This, in my opinion, created vested remainders to the fund in the hands of the trustee.

The petition to revise should be denied.

SANBORN, Circuit Judge (dissenting). I am unable to concur in the opinion of the majority in this case for the following reasons:

First. The opinion states that, because the bankrupt answered over after the overruling of his demurrer to the creditors' petition to open the proceedings in bankruptcy, he waived his demurrer, as though it were the universal rule that pleading over after the overruling of a demurrer waived the objection raised by it, and deprived the defeated party of the right to review in a federal appellate court the ruling upon the demurrer. This statement seems to me to be liable to mislead those who read the opinion, unless the general rule which prevails in the federal courts upon the subject of the review of an order overruling a general demurrer to a pleading is clearly stated. In suits in equity in the courts of the United States one who demurs to a pleading has the right under the rules and practice in equity, after challenging the sufficiency of the pleading, to answer it. Files v. Brown, 124 Fed. 133, 142, 59 C. C. A. 403, 412, and cases there cited. And the rule upon the subject of the right to review the order of the court overruling the demurrer is, in the words of the Supreme Court, that:

"When the declaration fails to state a cause of action, and clearly shows that upon the case as stated the plaintiff cannot recover, and the demurrer of the defendant thereto is overruled, he may answer upon leave and go to trial without losing the right to have the judgment upon the verdict reviewed for the error in overruling the demurrer. The error is not waived by answer, nor is it cured by verdict. The question, therefor, whether the complaint in this case states facts sufficient to constitute a cause of action, is open for consideration." Teal v. Walker, 111 U. S. 242, 246, 4 Sup. Ct. 240, 28 L. Ed. 415; Bauserman v. Blunt, 147 U. S. 647, 652, 13 Sup. Ct. 466, 37 L. Ed. 316; Southern Pacific Co. v. Denton, 146 U. S. 202, 206, 13 Sup. Ct. 44, 36 L. Ed. 942; Hudson Canal Co. v. Penna. Coal Co., 8 Wall. (75 U. S.) 276, 287, 19 L. Ed. 349; In re Atlantic City Railroad, 164 U. S. 633, 635, 17 Sup. Ct. 208, 41 L. Ed. 579.

While the practice relative to this matter in the state courts is not controlling or material upon this question of practice in the federal courts, it is interesting to note a learned and exhaustive opinion by the Supreme Court of Wyoming setting forth persuasive reasons for this

rule in Grover Irrigation & Land Co. v. Lovella Drainage, etc., Co., 21 Wyo. 204, 131 Pac. 43, 50, 51, 52, Ann. Cas. 1915D, 1207.

In the year 1914 this question was considered and decided by this court, after consultation of the authorities cited in the opinion of the majority in this case, and the rule stated in Teal v. Walker, which had theretofore been followed in this court, was adhered to. Citing Teal v. Walker the court stated the rule in these words:

"If the petition, as challenged by the demurrer, is fatally defective in substance, and clearly shows that upon the case as stated the plaintiff cannot recover, the judgment must be reversed; otherwise, it should be affirmed." City of Harper, Kansas, v. Daniels, 211 Fed. 57, 60, 129 C. C. A. 242, 245; Rush v. Newman, 58 Fed. 158, 161, 7 C. C. A. 136, 139.

This is the rule which prevails in the Seventh and Ninth circuits. City of Pontiac v. Talbot Pav. Co., 94 Fed. 65, 67, 36 C. C. A. 88, 90, 48 L. R. A. 326; Mitsui v. St. Paul Fire & Marine Ins. Co., 202 Fed. 26, 28, 29, 120 C. C. A. 280, 282, 283.

In City of Harper v. Daniels it was suggested by the learned writer of the majority opinion in this case that the laws of Kansas in which that suit arose warranted the ruling in that case by virtue of the act of conformity. It is suggested, however, under favor, that the question whether answering over upon the overruling of a demurrer deprives a party of his right to review that ruling in the federal appellate courts is a question of the practice of those courts, and that the power and practice of the national appellate courts and their means of reviewing the judgments and rulings of the District Courts are neither conditioned, affected, nor controlled by the statutes of the states, the practice of their courts, or the act of conformity. The act of conformity (section 914 of the Revised Statutes [Comp. St. 1913, § 1537]) is limited by its express terms to the practice and proceedings in the Circuit and District Courts. It has no application to the practice or proceedings of the national appellate courts, or to matters relating to bills of exceptions, motions for new trials, or any other means adopted to review the judgments of the United States District Courts. The power and practice of the United States appellate courts are derived exclusively from the Constitution, the acts of Congress, the common law, the ancient English statutes, and the rules and practice of the federal courts. The statutes and the practice of the courts of Kansas, it seems to me, could neither give to nor take away from the national appellate courts the power or duty to review a ruling of a United States District Court upon a demurrer after an answer over. Chateaugay Iron Co., Petitioner, 128 U. S. 544, 554, 555, 9 Sup. Ct. 150, 32 L. Ed. 508; Hudson v. Parker, 156 U. S. 277, 281, 15 Sup. Ct. 450, 39 L. Ed. 424; St. Clair v. United States, 154 U. S. 134, 153, 14 Sup. Ct. 1002, 38 L. Ed. 936; Nalle v. Oyster, 230 U. S. 165, 167, 33 Sup. Ct. 1043, 57 L. Ed. 1439; Ghost v. United States, 168 Fed. 841, 843, 94 C. C. A. 253, 255; Francisco v. Chicago & A. Ry. Co., 149 Fed. 354, 359, 79 C. C. A. 292, 297, 9 Ann. Cas. 628, and cases there cited.

Turning again to the rule, of course, if a defendant, after a demurrer to a defective complaint, answers over, and in his answer himself pleads, and thereby admits, facts which, read together with the a-

legations of the complaint, constitute a good cause of action, as in Eau Claire National Bank v. Jackman, 204 U. S. 522, 535, 27 Sup. Ct. 391, 51 L. Ed. 596, where the defect was the lack of an averment of a demand, and the defendant set forth in his answer facts which rendered a demand unnecessary, or if the case is one in which the defect in the complaint is not substantial, if, notwithstanding the defect, the complaint fairly and substantially states a good cause of action, the rule in Teal v. Walker is inapplicable. But the rule stated in that case and quoted above, as it seems to me, prevails in this court, in the Supreme Court, in the Courts of Appeals of the Seventh and Ninth Circuits, and, so far as I am aware, in the other appellate courts of the United States.

When, however, we turn from this rule of practice and examine the petition for the opening of the bankruptcy proceedings, that pleading clearly states a good cause for the opening. It pleads that the bankrupt had a complete vested title in remainder worth $2,000 in trust funds and securities which he did not mention in his bankruptcy proceeding, but which he fraudulently concealed, with intent to hinder, delay, and defraud his creditors, and that the petitioners were ignorant of these facts until a few days before they filed their petition to open the proceedings. Because the petition alleged facts sufficient, if true, to entitle the creditors to open the proceedings and to have an administration of the bankrupt's interest in the vested remainder which the petition stated he had in the securities, there was no error in overruling the demurrer.

Second. When, however, the facts were disclosed upon the hearing before the referee and the court, it clearly appeared, in my opinion, that the bankrupt never had any vested title, right, or remainder in the trust funds or securities mentioned at any time while the administration of his estate in bankruptcy was pending, or at any time before the death of Mary Pollack on July 6, 1913. The petition for the adjudication in bankruptcy was filed and the adjudication was made on July 1, 1907. The administration of the estate in bankruptcy was closed on June 2, 1908. The bankrupt was discharged on September 14, 1908. During all the time between 1899 and the death of Mary Pollack in 1913, the securities that occasioned this litigation, which were in 1899 worth about $18,000, were held by the St. Louis Trust Company under the decree of a state court, in trust to pay to Mary Pollack the entire net income thereof and as much of the principal as should be required to pay for her comfortable maintenance and support during her life, and upon her death to pay the expenses of her last sickness and a sum not exceeding $200 for a monument at her grave, and then to sell the securities and distribute the balance, if any, to Phillip Pollack, Henry Pollack, Joseph Pollack, the bankrupt, Charles Pollack, Martin Pollack, Hannah Goodman, Lotta Hart, Harrietta Freefield, and Lilly Drukker, their heirs or legal representatives, in equal shares. The interest of Joseph Pollack, therefore, during the bankruptcy, and at all times before the death of Mary Pollack, as it seems to me, was not vested, but was contingent, not only as to its amount, but as to the existence and enjoyment of any interest what-

ever, upon the failure of the trustees to expend the entire trust property before the death of Mary Pollack, as they were empowered to do, for her comfortable maintenance and support.

Whether that right was vested or contingent will be considered more at length later. If it was contingent, and not vested at the filing of the petition in bankruptcy and during the pendency of the proceedings therein, then Joseph Pollack could not, prior to the filing of the petition in bankruptcy, by any means have transferred it, nor could it have been levied upon or sold under judicial process against him. Section 70 of the Bankruptcy Law. The trustee in bankruptcy had no claim to or upon it, and neither he nor the creditors can now recover anything on account of it, because it did not vest in Pollack, the bankrupt, or become his property so as to be subject to administration in bankruptcy until Mary Pollack died, more than five years after the petition in bankruptcy was filed and more than four years after the bankruptcy proceedings were closed. A contingent right or remainder is not transferable by the remainderman or leviable upon execution against him. Lucas v. McNeill, 231 Fed. 672, — C. C. A. — (C. C. A. 8th Circuit, opinion filed February 24, 1916); Ætna Life Ins. Co. v. Hoppin, 214 Fed. 928, 931, 131 C. C. A. 224, 227, and cases there cited.

Now the question whether or not there was an error of law in the action of the referee and of the lower court in ordering an opening of the bankruptcy proceeding and an administration of this interest depends entirely upon the true answer to the question whether Joseph Pollack had a vested or a contingent interest in the trust property when the petition in bankruptcy was filed against him. If he had the former, the orders were right; if only the latter, they were wrong, and the petition of the creditors should have been dismissed. If that interest was only a contingent interest when the petition for the adjudication in bankruptcy was filed, the petitioning creditors can never recover or administer it, or any interest in the trust property that subsequently vested in Joseph Pollack, and they can derive no benefit from this proceeding. If that interest was contingent when the petition for the adjudication was filed, the opening of the bankruptcy proceeding would be futile, its only effect would be to prolong litigation, to increase the expense of the litigants and to delay an adjudication which the record clearly presents to the court now.

For this reason it is immaterial whether or not Joseph Pollack was required by the Bankruptcy Law to disclose in his petition in bankruptcy, or in his schedules, the interest he had in the trust fund in question. If he was, and if that interest was contingent, the petitioning creditors can never have any relief by this proceeding; and if he was not, and that interest was contingent, the result is the same. If creditors should apply to open bankruptcy proceedings and to administer the homestead of a bankrupt, which was clearly exempt, because he did not describe it in his petition or schedules as required by the Bankruptcy Law, no court would fail to dismiss the petition because it could grant no substantial relief by opening the proceedings.

So here, even if Joseph Pollack was required to describe or schedule his interest in the trust property, yet if the only interest he had was contingent, and hence not subject to administration or application in bankruptcy to the payment of his debts, the petition of his creditors to open the bankruptcy proceedings and attempt to administer that interest should have been denied, because no court could grant the petitioning creditors any beneficial relief by such an opening and attempted administration. A court of equity will not foster or conduct futile proceedings, when the record clearly shows that there is no possibility that they can result in any benefit to any one.

The result is that the crucial question in this case is whether the interest of Joseph Pollack was vested or contingent when he filed his petition for an adjudication in bankruptcy in 1907. Let us turn to that question. Measure his right by the definition cited in the majority opinion from Pearsall v. Great Northern Railway, 161 U. S. 646, 673, 16 Sup. Ct. 705, 713 [40 L. Ed. 838]. A vested right is "an immediate fixed right of present or future enjoyment"; or, as Chancellor Kent puts it, "An immediate right of present enjoyment, or a present fixed right of future enjoyment." The right of Joseph Pollack was none of these. In 1907 or 1908 it was not an immediate right of present enjoyment, for it could not be enjoyed until after the death of Mary Pollack, and she was living. It was not a present fixed right of future enjoyment, for it was not fixed, certain; it was subject to change, to destruction. The trustee might diminish the principal, it might expend all the principal and all the income of the trust property in the maintenance and support of Mary Pollack before she should die, so that Joseph's right to enjoy anything under the trust would never arise. Take Justice Cooley's definition:

"Rights are vested, in contradistinction to being expectant or contingent. They are vested when the right to enjoyment, present or prospective, has become the property of some particular person or persons as a present interest. They are expectant when they depend upon the continued existence of the present condition of things until the happening of some future event. They are contingent when they are only to come into existence on an event or condition which may not happen or be performed until some other event may prevent their vesting."

The right of Joseph Pollack was not vested in 1907 and 1908, because no right to enjoy in the then present or future any part of the trust was then his property. If it had been, he could by legal proceedings have prevented the loss or destruction of that property by the trustee by means of the expenditure of the trust fund to maintain or support Mary Pollack. It was not an expectant interest, because it did not depend upon the continuance of the then present condition of things until the happening of some future event, in this case the death of Mary Pollack, for, although the then present condition of things had continued until her death, still the trustee might, under that condition of things, have expended all or any part of the principal and income of the fund for her maintenance and support before that death, and thus have destroyed any possible interest of Joseph. It was a contingent right, because it was only to come into

existence on an event, the death of Mary Pollack, which might not happen until some other event, the expenditure of all the principal and income of the trust fund for the support and maintenance of Mary Pollack, had prevented its vesting.

On March 6, 1899, when by decree of the circuit court of Missouri the title to the trust property was vested in St. Louis Trust Company, as trustee, it consisted of 10 bonds of $1,000 each, and a cashier's check for $8,000. By the decree the trust company was made the trustee of this property to "invest, reinvest, collect, account for, and pay over" the income thereof and such portions of the principal thereof as should be necessary for the maintenance and support of Mary Pollack until her death, and to pay for her last sickness and monument, and when all these payments had been made to sell any securities on hand, if necessary to make the distribution, and to pay over the remainder, if any, to the nine remaindermen, of which the bankrupt was one. As it was the duty of the trustee to keep the property in income-bearing securities, the legal presumption, and, as there is no evidence on the subject, the unavoidable conclusion, is that at the time of and during the pendency of the bankruptcy proceedings, as well as at the conclusion of the payments for the funeral expenses and the monument, the trust property was in such securities, and it was clear from the adjudication of the trust that under it, it would be and it was necessary for the trustee to convert the securities into money to raise the necessary fund to make a distribution among the remaindermen.

It is contended that the will and the decree which is based upon it vested remainders in the nine remaindermen, vested an absolute property right in Joseph Pollack, although it was uncertain whether or not there would be any remainder whatever of the trust property after the trustee paid the prior charges; and in support of this conclusion In re Arden (D. C.) 188 Fed. 475, Doe v. Considine, 6 Wall. 458, 473, 18 L. Ed. 869, Johnson v. Washington Loan & Trust Co., 224 U. S. 224, 237, 32 Sup. Ct. 421, 56 L. Ed. 741, Collier's Will, 40 Mo. 287, 300, Buxton v. Kroeger, 219 Mo. 224, 117 S. W. 1147, and other cases are cited. A careful reading and examination of these cases will show, however, that they all relate to devises of and trusts in real estate, while the trust here relates to personal property. They are distinguishable from this case by the decisive fact that it was certain in each of them that under the devise or trust the enjoyment of some valuable interest must eventually come to the remainderman, or his heirs or assigns, while in the case at bar it was uncertain during the pendency of the bankruptcy proceedings and until the death of Mary Pollack whether or not the enjoyment of any interest whatever would ever come to Joseph Pollack, his heirs or assigns. That enjoyment was always contingent upon the issue whether or not the trustee should expend the entire trust fund, as it had the right to do, for the comfortable support and maintenance of Mary Pollack. For that reason Joseph Pollack's remainder or right was, in my opinion, not vested. It was contingent. He had no property or property right in the trust fund which he could enforce before the

death of Mary Pollack. He could not prevent the expenditure of the entire trust fund for the purposes stated in the trust before her death, so that the enjoyment of nothing would come to him. Hence he could not have conveyed or transferred any interest in the fund, and if he had attempted to do so, and had subsequently died before the death of Mary Pollack, his grantee would have taken nothing, and his interest, on her death, if there were any, would have gone to his heirs. Shipman v. Rollins, 98 N. Y. 311, 322, 325; Vincent v. Newhouse, 83 N. Y. 505; Warner v. Durant, 76 N. Y. 133, 136; Smith v. Edwards, 88 N. Y. 92, 104; Hobson v. Hale, 95 N. Y. 588, 596, 615; Bristol v. Atwater, 50 Conn. 402, 407, 409, 410; In re Hoadley & Munroe (D. C.) 101 Fed. 233, 3 Am. Bankr. R. 780, 783, 784, 786, 787, and cases there cited; Ernst v. Foster, 58 Kan. 438, 443, 49 Pac. 527; McNutt v. McComb, 61 Kan. 25, 58 Pac. 965; Greenwalt v. Keller, 75 Kan. 578, 90 Pac. 233; Bullock v. Wiltberger, 92 Kan. 904, 142 Pac. 950; Ætna Life Ins. Co. v. Hoppin, 214 Fed. 928, 933, 131 C. C. A. 224, 229; Lucas v. McNeill, 231 Fed. 672, —— C. C. A. —— (C. C. A. 8th Circuit, opinion filed February 24, 1916).

Bearing in mind the fact that until the death of Mary Pollack the remainder of Joseph Pollack was uncertain, not only as to amount, but as to enjoyment and existence, that it might be more or less, and it might be nothing, contingent entirely upon the income the trustee derived from the trust and the amount it expended for the comfortable support of Mary Pollack, the case of Shipman v. Rollins exactly rules the question here at issue. In that case the testator devised the use of one piece of his real estate to his widow for life, empowered his executors to sell at once so much of his other real estate as should be sufficient to produce, by investing it in bonds and mortgages, an annuity of $1,500, which was to be paid to the widow during her life, the testator authorized them to sell any portion of his real estate necessary to pay taxes, assessments, and other exigencies during the life of the widow, and directed them to sell, after her death, what remained of the real estate, to add the proceeds to the amount invested to produce the annuity, to pay from the amount thus produced his funeral expenses, mortgages, and debts, and to distribute the balance equally among eight named legatees. The question was whether or not these legacies were vested or contingent before the death of the widow, and the Court of Appeals of New York held that they were contingent. It said (98 N. Y. 325):

"It should be borne in mind that the fund out of which the legacies in question were to be paid had no legal existence until the decease of the testator's widow. It was upon the happening of that event that it was to be created, and it was only then that it could be ascertained what the fund would be. It might be more or less, according to the exigencies provided for by the will, and it might be nothing, and it was only in case a balance remained that the same was to be divided as directed. It was then to be disposed of or given away, and not before that time. * * * In Vincent v. Newhouse, 83 N. Y. 505, the testator, by his will, gave certain lands to his wife for life and directed that at her death the lands should be sold by the executor, and the proceeds equally divided among three of his children named, and the children of three others, share and share alike, and if either of the

heirs mentioned should die after the date of his will, and before their shares were paid them, the share of the one so dying without issue to be equally divided among the other heirs before named, and it was held that the will intended a conversion of the land into money, the actual conversion, however, not to take place until the termination of the life estate, and that the land was converted into money from the time the sale was directed to be made, and that no portion of the remainder vested at the death of the testator, but only upon the death of the widow."

In Warner v. Durant, 76 N. Y. at page 136, that court declares that the rule is that:

"Where there is no gift, but by a direction to executors or trustees to pay or divide, and to pay at a future time, the vesting in the beneficiary will not take place until that time arrives."

In Ætna Life Ins. Co. v. Hoppin, 214 Fed. 928, 933, 131 C. C. A. 224, 229, the Circuit Court of Appeals of the Seventh Circuit declared, and this court approvingly followed that declaration in Lucas v. McNeill, supra:

"That a remainder is vested when throughout its existence it stands ready to take effect in possession, whenever and however the preceding estate determines. A remainder is contingent when it is limited on an event which may happen before or after, or at the time of or after, the determination of the particular estate."

The remainder here at issue was limited on the death of Mary Pollack, an event which might have happened after the termination of her particular estate, for her estate might have been terminated before her death by the lawful expenditure by the trustee of the entire trust property for her support and maintenance, and in that event Joseph Pollack could have taken nothing. His right was therefore not vested, but contingent on the failure of the trustee so to expend the trust property before the death of Mary Pollack. He had no leviable or transferable interest or property in the trust property at the time he filed his petition in bankruptcy, or during the pendency of the bankruptcy proceedings, or at any time prior to the death of Mary Pollack.

Neither the petitioning creditors nor the trustee in bankruptcy can therefore now recover any right or interest therein, and the order of the court below should be reversed, and the case should be remanded, with directions to dismiss the petition of the creditors upon its merits.

KASLE v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. June 13, 1916.)

No. 2730.

1. RECEIVING STOLEN GOODS ⟸7(1)—INDICTMENT—SUFFICIENCY.

An indictment charging that accused did unlawfully and feloniously receive goods and chattels which had been a part of an interstate shipment of freight and were stolen in the course of shipment sufficiently charges that the goods and chattels were interstate commerce and had not lost their character as such, so as to bring the offense within Act

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Feb. 13, 1913, c. 50, 37 Stat. 670, making it an offense to receive, knowing the same to have been stolen, chattels moving as or which constitute an interstate or foreign shipment.

[Ed. Note.—For other cases, see Receiving Stolen Goods, Cent. Dig. § 9; Dec. Dig. ⊂⊃7(1).]

2. RECEIVING STOLEN GOODS ⊂⊃3—OFFENSES—SUFFICIENCY.

Under Act Feb. 13, 1913, declaring that whosoever shall steal, unlawfully take, or carry away goods or chattels which are part of an interstate or foreign shipment, or shall receive or have in his possession any such goods, knowing them to have been stolen, shall be punished, one knowingly receiving stolen goods does so at the peril of their having been stolen while in the course of interstate shipment, and it is no defense to a prosecution that he did not know they were so stolen.

[Ed. Note.—For other cases, see Receiving Stolen Goods, Cent. Dig. § 5; Dec. Dig. ⊂⊃3.]

3. LARCENY ⊂⊃32(5)—PRESUMPTION—ESSENTIALS.

Specific ownership must be alleged and proven, but an averment of a special property, such as that of a bailee or carrier, in the goods stolen, is sufficient allegation of ownership for an indictment for larceny.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. § 85; Dec. Dig. ⊂⊃32(5); Indictment and Information, Cent. Dig. §§ 281, 282.]

4. RECEIVING STOLEN GOODS ⊂⊃7(5)—INDICTMENT—SUFFICIENCY.

A prosecution for receiving stolen goods stands in some respects on the same footing as one for larceny, and an allegation of a special property right in a bailee or carrier of the goods which were stolen and received by accused is sufficient.

[Ed. Note.—For other cases, see Receiving Stolen Goods, Cent. Dig. § 13; Dec. Dig. ⊂⊃7(5).]

5. RECEIVING STOLEN GOODS ⊂⊃7(5)—DELIVERY TO CARRIER—EFFECT OF.

As the delivery of goods to a carrier is delivery to the consignee, in the absence of agreement to the contrary, an indictment under Act Feb. 13, 1913, for receiving goods stolen while in an interstate shipment, which averred the name of the consignees, sufficiently declares the ownership of the goods.

[Ed. Note.—For other cases, see Receiving Stolen Goods, Cent. Dig. § 13; Dec. Dig. ⊂⊃7(5).]

6. CRIMINAL LAW ⊂⊃1186(4)—REVERSAL—DEFECTIVE INDICTMENT—STATUTE.

An indictment charging that accused knowingly received goods which had been part of an interstate shipment and had been feloniously taken and carried away from a railroad station house at Toledo known and described as the "New York Central Terminal Freight Station," and that the goods were consigned to consignees, naming them, is sufficient, in view of Rev. St. § 1025 (Comp. St. 1913, § 1691), declaring that an indictment shall not be held bad for errors not prejudicial to accused, to charge the offense of receiving stolen goods while part of an interstate shipment, denounced by Act Feb. 13, 1913, though the name of one of the consignees indicated that it was a partnership, and there was no averment of title of any of the partners, and the name of the owners of the freight house was not given, for, the freight house being a fixed and permanent object, the ownership of the goods and particulars of the offense were sufficiently alleged.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3215; Dec. Dig. ⊂⊃1186(4).]

7. CRIMINAL LAW ⊂⊃753(2)—TRIAL—MOTION FOR DIRECTED VERDICT.

A motion for directed verdict at the end of the government's case is waived by accused's introduction of evidence; but such waiver does not

deprive him of the right to have the sufficiency in law of the entire evidence considered upon similar motion made at the close of all testimony.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1727, 1729; Dec. Dig. ⊂⊃753(2).]

8. RECEIVING STOLEN GOODS ⊂⊃2—WHAT CONSTITUTES—LARCENY.

Where tallymen employed by a railroad were required to check freight in and out of cars, the freight did not pass into their possession, so that their wrongful appropriation would amount merely to embezzlement; but such appropriation is larceny, and one knowingly receiving goods so appropriated is, where they were part of an interstate shipment, guilty of the offense of receiving goods stolen while part of an interstate shipment, denounced by Act Feb. 13, 1913.

[Ed. Note.—For other cases, see Receiving Stolen Goods, Cent. Dig. § 4; Dec. Dig. ⊂⊃2.]

9. RECEIVING STOLEN GOODS ⊂⊃9(2)—PROSECUTION—INSTRUCTION.

In a prosecution, under Act Feb. 13, 1913, for knowingly receiving stolen goods while part of an interstate shipment, a charge directing the jury to find whether the goods were articles of interstate transportation, whether they were stolen while in the course of such transportation, whether defendant received them, and, if he did so, whether he received them knowing them to be stolen which allowed a finding that accused knew the goods were stolen if the circumstances were such that a reasonable and honest man would have doubted his transferors' title, *held* erroneous, because allowing the jury to convict accused, regardless of his own intention in receiving the goods, if the circumstances were such that a reasonable man would have doubted the title of his transferors.

[Ed. Note.—For other cases, see Receiving Stolen Goods, Cent. Dig. § 20; Dec. Dig. ⊂⊃9(2).]

10. RECEIVING STOLEN GOODS ⊂⊃8(4)—OFFENSES—CIRCUMSTANTIAL EVIDENCE.

In a prosecution for receiving stolen goods, the fact that accused took them knowing them to be stolen may be established by circumstantial evidence.

[Ed. Note.—For other cases, see Receiving Stolen Goods, Cent. Dig. § 18; Dec. Dig. ⊂⊃8(4).]

11. RECEIVING STOLEN GOODS ⊂⊃8(1)—POSSESSION—EFFECT OF.

In a prosecution under Act Feb. 13, 1913, for knowingly receiving goods stolen while in interstate shipment, an instruction that the possession of stolen property imputes knowledge in the possessor that it was stolen, unless the possessor explains, is improper; the offense not being that of larceny, but of receiving stolen goods, in which case the question at issue is defendant's knowledge, and no presumption is raised by his possession of the stolen property.

[Ed. Note.—For other cases, see Receiving Stolen Goods, Cent. Dig. § 18; Dec. Dig. ⊂⊃8(1).]

In Error to the District Court of the United States for the Western Division of the Northern District of Ohio; John M. Killits, Judge.

Sam Kasle was convicted of unlawfully having in his possession goods and chattels, knowing them to have been stolen from a railroad freight station while in the course of shipment in interstate commerce, and he brings error. Reversed and remanded.

H. W. Fraser and Marshall & Fraser, all of Toledo, Ohio, for plaintiff in error.

E. S. Wertz, U. S. Atty., of Cleveland, Ohio, and John S. Pratt, Asst. U. S. Atty., of Toledo, Ohio.

Before WARRINGTON and DENISON, Circuit Judges, and HOLLISTER, District Judge.

WARRINGTON, Circuit Judge. Kasle was convicted and sentenced under an indictment charging him with unlawfully and feloniously having in his possession certain goods and chattels, knowing them to have been stolen from a railroad freight station while in course of shipment in interstate commerce. A motion to quash the indictment was overruled. At the close of the evidence offered by the government, the defendant moved that the evidence be withdrawn and a verdict directed in his favor, and the motion was denied. Again at the close of all the evidence defendant renewed his motion for a directed verdict on the ground that there was no evidence to sustain the allegations of any of the counts of the indictment, which was granted as to the first count and overruled as to the second and third counts. Aside from the ruling upon the first count, exception was reserved and error assigned upon each of the rulings mentioned; and some twenty additional assignments are presented upon exceptions reserved in the course of the trial concerning rulings in admitting and rejecting testimony and certain instructions contained in the charge to the jury. Defendant prosecutes error.

1. The motion to quash the indictment is based on six grounds, the first four of which are in substance that at the time the goods and chattels are alleged to have been in defendant's possession it does not appear in any of the counts (a) that defendant knew they had been stolen, taken or carried away from interstate commerce, (b) that they were interstate commerce or a part thereof, (c) that they retained their character as an interstate shipment of freight, (d) that they had not lost their character as part of interstate commerce; and the two remaining grounds are (e) that the indictment and the counts respectively do not with sufficient certainty describe the offense charged so as fairly to inform defendant of its nature and of what he would be called upon to meet, and (f) that the indictment and counts do not state facts sufficient to constitute an offense against the United States.

[1] The indictment is based on an act of Congress passed February 13, 1913 (37 Stat. 670). The applicable portion of this statute is as follows:

"* * * Whoever shall steal or unlawfully take, carry away, or conceal, or by fraud or deception obtain from any railroad car, station house, platform, depot, steamboat, vessel, or wharf, with intent to convert to his own use any goods or chattels moving as, or which are a part of or which constitute, an interstate or foreign shipment of freight or express, or shall buy, or receive, or have in his possession any such goods or chattels, knowing the same to have been stolen, * * * shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both."

The indictment contains three counts; but as count 1 was in effect eliminated, as stated, it is necessary to consider only counts 2 and 3. Except as to dates of the offenses charged, the kinds and the points of origin and destination of the goods and chattels involved (the second count describing ten pigs of tin, comprising about 1,119 pounds, and the third, two barrels of scrap brass), the two counts remaining

are alike; the second count is printed in the margin.[1] Comparison of the allegations of the count with the first four grounds stated in the motion to quash will show these grounds to be without merit, since defendant was charged with knowingly, and so unlawfully and feloniously, having in his possession distinct goods and chattels which had been stolen, taken and carried away, from a named railroad station in Toledo, Ohio, while in course of shipment in interstate commerce between points named in the counts. It is true, as the first ground of the motion to quash states, that it is not charged that at the times the goods and chattels are alleged to have been in his possession defendant knew they had been stolen from interstate commerce.

[2] As we interpret the statute such an allegation is not necessary. One who knowingly receives stolen chattels must do so at the peril of their having been stolen while in course of interstate transportation; indeed it is not perceived why the thief should escape conviction under this statute just because he did not know the points of origin and destination. Manifestly both the receiver and the thief are chargeable with knowledge of the act of Congress forbidding this particular theft, quite as certainly as they are of a state statute prohibiting theft generally. The status of the articles, in the sense of being interstate or intrastate in character, cannot in the nature of things affect the fact either of the stealing or receiving alleged; and the statute, whether federal or state, is at bottom aimed against stealing or receiving. The most then that can be said of the object of allegation, as well as proof, touching the interstate character of the articles is to show the existence of the condition which brought the subject within the federal power and jurisdiction.

[3-6] The last two grounds of the motion to quash, however, present some difficulties. Ownership of the goods and chattels described in counts 2 and 3 is not in terms laid in any particular person or company, either by absolute or qualified title, at the times the articles were severally alleged to have been "feloniously stolen, taken and carried away from a certain railroad station house * * * known and de-

[1] "Count II. And the grand jurors aforesaid, upon their oath aforesaid, do further present and find that the said Sam Kasle, heretofore, to wit, on or about the 7th day of September, in the year of our Lord one thousand nine hundred and thirteen, at the city of Toledo, Lucas county, Ohio, in the division and district aforesaid, and within the jurisdiction of this court, unlawfully and feloniously did knowingly have in his possession certain goods and chattels, to wit, ten pigs of tin consisting of about eleven hundred and nineteen pounds of tin, which said goods and chattels had theretofore, to wit, on or about the 7th day of September, 1913, been a part of an interstate shipment of freight in course of shipment in interstate commerce, and had been unlawfully and feloniously stolen, taken and carried away from a certain railroad station house at Toledo, in the county of Lucas, Ohio, known and described as the New York Central Terminal Freight Station, at Toledo aforesaid, while said goods and chattels were so in course of shipment in interstate commerce from the Pope Metals Company, at New York, in the state of New York, to the Union Steel Screen Company, at Albion, in the state of Michigan, he, the said Sam Kasle, at the time and place aforesaid, when as aforesaid he so unlawfully and feloniously had the said goods and chattels in his possession, well knowing the same to have been stolen—contrary to the form of the statute of the United States in such case made and provided, and against the peace and dignity of the United States."

scribed as the New York Central Terminal Freight Station." Neither the name of the owner of the station, nor any excuse for its omission, is to be found in the counts. Presumably the owner of the station held an interest in the goods and chattels which was sufficient for all purposes of the indictment. The rule is that specific ownership must be alleged and proved; but a special property, such as that of a bailee, carrier, or the like, in goods stolen, is sufficient for purposes of an indictment, say for larceny (2 East's P. C. 652; 1 Wharton Crim. Law, § 932; Wharton American Crim. Law, pp. 657, 658; Darter v. Commonwealth, 5 S. W. 48, 9 Ky. Law Rep. 277, 278; Commonwealth v. Finn, 108 Mass. 466, 468; Commonwealth v. Rubin, 165 Mass. 453, 454, 43 N. E. 200; Allen v. State, 134 Ala. 159, 165, 32 South. 318); and in this respect there is no difference in principle between the offense of larceny and that of receiving stolen goods (3 Bishop's New Crim. Procedure, § 982); indeed, in his treatment of the subject of indictments for receiving stolen goods, Mr. Bishop says: "The owner's name is essential in identification; hence to be stated if known" (Id. § 983; State v. McAloon, 40 Me. 133, 135; State v. Polland, 53 Me. 124, 125; Miller v. People, 13 Colo. 166, 167, 21 Pac. 1025; Brothers v. State, 22 Tex. App. 447, 462, 3 S. W. 737; Zweig v. State [1913] 74 Tex. Cr. R. 306, 171 S. W. 747, 749); and the rule so laid down by Bishop is in effect recognized in Kirby v. United States, 174 U. S. 47, 61, 19 Sup. Ct. 574, 43 L. Ed. 809, where contention that the indictment was defective because it did not allege ownership by the United States of the stolen articles at the time they were alleged to have been feloniously received by the accused, was denied, but the reason given was that the indictment alleged the articles to be "the property of the United States." The present counts 2 and 3 do, however, name the consignees of the goods and chattels in question, the name stated in the second being Union Steel Screen Company, and in the third, Koblitz, Kohn & Company; and ordinarily this would be sufficient for all purposes of identification of the articles in dispute and so of the indictment, since delivery to a common carrier is delivery to the consignee, in the absence of agreement to the contrary, even though the carrier is not designated by the consignee. Commonwealth v. Sullivan, 104 Mass. 552, 554. But here again objection is urged, and for the reason that the consignees' names are indefinite, in that they may be either corporations, joint-stock associations or partnerships.[2] An objection of this character, certainly as respects the present second count, was recently disallowed in Morris v. United States (229 Fed. 516, 520, — C. C. A. —, and citations [C. C. A. 8]), when the court was considering an indictment based on the statute involved in the instant case and a failure to allege therein that the railway company, owning the car from which the property was stolen, was an incorporated company. We agree with the ruling there made, that in view of section 1025, Rev. Stat., such an allegation was unnecessary, since, as the court said (229 Fed. 520, — C. C. A. —):

[2] Reliance being placed by counsel on State v. Suppe, 60 Kan. 566, 567, 57 Pac. 106, and State v. Pollock, 105 Mo. App. 273, 277, 79 S. W. 980, among other citations.

"We are unable to see how that omission can have any tendency to the prejudice of the defendant." And see ruling of court in Burke v. State of Ohio, 34 Ohio St. 79, syl. 1, and opinion of the late Judge Okey, 81, 82.

Furthermore, since the consignee named in the third count, Koblitz, Kohn & Company, is seemingly a partnership, and since ownership of the property described is not laid in the name of any person purporting to be a partner, it may be well to look further into the statute itself. While such objections as we have been considering might be avoided, and ought to be, through careful preparation of indictments, still it is plain enough that the act of Congress here involved was not intended to require strict observance of either all the rules of the common law upon the subject of certainty in criminal pleading, or those growing out of distinct statutes which were intended to change and modify many of such rules. It is to be observed, too, that the relevancy or not of decisions, which in large measure are controlled by local statutes, is to be tested by comparison of those statutes with the particular statute in issue. The act now in question is designed to protect articles while in course of interstate shipment. When the articles of freight now in dispute are considered in connection with their points of origin and destination and the "railroad station house," as such points and station are described in the counts, it is clear that for purposes of the indictment the freight articles are to be treated as having been "in course of shipment in interstate commerce" at the times they are alleged to have been stolen; and it is equally clear that when defendant was required to meet the allegations charging him with having possession of the articles his opportunities for identifying them were quite as available as they would have been if title to the articles, and also to the station, had been laid in the name of the owner of the station. The station was the natural place for the custody and control of such articles until the movement toward their fixed destinations should actually be resumed; and the charge made in the indictment that the goods were "stolen, taken and carried away" from this station, may be said to have followed the language of the statute. A statute and an indictment somewhat similar to the statute and indictment here involved were under consideration in United States v. Coombs, 37 U. S. (12 Pet.) 72, 9 L. Ed. 1004. It is true, however, that the court was there called upon to determine only a question of jurisdiction which arose under the indictment; the act forbade any person to (37 U. S. [12 Pet.] 74, 9 L. Ed. 1004)—

"plunder, steal or destroy any money, goods, merchandise, or other effects from, or belonging to, any ship or vessel, * * * which shall be in distress, or which shall be wrecked, lost, stranded or cast away, upon the sea, or upon any reef, shoal, bank, or rocks of the sea, or in any place within the admiralty or maritime jurisdiction of the United States."

Although the question of ownership, with which we are now concerned, did not arise in that case, it is noteworthy that the indictment is there stated (37 U. S. [12 Pet.] 74, 9 L. Ed. 1004) to have charged that the merchandise stolen "belonged to the ship Bristol, the said ship then being in distress," etc. (Id.). It hardly is to be inferred that

absolute title to such merchandise was in the owner of the ship, though the merchandise might well have been in the custody and control of the ship for purposes of transportation; and since no question concerning the form of the indictment was certified it is to be presumed that the allegation that the merchandise "belonged" to the ship was open to such an interpretation as this and also was regarded as sufficient to identify the stolen articles and so to sustain the indictment. We are led to believe upon the whole that wherever the place of custody and control of articles of interstate freight alleged to have been stolen therefrom falls within the language of the statute and is permanent in character and adapted and generally used for such custody and control, like a railroad station, it is not essential to the validity of an indictment similar in object to the present one that ownership in either the place or the articles be distinctly alleged (State v. Casavant, 64 Vt. 405, 407, 23 Atl. 636); and this is for a stronger reason than can be ascribed even to a distinctive though stranded ship like the Bristol. These views will not of course be interpreted to apply to a movable place of custody, such as a freight car, from which goods claimed to have been stolen and subsequently feloniously received in possession are made the subjects of indictment. The necessity for applying the rule of identification in that kind of a case may be conceded, for the reason that a place of custody described only as a freight car would imply no such distinct identity as does a freight terminal station in a city; but plainly that reason can have no application here. It was necessary, it is true, that the elements of the offense charged should be stated with such particularity as fairly to apprise defendant of what he must meet, and in the event of conviction or acquittal to enable him to plead the indictment in bar of any subsequent prosecution for the same offense; and these requirements we think were sufficiently met (Armour Packing Co. v. United States, 209 U. S. 56, 83, 28 Sup. Ct. 428, 52 L. Ed. 681; Cochran and Sayre v. United States, 157 U. S. 286, 290, 15 Sup. Ct. 628, 39 L. Ed. 704; Grand Rapids & I. Ry. Co. v. United States, 212 Fed. 577, 583, 129 C. C. A. 113, and citations [C. C. A. 6]); the motion to quash the indictment was therefore rightly denied.

[7, 8] 2. The assignment concerning denial of defendant's motion to direct a verdict at the close of the government's evidence is not available, since the alleged error was waived by the introduction of evidence for defendant (Sandals v. United States, 213 Fed. 569, 573, 130 C. C. A. 149 [C. C. A. 6]; Tucker v. United States, 224 Fed. 833, 837, 140 C. C. A. 279 [C. C. A. 6]); but such waiver did not affect the right of defendant to have the sufficiency in law of the entire evidence considered upon the motion to direct made at the close of all the testimony (Tucker v. United States, supra, 224 Fed. at 837, 140 C. C. A. 279). Our consideration of all the evidence, however, satisfies us that the last motion to direct was rightly overruled as to the second and third counts. In reaching this conclusion we are not unmindful of the contention that defendant was charged with knowingly receiving stolen property, and that the evidence tended at most to show only that he received embezzled property. This is a misap-

prehension of the relation borne to the property in dispute by the tallymen, who appear to have had more or less to do with its alleged theft. They were to "check freight in and out of cars," rather than to take it into their possession and control; they were not intrusted with the property in the sense that their acts of taking and disposing of it for their individual benefit amounted to embezzlement; such a taking, if it occurred, was simply larcenous. State v. C. B. Smith, 250 Mo. 350, 367, 157 S. W. 319. The decision in that case is sufficient to point the distinction which renders the decisions of the same court, relied on by defendant, inapplicable (State v. Gennusa, 258 Mo. 273, 274, 167 S. W. 439; State v. George, 263 Mo. 686, 173 S. W. 1077, 1078); for in the latter cases the property in question was intentionally committed to teamsters for purposes of transportation and specific delivery, and after possession was taken the conversion was committed in the course of executing the duty.

[9] 3. We come next to the errors assigned respecting the charge of the court. The first instruction to which exception was reserved dealt with the question whether the goods and chattels "were articles in interstate transportation and were stolen," and also with the circumstances which might be considered in determining that question. The court stated that both the pig tin and the brass seemed to have been subjects of interstate transportation, and that the jury might "use the circumstances surrounding these shipments and any other circumstances that give to you (the jury) the right to indulge in reasonable inferences that men use under like circumstances to determine" the fact or not of theft. The exception mentioned concerned this latter portion. It is true that this instruction affected defendant in the sense that he could not be rightfully convicted of knowingly receiving stolen goods that were not shown to have been stolen, yet in our view of the evidence the instruction could not have prejudiced the defendant. Following that subject it was said:

"If you determine that you can identify as stolen two barrels of brass or any portion of the shipment of brass referred to in the exhibits in question, or the pig tin referred to in the exhibits in question, if that identification satisfies you beyond a reasonable doubt, then, of course, logically, your next inquiry is, whether either or both of those classes of articles, on one count or the other, came into the possession of the defendant Sam Kasle. You must carry the identification, of course, to him. * * *

"Then, if you find, beyond a reasonable doubt, either this brass or this tin in Sam Kasle's possession, you must proceed then to determine whether he had possession of either or both of those classes of articles, knowing that they were stolen.

"I may say to you, in the first place, that the law is that the possession of stolen property imputes knowledge in the possessor that it was and is stolen, unless the possessor explains his possession in such a way as to free his mind [as to free him?] from that presumption.

"The law also is that one who acquires possession of stolen property, under conditions and circumstances which would put a reasonable man who was honest upon inquiry as to the character of that property, is deemed to have just such knowledge of the character of the property as would come to him had he made the reasonable inquiries as to the source of the property which would occur to an honest man of average intelligence under the circumstances in which he got it; that one who takes into his possession personal property is chargeable with the duty of giving attention to those circum-

stances attending his reception of the property which in your judgment should have been deemed by him at the time to be suspicious and suggestive that the title of him who was transferring it was open to question."

As we understand these portions of the charge, the jury was in substance instructed to find: (a) Whether the goods and chattels in issue were articles of interstate transportation; (b) whether they were stolen while in course of such transportation; (c) whether defendant came into possession of them; and, if these findings were in the affirmative, then to find (d) whether defendant received the articles knowing them to have been stolen. Later it was said of the statute:

"This law makes one of the essential elements of the offense possession with knowledge."

If error was committed in respect of the ultimate issue of fact, it was not in defining it but in stating the tests to which the jury might resort in resolving the issue one way or the other. One of the tests was in effect that a person who receives property, which in fact is stolen property, under circumstances which would put a reasonable and honest man upon inquiry, is chargeable with such knowledge in that behalf as would have come to him had he made such reasonable inquiries, touching the source of the property, as would have occurred "to an honest man of average intelligence." Another test was that one receiving personal property is chargeable with the particular effect of "those circumstances attending his reception of the property," which, in the judgment of the jury, "should have been deemed by him at the time to be suspicious and suggestive that the title" of the transferor "was open to question."

Plainly such tests as these of guilty knowledge on the part of the accused subjected him to a standard of conduct and of capacity to detect crime, which the jury might conclude to be the standard of reasonable and honest men of average intelligence when acting under circumstances like those which might be found to have existed here. The effect of such tests was to charge the accused with guilty knowledge or not upon what the jury might find would have induced belief in the mind of a man such as they were told to consider, rather than the belief that was actually created in the mind of the accused; or, at last, the accused might be condemned even if his only fault consisted in being less cautious or suspicious than honest men of average intelligence are of the acts of others. The result of the rule of the charge would be to convict a man, not because guilty, but because stupid. The issue was whether the accused had knowledge—not whether some other person would have obtained knowledge—that the goods had been stolen. The circumstances must have had that effect upon the mind of the accused, to constitute knowledge in him. The issue must be determined upon the individual test of the accused. It may well be that the tests stated in the charge are proper enough to fix civil liability for the acts or omissions of a defendant, but hardly to fasten upon him an intent to commit a felony. There is some conflict in the decisions upon this subject, but we think the tests of the charge are opposed to the clear weight of authority; this may be fairly illustrated by the

following: State v. Alpert, 88 Vt. 191, 204, 92 Atl. 32; Peterson v. United States, 213 Fed. 920, 922, 923, 130 C. C. A. 398 [C. C. A. 9]; State v. Rountree, 80 S. C. 387, 391, 61 S. E. 1072, 22 L. R. A. (N. S.) 833; State v. Daniels, 80 S. C. 368, 371, 61 S. E. 1073; State v. Goldman, 65 N. J. Law, 395, 397, 47 Atl. 641; Cohn v. People, 197 Ill. 482, 485, 64 N. E. 306; Robinson v. State, 84 Ind. 452, 456; State v. Denny, 17 N. D. 519, 525, 526, 117 N. W. 869; Forrester v. State, 69 Tex. Cr. R. 62, 152 S. W. 1041, 1042; Pickering v. United States, 2 Okl. Cr. 197, 101 Pac. 123, 124; Drummond v. State, 103 Miss. 221, 224, 60 South. 138.

[10] It is not meant to say, however, that conviction cannot be established upon circumstantial evidence. While there was direct testimony, and specific denial, of guilty knowledge on defendant's part, yet there were in addition circumstances of more or less tendency to show as well as to refute such knowledge; the relevancy of such circumstances, when not too remote, cannot of course be rightly denied; but, apart from instructions as to whether the property was in fact stolen, no difficulty is perceived in applying the circumstances directly to the accused with a view of testing the question of notice or knowledge on his part, at the times he received the goods and chattels, that they had been stolen (if in fact they were stolen).

[11] Another feature complained of in the charge is, as already shown, that the law is stated to be:

> "That the possession of stolen property imputes knowledge in the possessor that it was and is stolen, unless the possessor explains his possession in such a way as to free his mind [as to free him?] from that presumption."

We gather from the context that this portion of the charge was intended to be applied only in case it should first be found, as already stated, that the articles in issue— the tin and the brass or either—had been stolen while in course of interstate transportation, and that either or both had come into defendant's possession; but in that event the jury was to approach the ultimate question subject to a presumption that defendant received the articles with knowledge that they had been stolen. This question was of course vital to defendant. He was not charged with the theft; the only tendency of the proofs in that behalf is that the theft was committed by others; and these acts, if committed, constituted larceny. The charges that defendant had the articles in his possession with knowledge of the theft do not in terms allege that such possession was taken in aid of the larceny; hence each charge made against defendant was for an offense distinct from the antecedent larceny. The instant case therefore differs from a case, where, for instance, the statute so defines the act of receiving stolen property and that of stealing it as in effect to make the two offenses the same in character. Under a statute of that kind the receipt may amount to larceny, as well as the theft; and so the same presumption arising from recent possession that would be applicable to the thief might also be to the receiver. Thus in Martin v. State, 104 Ala. 71, 78, 16 South. 82, under an indictment for both larceny and knowingly receiving, it was held "that the recent possession of stolen goods,

imposes on the possessor the onus of explaining the possession," etc.; but, as we understand, the case arose under a statute in which it is provided:

"Any person, who buys, receives, conceals or aids in concealing any personal property whatever, knowing that it has been stolen, and not having the intent to restore it to the owner, must, on conviction, be punished as if he had stolen it." 2 Crim. Code Ala. 1896, § 5054, p. 369.

To the same effect is Jenkins v. State, 62 Wis. 49, 21 N. W. 232, and also the statute (2 Sanborn & Berryman Ann. Stat. Wis. § 4417); moreover, the decisions mostly relied on there relate to cases of larceny (62 Wis. 57, 58, but see page 61, 21 N. W. 232); State v. Record, 151 N. C. 695, 697, 65 S. E. 1010, 25 L. R. A. (N. S.) 561, 19 Ann. Cas. 527, and 2 Pell's Revisal of 1908 (N. C.) § 3507; and Reg. v. Langmead (1864) 10 L. T. (N. S.) 350, 351, and 101 Stat. (24 and 25 Vict. 1861) 361, §§ 91, 92; and also 2 Archbold's Crim. Pr. & Pl. 1422. The statute last referred to (and which apparently governed Langmead's Case) provided that a person receiving stolen property, "knowing the same to have been feloniously stolen," should be guilty of a felony and might be "indicted and convicted either as an accessory after the fact or for a substantive felony," etc., and also provided that an indictment might contain a charge of "feloniously stealing any property," and also one or more counts for "feloniously receiving the same or any part or parts thereof, knowing the same to have been stolen," etc.; Langmead was indicted and tried on two counts, one for stealing and the other for receiving, and was found guilty of feloniously receiving; Pollock, C. B., said (page 351):

"The distinction between the presumption as to felonious receiving and stealing is not a matter of law. No doubt, upon the evidence, no other person than the prisoner appears distinctly to enter into the transaction, and all that appears is that the prisoner was found very recently in possession of the stolen sheep. That prima facie is evidence of stealing rather than of receiving, but in no case can it be said to be exclusively such, unless the party is found so recently in possession of stolen property, and under such circumstances as to exclude the probability of receiving; as where a party is stopped coming out of a room with a gold watch which has been taken from the room; but if he has left the room so long as to render it probable that he may have received it from some one else, then it may be evidence either of stealing or of feloniously receiving."

These decisions and the statutes affecting them are enough to illustrate the distinction, already mentioned, between cases of that character and the instant case. If those decisions cannot be so distinguished, we are unable to follow them; but must rather adopt the rule of the cases hereafter cited. We cannot think that the last quoted portion of the charge here is sustainable under either count 2 or count 3 of the present indictment. The charge is broad and unqualified; it states as matter of law "that the possession of stolen property imputes knowledge in the possessor that it was and is stolen"; and the defendant is at once put upon his proofs to free himself of that presumption. It might be that the circumstances shown to have attended the possession of property involved in a given case, not to say the case in hand, would, if unexplained by defendant, naturally lead the jury to believe that he received the property with knowledge that

it had been stolen; but to impute such knowledge as matter of law, is a different proposition. The effect of this, as it seems to us, was to impose the burden upon defendant to prove his innocence, in case the jury should find the goods had in fact been stolen. Defendant's possession, say of the tin, was practically admitted; and, if it was once found that this tin was in fact stolen, the effect of the charge was to treat such admission, coupled with such finding, as sufficient to impute "knowledge in the possessor that it was and is stolen" property; and this was calculated to prejudice the rights of the accused. In Durant v. People, 13 Mich. 351, Durant was charged with receiving stolen goods, "knowing the same to have been feloniously stolen," etc.; and, upon a ruling of the court below excluding testimony tending to show possession but without guilty knowledge, Christiancy, J., speaking for a unanimous court, said (13 Mich. 352):

"The defendant was not charged with larceny of the goods, and her possession could not be used as evidence tending to show that she had stolen them. Her possession must be regarded as innocent, unless shown to have been received with knowledge that they were stolen, or under circumstances which would satisfy the jury that she believed them to be stolen. Possession itself, without evidence tending to show such guilty knowledge, could have no tendency to establish her guilt. She did not, in fact, undertake to deny the possession, but admitting it, claimed she had come to the possession innocently, without notice that the goods were stolen. In the aspect the case had assumed when this question was proposed to the witness, guilty knowledge was practically the only question in dispute. But independent of the particular aspect the case had assumed upon the evidence, we think, in all prosecutions for this offense, it must, upon principle, be competent alike both for the prosecution and the defense to show what were the actual circumstances, the arrangement or understanding under which the goods were received by the defendant, whether the effect shall be to establish guilt or innocence. This is the res gestæ, the very essence of the inquiry."

See State v. Richmond, 186 Mo. 71, 82, 85, 84 S. W. 880; State v. Weinberg, 245 Mo. 564, 571, 150 S. W. 1069; People v. Weisenberger, 73 App. Div. 428, 429, 77 N. Y. Supp. 71; People v. Wilson, 151 N. Y. 403, 406, 45 N. E. 862; State v. Freedman, (Del. Ct. of Gen. Sess.) 3 Pennewill, 403, 405, 53 Atl. 356; State v. Janks, 26 Idaho, 567, 577, 578, 144 Pac. 779; Castleberry v. State, 35 Tex. Cr. R. 382, 383, 33 S. W. 875, 60 Am. St. Rep. 53; Territory v. Claypool & Lueras, 11 N. M. 568, 577, 71 Pac. 463; Slater v. United States, 1 Okl. Cr. 275, 98 Pac. 110, 113; Cooper v. State, 29 Tex. App. 8, 19, 13 S. W. 1011, 25 Am. St. Rep. 712; 2 Wharton's Crim. Ev. (10th Ed.) § 760.

We conclude that the errors pointed out in the charge were prejudicial; and an order will accordingly be entered reversing the judgment and remanding the case for new trial.

CHURCH v. SWETLAND et al.

(Circuit Court of Appeals, Second Circuit. April 18, 1910.)

No. 110.

1. DISCOVERY ⟸20—IN EQUITY—SUFFICIENCY OF BILL.
A bill for relief, and also for discovery as incidental to such relief, if it fails to state a cause of action for the relief, fails also as to the discovery.
[Ed. Note.—For other cases, see Discovery, Cent. Dig. § 27; Dec. Dig. ⟸20.]

2. CORPORATIONS ⟸576 — REORGANIZATION — RIGHTS OF STOCKHOLDERS — GROUNDS FOR RELIEF—SUFFICIENCY OF BILL.
A bill based upon separate transactions by which complainant transferred bonds and other claims against a bankrupt corporation under a proposed reorganization plan considered, and *held* not to state a cause of action for relief in equity against defendants, who were subsequent transferees of the property, no fraud or mistake being alleged, and to have been properly dismissed as to such defendants.
[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2305, 2306; Dec. Dig. ⟸576.]

Appeal from the District Court of the United States for the Southern District of New York.

Suit in equity by Alfred W. Church against Horace M. Swetland and Chester Griswold, individually, and Horace M. Swetland, Robert R. Moore, Chester Griswold, Louis B. Rolston, Adelbert Hauschild, and Ernest E. Bruckman, as members of a committee of preferred stockholders and creditors of Wyckoff, Church & Partridge, Incorporated, under their agreement of April 15, 1912, George A. Ellis, Howard C. Dickinson, the Commercial Trust Company of New York City, John S. Sheppard, Jr., receiver and trustee in bankruptcy of Wyckoff, Church & Partridge, Incorporated, the Vaughan Car Company, Incorporated, and the Swetland Operating Company. From a decree dismissing the bill as to certain defendants, complainant appeals. Affirmed.

On March 12, 1912, a petition was filed in the Southern District of New York asking that the corporation of Wyckoff, Church & Partridge, Incorporated, be declared a bankrupt. Upon the adjudication defendant Sheppard was appointed receiver and later was made trustee of the bankrupt. The bill of complaint alleged that complainant was the owner of 250 shares of the preferred stock of the bankrupt company, and on April 15, 1912, signed an agreement between a committee of the creditors and the preferred stockholders of the bankrupt company. Pursuant to the terms of that agreement complainant deposited his preferred stock with the Commercial Trust Company of New York City, depository; and pursuant to the agreement Clarence F. Wyckoff and Ernest S. Partridge also signed the agreement, and with the consent of complainant deposited with the Commercial Trust Company 3,130 shares of the preferred stock of the bankrupt company, which shares complainant avers he was entitled to as collateral for an indebtedness by Wyckoff to complainant. On April 26, 1912, Wyckoff and Partridge transferred to complainant all their right as preferred stockholders, and on May 25, 1912, the complainant notified the committee of creditors and the Commercial Trust Company of the transfer. The complainant was also an unsecured creditor

of the bankrupt to the extent of $9,250, and deposited his claims, which were subsequently duly proved and allowed in the bankruptcy proceedings.

The Committee for the creditors and preferred stockholders, it is averred, never notified the complainant of the plan of reorganization of the bankrupt corporation, as was provided for in the agreement, and never notified him that unless he agreed to the plan he might withdraw his preferred stock or his claims, in accordance with the terms of the agreement, and he asserts that he never had any opportunity to withdraw. It is also averred that in November, 1912, certain of the defendants and the firm of H. B. Hollins & Co. made an offer to the receiver by which they agreed to purchase all the assets and property of the bankrupt, except a certain claim, for the sum of $150,000, and that the receiver accepted the offer with the consent and approval of the committee of creditors and preferred stockholders, and that the property was transferred to those of the defendants who made the offer; that $100,000 was paid over to the receiver as agreed upon, but the balance, $50,000, has never been paid to him; and that the defendants, who originally agreed to pay it, now say they are unable to do so.

It is averred that certain of the defendants, Ellis, Dickinson, and Griswold, organized the Vaughan Car Company, Incorporated, also a defendant herein, and that all the assets of the bankrupt were transferred to that company, and that it was not an innocent purchaser for value without notice of the rights of the receiver and trustee in bankruptcy. The Vaughan Company has a capital of $1,350,000, and the said stock is alleged to have been issued as full-paid stock in consideration of the transfer to it of the assets of the bankrupt, and that $225,000 of the stock which had been turned back into the treasury of the company was underwritten and sold to the firm of H. B. Hollins & Co. at 90 per cent., or for the sum of $202,000. It is averred that the defendants Ellis, Griswold, and Dickinson realized about $100,000 upon certain claims and other assets of the bankrupt which had been sold to them, and that the amount so realized was turned over by them to the receiver or trustee of the bankrupt, as part payment of the purchase price of the property sold to them as aforesaid, and that the portion thereof applicable to complainant's claims is more than $3,000.

It is averred that certain real estate owned by the bankrupt, and purchased by Ellis, Griswold, and Dickinson as aforesaid, was sold by them subject to a mortgage thereon made or assumed by the bankrupt, to secure an issue of $200,000 of bonds, to defendant Swetland, or the Swetland Operating Company, also a defendant, and that the vendee was not an innocent purchaser for value without notice of the rights of the receiver and trustee of the bankrupt. Swetland, it is alleged, was at all the times mentioned in the bill a stockholder and director of the bankrupt company; that in January and February, 1912, he knew that the company was in need of money and was in financial straits, and he proposed to loan it $105,473.68, provided it delivered to him its notes for $150,000, and also gave him as collateral security 150 bonds, $150,000, secured by a first mortgage on certain real estate, which bonds he knew were good and worth par and interest; that Swetland induced Wyckoff and Partridge, as his representatives, to procure from complainant for him as collateral $150,000 of bonds, and to arrange with the officers of the bankrupt to have a stockholders' and directors' meeting to consummate the loan as aforesaid.

It is stated that there had been deposited with the Title Guarantee & Trust Company, as collateral for the performance of a contract between complainant and Wyckoff for the payment to complainant of $450,000 for the purchase of certain property, the said issue of $200,000 of bonds of the bankrupt company, together with the $250,000 of the preferred stock of that company, and $450,000 of the common stock, and that complainant was induced by Swetland to allow Wyckoff to withdraw from said collateral so deposited as aforesaid $150,000 of the bonds to be delivered as collateral to Swetland, upon the understanding and representation by the latter to complainant that the credit of the bankrupt would be saved by such pledge of the bonds, and that Swetland would take charge and manage the affairs of the corporation, would save its credit, arrange its finances, and prevent the company from go-

ing into bankruptcy; that complainant, relying on these representations, caused $150,000 of bonds to be delivered to Swetland, and that the latter and Wyckoff agreed that the bonds still belonged to complainant as collateral security, subject to the right of Swetland to hold them as collateral. Swetland then loaned the bankrupt $105,473.68, took its notes for $150,000, and with complainant's consent obtained $150,000 of the bonds of the bankrupt to hold as collateral as aforesaid. Thereupon Swetland became chairman of the board of directors of the bankrupt.

It is averred that Swetland deposited his claim as holder of $150,000 of notes of the bankrupt stockholders' and creditors' committee, and signed the agreement of April 15, 1912, and said claim was proved and allowed and thereafter Swetland transferred and assigned to Ellis his claim on said notes for $150,000, but retained possession of said $150,000 of bonds and claimed to own them absolutely. It is averred that complainant assigned to defendant Ellis certain claims belonging to complainant arising out of the affairs, and consisting of promissory notes made by the bankrupt, amounting to the sum of $9,250 and a claim for about $20,000 arising out of money advanced to said bankrupt by complainant, and also a claim of complainant arising out of the pledging with the defendant Swetland of $150,000 of bonds, and with the Commercial Trust Company of New York City the remaining $50,000 of bonds of the bankrupt which are hereinbefore mentioned, in accordance with the terms of a letter which defendant Ellis wrote to complainant.

In that letter, dated October 25, 1912, Ellis agreed as follows: "In consideration of your assignment to me of (1) claims of $29,250, against Wyckoff, Church & Partridge, Incorporated, and (2) interest and equity in bonds Wyckoff, Church & Partridge, Incorporated, par value $200,000, I agree, at my option, either to (1) reassign said claims and equity to you within sixty (60) days from date; or (2) pay to you the sum of $29,250; or (3) deliver to you as security for the payment of $29,250 assignments of unsecured claims against Wyckoff, Church & Partridge, Incorporated, to the amount of $150,000, with the understanding that you may retain said assignments and retain said amount of $29,250 from the dividends paid thereon, and deliver to me the balance; or (4) to pay you $29,250 out of the proceeds of liquidation of assets which may be transferred to me individually, or to me with others, by John S. Sheppard, Jr., as receiver of Wyckoff, Church & Partridge, Incorporated, after the payment of the receiver in full, together with expenses, and after the release of such bond or guaranty as may be given to secure an offer made for such assets."

It is stated that subsequently Ellis transferred to Swetland all of complainant's interest in $200,000 of bonds of the bankrupt, and that Swetland transferred to Ellis all of Swetland's interest in, and the dividends payable on, the $150,000 of the notes of the bankrupt which were given to Swetland at the time he advanced to the bankrupt the sum of $105,473.68 just prior to the appointment of the receiver, which notes were deposited with the creditors' and stockholders' committee, of which committee Swetland was chairman, and that at the time of the assignment Swetland as holder of the bonds executed a release running to the trustee in bankruptcy of any claim on the bonds against the property covered by the mortgage which secured the bonds; that Swetland also assigned to Ellis his interest in and dividends payable upon the notes of the bankrupt, amounting to $50,000, which had been held by the Commercial Trust Company, and for which notes the latter company also held as collateral security $50,000 of the bonds of the bankrupt; and that said transfers were made pursuant to a certain agreement dated October, 1912, which agreement is set out at length in the bill, in which various transactions were agreed to be performed which need not in detail be set forth herein.

It is averred that in April, 1913, the complainant addressed a letter to Griswold, Ellis & Dickinson, in which, after referring to the foregoing agreement of October 25, 1912, he wrote: "I hereby agree, in consideration of one dollar ($1) and other valuable considerations, the receipt whereof is hereby acknowledged, that you may transfer and assign to the Vaughan Car Company, Incorporated, the Kingston property and all assets relating to Vaughan

cars in accordance with a prospectus heretofore presented to me with the following change; that you receive the promissory note of the Vaughan Car Company for ten thousand dollars ($10,000), instead of the second mortgage for forty thousand dollars ($40,000), and I further agree that, in consideration of your making such transfer to the Vaughan Car Company, I will accept in full satisfaction of all my claim against George A. Ellis under said agreement of October 25, 1912, the common stock of the Vaughan Car Company of the par value of fifty thousand dollars ($50,000), in case sufficient moneys are not available to make the payment to me in accordance with the fourth paragraph of said agreement of George A. Ellis."

The bill, however, does not aver that Ellis ever agreed to this modification of the agreement of October 25, 1912. It is averred that defendant Ellis did not make an election or tender to complainant pursuant to the terms of his letter of October 25, 1912, nor pursuant to the letter dated April, 1913; and it is averred that complainant has never received any actual consideration for the last-named letter; and it avers that Ellis has never returned the claims against the bankrupt assigned as above set forth, or the interest and equity of the complainant in and to the $200,000 of bonds. It is averred that after the $150,000 of bonds of the bankrupt were turned over by complainant to defendant Swetland as collateral for the latter's loan of $105,473.68 to the bankrupt, a paper dated April 25, 1913, was executed by complainant, defendant Swetland, and Wyckoff & Partridge, which stated the terms upon which the said bonds were turned over as collateral as aforesaid to Swetland. This writing is set forth in full and contains, among others, the following provision: "V. Upon payment in any manner (except by sale of the bonds), before, at, or after maturity, of the full amount of said note to Mr. Swetland, the bonds shall be returned to Mr. Church upon his receipt or order for the delivery of the same. Until sale the interest on said bonds shall be paid to Mr. Wyckoff, subject to his agreement with Mr. Church. This agreement shall be binding upon and inure to the benefit of the parties hereto and their respective personal representative and assigns."

It is averred that defendant Ellis undertook to assign to the committee of creditors and stockholders of the bankrupt all of complainant's interest in and dividends payable upon the notes of the bankrupt, held by complainant for $9,250, with the understanding that the dividends thereupon should be used for the expenses of the committee. It is averred that defendant Ellis, as assignee of complainant, proved in the bankruptcy proceedings the claim arising out of the $20,000 advanced by complainant to the bankrupt, and that said claim was allowed.

It is averred that on January 5, 1914, the defendant Sheppard, as trustee of the bankrupt, filed a petition in which he stated that he had been informed by defendant Ellis that neither Ellis, Griswold, nor Dickinson could pay the last installment of $50,000 due upon their purchase of the property of the bankrupt, and that from inquiries he had made as to the financial responsibility of these persons he was unable to find that they were able to respond, and also that he had received a written offer from them that, in consideration of their being released from all liability respecting the aforesaid liability of $50,000, they would secure the cancellation of the following claims proved and allowed against the estate of the bankrupt: (1) Swetland's claim for $150,000 filed by the creditor's committee as assignee. (2) The Commercial Trust Company's claim filed by Ellis as assignee, for $50,408.50, being the amount of the notes and interest held by the Trust Company secured by the $50,000 of bonds. (3) A claim of complainant for $20,000 arising out of moneys advanced by complainant to the bankrupt and assigned to Ellis.

It is averred that complainant, on receiving notice from the referee in bankruptcy of a meeting of creditors to be held to pass upon the advisability of accepting the aforesaid offer of Ellis, Griswold & Dickinson, notified the latter and the trustee and the creditors' and stockholders' committee that Ellis had no right to assign to any one the claims against the bankrupt belonging to complainant arising out of the notes of the bankrupt amounting to $9,250 and the claim of $20,000 for money advanced by complainant to the bankrupt, and to claims arising out of complainant's right to $200,000 of bonds

of the bankrupt, or any other claims belonging to Church, and that for the aforesaid reasons complainant objected to the acceptance of the offer made as aforesaid to the trustee.

Complainant asserts that he is entitled to receive from defendant Swetland $50,000 of bonds, or, if not entitled to the bonds, that he is entitled to a claim for $50,000, which is the value of the bonds against the assets of the bankrupt, and to have his claim proved and allowed to that extent. It is further averred that complainant has never received the sum of $450,000, for which the bonds and stock of the bankrupt were pledged, nor any sum of money whatsoever, out of the assets of the bankrupt.

John M. Shedd, of New York City (William G. Bates, of New York City, of counsel), for appellant.

Parker, Davis & Wagner, of New York City (Arnold L. Davis, of New York City, of counsel), for appellees Horace M. Swetland and others.

Campbell, Moore & Amerman, of New York City (Henry Amerman, of New York City, of counsel), for appellees Commercial Trust Co. of New York and Robert R. Moore.

Before COXE, WARD, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge (after stating the facts as above). The complaint in this case, the main averments of which have been summarized above, covers 34 printed pages. The facts are somewhat complicated, and the complaint is unusual, and, as it appears to us, somewhat extraordinary. The court is asked to fix and determine the rights of the complainant against any of the defendants and to determine the complainant's interest in any of the property mentioned in the bill. The defendant Swetland is called upon to disclose in his answer what consideration was paid to Griswold, Dickinson and Ellis when the leases and buildings of the bankrupt were purchased from them subject to the mortgage of $200,000. He is also called upon to state in whose name the title was taken and in whose name it now stands; and if the title stands in the name of the Swetland Operating Company, the complainant wishes to be informed what securities of that company were issued to defendant Swetland, and what securities of that company are now held by him. Swetland is also called upon to say who now holds the notes of the bankrupt, aggregating $150,000, given to him when he loaned $105,000 to the bankrupt. Complainant also wants Swetland to say who now holds the $150,000 of bonds of the bankrupt, which were procured from the complainant at the time Swetland made the loan to the bankrupt; and the court is also asked to issue an injunction to restrain Swetland from disposing of any of the bonds.

The court below dismissed the bill as against defendants Swetland, Bruckman, and Moore as members of the creditors' and stockholders' committee, as against Swetland individually, the Swetland Operating Company, and the Commercial Trust Company. As to those defendants it was dismissed on a memorandum opinion, stating that, if a cause of action is stated against any of them, it is one at law, and not in equity. The bill was allowed to stand as against defendant Ellis, as he had not moved to dismiss.

[1] Where, in a bill for discovery and relief, the discovery sought is incident to the relief sought, a demurrer well taken to the relief is held to hold good as to the discovery also. In McClanahan v. Davis, 8 How. 170, 183, 12 L. Ed. 1033 (1850), Mr. Justice Nelson, speaking for the court, said:

"The complainant having, in our judgment, failed to set forth any foundation for relief, the right to the discovery, which is claimed as incidental, of course fails with it."

[2] As the complainant asks for equitable relief, while not indicating the specific relief he thinks he is entitled to, and asks the court to determine and fix his rights as against the defendants in any of the property mentioned in his complaint, we have endeavored to find what justification he has for coming into a court of equity at all as against the appellants. If he has a complete and adequate remedy at law as respects them, the action of the court below in dismissing the bill as to them must be affirmed.

It appears that early in 1912 the bankrupt was financially embarrassed. The complainant and defendant Swetland were stockholders in it, and the latter offered to loan it $105,473.68, provided the corporation would deliver to him its notes for $150,000, together with collateral security, consisting of $150,000 of its bonds secured by a mortgage upon its real estate. The loan was made on the terms above stated. The bonds given to Swetland as security, according to complainant's averments, were bonds issued by the bankrupt, and which had been deposited with the Title Guarantee & Trust Company as collateral for the performance of a contract of purchase by which defendant Wyckoff was bound to complainant. The latter avers that he was induced by Swetland to allow Wyckoff to withdraw $150,000 of the bonds deposited as collateral with the Title Guarantee & Trust Company, and that complainant consented to the arrangement upon the assurance that the bankruptcy would be thereby prevented, and also upon an agreement that the bonds belonged to complainant as collateral security subject to the right of Swetland to hold them also as collateral security. This did not, however, prevent the bankruptcy and the receiver was appointed shortly thereafter, on March 12, 1912. Then in April the protective committee of creditors and stockholders was formed, with Swetland and Bruckman as members of it.

The complainant became a party to the committee agreement, depositing thereunder his shares of stock, and signing the agreement as an unsecured creditor, and assigning to the committee his claim for $9,250. The committee agreement which the complainant signed stated that the purpose was to devise and carry into effect an equitable and fair plan of reorganization. The agreement contained a provision declaring that neither the committee nor any member thereof should be liable "for any mistake of law or fact, or for any act, default, or omission of any other member, * * * and the committee or any member thereof cannot be held personally liable in any case for any act or acts of any agent or employé, or for its own acts or acts of any of its members, except in case of willful negligence or malfeasance." There are no allegations in the complaint which entitle the complain-

ant to relief as against Swetland and Bruckman as members of the committee. The committee seem to have been made parties to the bill because Ellis is alleged to have undertaken to transfer to it the dividends on the $9,250 claim against the bankrupt belonging to the complainant in order to pay the expenses of the committee. But this surely constitutes no ground for equitable relief and is wholly insufficient to make the committee trustees of any dividends Ellis undertook to transfer.

As respects the $150,000 of bonds which complainant consented should be turned over to Swetland to secure the latter on his loan to the bankrupt, the bill discloses no ground of equitable relief. The allegations of the complaint show that whatever interest Mr. Church originally had in the $150,000 of bonds was subject to the right of Mr. Swetland to hold them as collateral security for the note of the bankrupt. It does not appear that the note has ever been paid, and it is nowhere alleged that complainant's consent to the transfer of these bonds to Swetland was due to any mistake made by him or to any fraud practiced upon him. We are at a loss, therefore, to see at this stage of the transaction that he is entitled to any equitable relief as against Swetland, who appears to be a bona fide holder of them for value.

The subsequent agreement which the complainant made with Ellis, by which complainant assigned to Ellis his interest and equity in $200,000 of the bonds (which included the bonds held by Swetland as collateral and $50,000 additional hereinafter referred to), certainly could not in any way operate to deprive Swetland of his right to hold these bonds as collateral for the notes, which were still unpaid, as Swetland was not a party to any such contract subsequently made, and there are no allegations that complainant was induced by mistake or fraud to enter into that contract.

Then Ellis, having obtained from complainant absolute assignment of his interest in the bonds and having a right as owner to transfer the same, actually transferred them to Swetland for a valuable consideration. Under the options reserved to Ellis under that contract, complainant has not yet received what Ellis agreed to pay him; but that does not invalidate the contract, and Ellis is not in default under it, for in its fourth paragraph it was provided that Ellis might pay out of the proceeds of liquidation of assets which might be transferred to him by the receiver after the payment of the receiver, etc., and that has not yet occurred. That agreement may, as against Ellis, entitle the complainant to equitable relief by impressing a trust on any money payable by the trustee in bankruptcy on the claims against the bankrupt's estate filed by Ellis. But whether it does or does not is not now before us, as Ellis is not a party to this appeal, and the question therefore is not decided. The fact that Ellis has not paid complainant certainly discloses no equitable claim against the moving defendants, and does not invalidate the title of Swetland.

The defendant Swetland, in addition to the $150,000 of bonds which he held as collateral, is alleged to have obtained $50,000 of other bonds, which were turned over to him by the Commercial Trust Com-

pany "pursuant to some arrangement unknown to complainant." As to these bonds complainant avers that he is—

"informed and believes that he is entitled to receive from Horace M. Swetland said $50,000 of bonds, or, if not entitled to said bonds, is entitled to a claim for $50,000, which is the value of said bonds, against the assets of Wyckoff, Church & Partridge, Incorporated, in the hands of its trustee in bankruptcy, and to have his claim proved and allowed to that extent."

What has been said above as to the $150,000 of bonds applies equally to the $50,000 of bonds held by the Commercial Trust Company. The latter company is not in this court complaining that Swetland has unlawfully as against it acquired the bonds; and the complainant having parted with its interest in them to Ellis has no right for reasons above stated to assail the transfer Ellis made of them to Swetland, and the claim which he alleges he has upon the assets in the hands of the trustee is a claim upon the assets to which Ellis is entitled and does not involve the moving defendants.

The complaint also alleges that complainant assigned to Ellis a claim against the bankrupt for $9,250 as well as one for $20,000. The latter claim was for moneys advanced to the bankrupt. The former was for notes made by the bankrupt and held by complainant. It is then averred that these claims were assigned by Ellis to the creditors' and stockholders' committee without authority. The reason assigned for this lack of authority is that Ellis had failed to comply with the terms of the agreement embodied in his letter of October 25, 1912. If Ellis failed to pay for these claims in accordance with his promise, he nevertheless held the legal title and could transfer it to one without notice, and after such a transfer notice given would be without effect upon the rights of the transferees. As to complainant's rights against Ellis growing out of any failure to perform the agreement of October 25, 1912, or as to the trustee holding for Ellis, we are not now concerned. It is enough to know now that, whatever rights he may have, he has no right to proceed in equity against the moving defendants.

We do not see upon the allegations of the complaint any possible relief which this court can grant complainant against the moving defendants herein. There is no contract which the complainant can have specifically performed. There is no contract which he can have reformed on account of mutual mistake. He alleges no mistake. There is no contract which he can have rescinded on the ground of fraud. He alleges no fraud. There is no vendor's lien against the moving defendants in favor of the complainant. A vendor's lien does not, in general, extend to personal property, although it extends to a leasehold. But the legal title to the leasehold was not in the complainant at any time, and at no time did he occupy the position of a vendor of the leaseholds or of any real estate. Neither is complainant entitled to an injunction. Where negotiable instruments have been fraudulently or illegally obtained, injunctions issue to prevent their alienation pending litigation. But there are no allegations that the bonds have been fraudulently or illegally acquired.

As against the moving defendants we are unable to spell out any

trust in complainant's favor. He relies on American Sugar Refining Company v. Fancher, 145 N. Y. 552, 40 N. E. 206, 27 L. R. A. 757. But that was a case in which defrauded vendors were allowed to claim in equity the proceeds of the sugars which the vendees had thereafter sold to bona fide purchasers. The ground upon which the case went was that the fraud which the vendees had practiced on the vendors made the former constructive trustees for the latter, so that they could follow the trust funds (the sugars) into the notes which the constructive trustees had received when they sold the sugars. That case is inapplicable to the facts of this case, for there are no allegations in the complaint that the complainant was induced by fraud to part with his property or surrender any of his rights.

He also relies on Newton v. Porter, 69 N. Y. 138, 25 Am. Rep. 152. That is a remarkable case, in which a party who had been deprived of his property, not by fraud, but by theft, was allowed to impress a trust upon the proceeds which the thief had received on selling the stolen negotiable bonds, which proceeds the owner was allowed to recover from persons who took them with notice. The principle finds some support in the authorities, although the cases are not agreed respecting it. The difficulty concerning it is the technical one that a trustee is one who holds a legal title, and the thief, of course, got no title at all. But, whatever may be thought of that decision, and we are not expressing either approval or disapproval of it, we are unable to perceive its relevancy to the facts before us.

Courts of equity in proper cases undoubtedly assume jurisdiction to avoid a multiplicity of suits. Where there is one common right to be established against several distinct persons, the court will allow the suit to be brought in order to relieve the complainant from the necessity of bringing a number of separate suits, each of which only decides the particular right in question between the complainant and the defendant thereto. Whether the existence of a mere community of interest, as distinguished from a common right, will suffice to give equity jurisdiction, is a question upon which the courts are not wholly in accord. See the case of Watson v. Huntington, 215 Fed. 472, 131 C. C. A. 520, decided by this court in 1914.

The complainant is wrong in supposing that he is entitled to bring one suit in equity and join all the defendants upon the theory that his separate claims arise from the same transaction, the failure of the bankrupt corporation. His claims do not arise from one transaction, as he asserts, but from a number of separate transactions, and they are not so connected with the failure of the bankrupt as to create "a common right," or a community of interest, within the meaning of the rule.

We think it unnecessary to pursue the subject farther. We have carefully considered the complainant's points, and have reached the conclusion that no error was committed by the court below. To consider the matter more in detail would only unnecessarily extend an opinion already too long.

Decree affirmed.

SOUTHERN RY. CO. v. CLARK.

(Circuit Court of Appeals, Sixth Circuit. June 16, 1916.)

No. 2689.

1. TRIAL ⟸296(2)—INSTRUCTIONS—CURE OF ERROR.
In an action by a passenger, hurt in a railroad wreck, where the railroad company set up a release, the passenger asserted that the release was procured through misstatements by the railroad company's physician and claim agent, and that when he told of his sufferings he was assured that the injuries were trivial. The court charged that the issue as to the validity of the release was one of fraud or mutual mistake, and at the request of defendant charged that the claim was barred if the passenger understandingly settled his claim and was not misled or deceived in any way, though at the time of the settlement he was hurt more seriously than he thought, having previously charged that if the passenger was injured as he claimed, and if he was misled by defendant's doctor and agent into believing that such injuries were trivial and would soon pass away, the release would not prevent recovery for such injuries if it was not intended that the settlement should include them. *Held* that, in view of the whole of the charge, error in misstating the issue was cured.
[Ed. Note.—For other cases, see Trial, Cent. Dig. § 708; Dec. Dig. ⟸296(2).]

2. TRIAL ⟸178—DIRECTED VERDICT—RIGHT TO.
In determining whether a verdict should be directed, the court should consider the evidence in the light most favorable to plaintiff.
[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 401–403; Dec. Dig. ⟸178.]

3. RELEASE ⟸58(6)—VALIDITY—EVIDENCE.
Where an injured passenger claimed that a release which he signed shortly after the accident was induced by fraud and misrepresentation of defendant's physician and claim agent, the question *held* under the evidence for the jury.
[Ed. Note.—For other cases, see Release, Cent. Dig. § 114; Dec. Dig. ⟸58(6).]

4. RELEASE ⟸24(1)—VALIDITY—FRAUD.
Fraud which enters into the execution of an instrument may be proven in law as well as in equity, and a release, unless a sealed instrument, may be attacked in an action in which it is set up by proof of the fraud.
[Ed. Note.—For other cases, see Release, Cent. Dig. §§ 41–44; Dec. Dig. ⟸24(1).]

5. RELEASE ⟸24(1)—ADDITIONAL SEALS—EFFECT.
As Shannon's Code Tenn. § 3213, declares that the addition of a private seal to an instrument of writing shall not affect its character, a release of personal injuries under seal does not acquire any peculiar sanctity by reason of the seal, and may be impeached in an action in which it is set up by proof of fraud.
[Ed. Note.—For other cases, see Release, Cent. Dig. §§ 41–45; Dec. Dig. ⟸24(1).]

In Error to the District Court of the United States for the Western District of Tennessee; John E. McCall, Judge.

Action by John Clark against the Southern Railway Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

Clark was a passenger on one of defendant's roads in Tennessee, and suffered injuries through derailment of the train on October 20, 1913. He re-

covered a verdict of $1,000, and defendant prosecutes error. The declaration charges defendant with negligence through certain alleged facts and circumstances, and in setting out his injuries plaintiff alleges among other things: "He was injured in his legs and ankles; he was ruptured." Defendant filed two pleas: (a) Not guilty; and (b) accord and satisfaction—alleging as to the latter, that on October 20, 1913 (the date of derailment and injury), the matter of defendant's liability was adjusted and settled between the parties for the sum of $10, which was paid and accepted in full settlement of all rights or claims against defendant, and of any further liability of plaintiff. Plaintiff's replication to the plea of accord and satisfaction alleges that the settlement and acquittal were procured by defendant's claim agent immediately after the casualty and "while plaintiff was shocked and excited and when he was in such mental condition as that he did not know or realize that he was injured, which condition of plaintiff was known or ought to have been known to the defendant's agent and plaintiff therefore avers that said settlement or acquittal was procured by fraud or entered into by mutual mistake and at a time when plaintiff was incapable of entering into a valid contract." The replication further alleges that plaintiff tenders into court the sum ($10) so received, together with interest thereon. Defendant joined issue on this plea.

Liability of defendant for the negligence alleged, as we understand it, was admitted. The issue as to the hernia claimed to have resulted from the injury was found in favor of plaintiff, and defendant acquiesced in this finding of fact. Defendant relied on the settlement alleged in the second plea, and the evidence appearing here concerns this settlement. At the conclusion of all the evidence defendant moved for a directed verdict, on the grounds: (a) That in this action at law the settlement made by the defendant was final and conclusive; (b) that the undisputed evidence was that there was no fraud perpetrated on the plaintiff in the matter of the execution of the contract of settlement; (c) that in this action at law the settlement could not be rescinded, but the sole remedy would be by proceeding in equity; and (d) that on the undisputed evidence the plaintiff could not even maintain a bill in equity to rescind. The motion was overruled and exception reserved.

Caruthers Ewing, of Memphis, Tenn., for plaintiff in error.

M. J. Anderson, of Memphis, Tenn., for defendant in error.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

WARRINGTON, Circuit Judge (after stating the facts as above). [1] We have a case where the real damage has been ascertained to have been $1,000, which in terms was released for $10. There is testimony tending to show that the release was executed: (1) Upon plaintiff's complaint of injury to one of his ankles and in his loins and groin; (2) upon an attending physician's statement to plaintiff—made after treatment of the ankle and some examination as to the other injury complained of—that "you are just mostly scared and sick at the stomach," and "you will soon get over that," which apparently satisfied plaintiff, since he testified, "I just taken his word for that"; (3) upon the claim agent's statement—made after plaintiff had told him he was injured in his "ankle and back"—that "if you are injured, you will get over it in a few days," but, according to plaintiff's testimony, this agent stated "the doctor says that you wasn't—you ain't hurt much; you are mostly scared and will soon get over it"; and (4) upon an offer of $10 for injury to plaintiff's ankle. If the injury complained of as to plaintiff's loins and groin had been of the character stated by the physician and claim agent, the release given would have been fair; but, as we have seen, it is in effect admitted that one of plaintiff's injuries re-

sulted in hernia. Concededly, the release is in writing and in terms is broad enough to include the injury resulting in hernia, as well as the injury to the ankle, in consequence of the negligent derailment.

In the charge to the jury, the trial court stated that the issue joined upon the replication was one of fraud or mutual mistake, and, after submitting the question whether plaintiff was or was not in fact ruptured, said:

"I shall hold and charge you that if you find that this rupture proximately resulted from the accident and the man didn't know that he was hurt there, or if he knew that he had some trouble in that region and was misled by the statements of the agents of the defendant company, then he would be entitled to recover for the injury to his side. But the burden is on him to prove that he was hurt; that is, that he had the rupture, and that he was misled by the doctor or the agent, and that his uneasiness in that direction was allayed by their statement that it would soon pass away. That they may have done either honestly or on purpose. That is to say, they may have known or believed that it would not pass away and that it was not cause(d) by the mere shaking up and mere matter of nausea, and if they did know it was not so caused, then they misled him; or they may not have known that the injury had been sustained in the side and may have said to him and in good faith that it was a merely temporary ailment and would soon pass away. But, if they did either one, in point of fact, and they didn't intend to include for that injury in the side in the settlement they made with him, then they would still be liable, if the man was so injured. I don't know whether I am making myself very clear or not, but I am trying to present the case here so that you will understand that the settlement made would not bar this plaintiff from recovering for the injury to the side unless the parties intended and understood that they were including the injury in the side within the terms of that settlement and the plaintiff was not misled about it to any extent by the defendant."

It is urged that the trial judge misinterpreted the issue and submitted the case to the jury on the theory that the question presented by the pleadings was whether the parties intended to make a full settlement or only one for the damages arising from injury to plaintiff's ankle; counsel's insistence being that no issue was tendered except the question, "Was the plaintiff at the time he signed the release capable of making a valid contract?" The court, as we have seen, stated the issue to be one of fraud or mutual mistake, the exact language being:

"The defense is that of not guilty, the general issue, and further a special defense that the defendant had settled with the plaintiff for whatever injury he had sustained by reason of the derailment of this train, and that the defendant is not liable to him for anything further.

"There is a replication filed by the plaintiff to that plea, in which he sets up that it was obtained by fraud or mutual mistake, and upon that replication, the defendant joins issue."

It was not necessary to restate the issue, but its alternative character—fraud *or* mistake—appears to have resulted in some confusion in the course of the charge. For example, the plaintiff was declared entitled to recover for the injury to his side, if at the time the release was given he did not know of such injury, or if the intention was not to include that injury in the release, or if the understanding was so to include the injury and plaintiff was not misled in that respect. The real meaning of all this, however, seems to have been made clear by a special instruction which was given at defendant's request after the general charge was concluded; it was stated in this instruction that:

"If the plaintiff understandingly settled his claim and was not misled or deceived by the defendant in any way, his action is barred, even though at the time of the settlement he was hurt more seriously than he thought."

It is true that this instruction as submitted ended with the following clause, which was stricken out: "and in a particular that he did not know." But that clause did not, while the next preceding and granted clause did, describe plaintiff's condition; for the record stands as a practical admission that shortly before the settlement plaintiff told the physician of the pains he was suffering in his loins and groin. The excluded words, therefore, were not applicable; and, moreover, the granted clause "even though at the time of the settlement he [plaintiff] was hurt more seriously than he thought," qualified and rendered harmless the words of the general charge, "if you find that this rupture proximately resulted from the accident and the man didn't know that he was hurt there"; for the special instruction as given is bottomed on the idea that the action was barred unless plaintiff had in some way been "misled or deceived by the defendant," whether at the time of the settlement he knew or did not know the nature or extent of the injury of which he had complained. Again, plaintiff's "intention" concerning this injury, as well as his concurrence in any "understanding" had in reference to it, might well have been brought about by the representation of the physician and its repetition by the claim agent. This instruction was the last expression of the court's view of the situation and also that of the parties in regard to the controlling issue of fact to be submitted to the jury; it was indicative of the very atmosphere of the trial and was calculated to clarify the situation; its effect was distinctly to reduce the issue to that of the alleged fraud. We may therefore assume that but for this instruction the judgment would have to be reversed; but we are convinced that any error occurring in the respects pointed out was thus substantially cured. We are strengthened in this view by the fact that the dominant issue traceable through the general charge and practically applied was the feature of fraud; this is shown by the frequent and purposeful use which was made of the word "misled," in stating the different hypotheses upon which the jury should consider the evidence; and the few omissions strictly to observe and apply this issue were effectively supplied by the special instruction denying the right of recovery "if the plaintiff understandingly settled his claim and was not misled or deceived by the defendant in any way." When considered in connection with the evidence and the instructions as an entirety, the true interpretation of the verdict is that the release was procured by misrepresentation and fraud; and, unless the evidence does not as counsel claims tend to support such an issue, we must conclude that the errors complained of in the charge were formal rather than material.

[2, 3] It is contended that the representations made by the physician and the claim agent must be regarded as expressions of opinion rather than statements of fact. The first test to which the proofs are subjected is whether the motion to direct should have been granted. It is hardly necessary to say, since it has been said so frequently, that upon such a motion of defendant it is the court's duty to take that view

of the evidence most favorable to plaintiff. It is to be observed that according to plaintiff's testimony the agent was possessed of the substance of what the physician had said to the plaintiff. This is deserving of notice because of the insistence made in argument that the physician was not in the employ or an agent of defendant. Plaintiff's counsel in effect contend that the trial was conducted on the theory that the physicians were in defendant's employ, but that the record is so abbreviated as not distinctly to show this. We have seen that in his charge the trial judge treated the physician who made the statement in question as "the defendant's physician." Now, whether we consider the physician's statement as it is given by the plaintiff without contradiction, or as it is given by the agent through his apparent repetition of the statement, we cannot think that the representation as to plaintiff's complaint of injury to his loins and groin was a bare expression of opinion; it was more than this; its tendency and effect were clearly to influence the plaintiff and to bring about the settlement now in issue. In Lumley v. Railroad Co., 76 Fed. 66, 22 C. C. A. 60 (C. C. A. 6), which, it is true, was a suit in equity to set aside an alleged fraudulent release, a question arose upon demurrer to the bill concerning the effect that should be given to a statement of defendant's physician in respect of a complaint made by Lumley of pain in his shoulder. The physician's statement was made with reference to a settlement and to a time during which Lumley would be unable to resume his work; and in speaking of the duty of the physician in such circumstances Judge Lurton said (76 Fed. 70, 22 C. C. A. 64):

"To say to him [Lumley] that the pain of which he complained was sympathetic, and was caused by the fracture below his elbow, was a positive misrepresentation of the truth, and an operative fraud."

We call attention to this only for the evidential weight that was there attached to the physician's statement; it was not regarded simply as an "erroneous opinion," as counsel claim in respect of the statement now under consideration. The form of release in the Lumley Case differs from the present one in this, that the injuries settled for in that case were specified in the release, while here the injuries covered by the present form of release were not; and the settled rule there followed in substance is that general language following injuries mentioned in a release will in its scope and effect be restricted to those particular injuries. Lumley Case, 76 Fed. at page 71, 22 C. C. A. 60; Texas & Pacific Ry. Co. v. Dashiell, 198 U. S. 521, 527, 528, 25 Sup. Ct. 737, 49 L. Ed. 1150; Union Pacific Ry. Co. v. Artist, 60 Fed. 365, 367, 9 C. C. A. 14, 23 L. R. A. 581 (C. C. A. 8). This rule, however, cannot impair the evidential character and weight that should be accorded to the statement made by the physician and repeated by the claim agent in the instant case. The settlement here occurred shortly after the accident happened, and on a relief train which seems to have been sent for the purpose of continuing the trips of those who were on the derailed train to their destinations as far at least as Memphis; the claim agent was on this relief train and engaged in securing settlements with passengers in addition to the plaintiff; and when it is recalled that the agent appears to have known what the physician had said to plain-

tiff, it would seem that the agent and the physician alike were under strong obligations either to make truthful statements to plaintiff, or none at all, concerning his complaint of injury in his loins and groin. The evidence tends to show that these statements were relied on by plaintiff in entering into the settlement. It results that so far as the relevancy and weight of the evidence are concerned, the case was rightly submitted to the jury, unless the form of the present release required the action to be docketed on the equity side of the court below and there heard and disposed of upon appropriate issues before recovery could be allowed if at all for the damages.

[4, 5] It is a long-settled rule that fraud which enters into the execution of an instrument may be proved at law as well as in equity. Hartshorn v. Day, 19 How. 211, 223, 15 L. Ed. 605; George v. Tate, 102 U. S. 564, 570, 26 L. Ed. 232. The rule prevailing in this court (Wagner v. International Ins. Co., 90 Fed. 395, 404, 33 C. C. A. 121), is that in a suit at law it is proper for the plaintiff "to meet a plea of release by a replication that the release was obtained by fraud, whether the fraud is in the execution, or in misrepresentation as to material facts inducing execution." This rule was laid down by Judge Taft, and it does not differ in principle from that stated and supported by Judge Lurton when considering a sealed instrument in the Lumley Case, supra, and who said (76 Fed. 73, 22 C. C. A. 67):

"If the release had in fact been procured by fraud, he (the plaintiff) could have shown this at law, if the fact that the release was under seal [had been] out of the way."

And this was approved in the Wagner Case, 90 Fed. 404, 33 C. C. A. 121.

We appreciate the claim of counsel that the rule of this court as thus pointed out is in conflict with the rule of the Supreme Court, and that it has not met with entire approval in some of the other federal courts. It is sufficient for present purposes to refer to the Supreme Court rule alluded to, as Mr. Justice Swayne stated it, in George v. Tate, supra, 102 U. S. 570, 26 L. Ed. 232:

"It is well settled that the only fraud permissible to be proved at law in these cases (the procurement of a bond in that case) is fraud touching the execution of the instrument, such as misreading, the surreptitious substitution of one paper for another, or obtaining by some other trick or device an instrument which the party did not intend to give. * * * The remedy is by a direct proceeding to avoid the instrument." [1]

We think the decision in that case and the decisions in other cases of a kindred character are sufficiently distinguished by the fact that they deal with sealed instruments, and so, for that reason alone, the rule in the Wagner Case cannot be said to be in conflict with those decisions. Indeed, after reviewing many decisions concerning the rule

[1] We assume that the act passed March 3, 1915, providing that "in all actions at law equitable defenses may be interposed by answer, plea, or replication without the necessity of filing a bill on the equity side of the court," etc. (38 Stat. 956, c. 90, § 274b), is not applicable here, for the reason that the instant case was commenced October 27, 1913.

applicable to sealed instruments, it was said in the Wagner Case, 90 Fed. 404, 33 C. C. A. 121:

"Except for the peculiar sanctity anciently attaching to a sealed writing at common law, which is now disappearing, it is difficult to see how there could be any doubt about the right in an action at law to avoid a release by a reply of fraud. The release or surrender is a contract (and in the case at bar not under seal), in which, for a valuable consideration, the releasor agrees to give up all claim and interest in his right of action. In the case of a contract of sale of personal property, a party may, by tendering back either the money or the property, as the case may be, rescind the sale for fraudulent misrepresentation as to any material fact inducing him to enter into the contract, and, if sued on the contract, may plead such rescission and justify it. Why may not one on the same ground and in the same way rescind a release, or, when it is produced against him as a bar to an action, avoid it by showing the fraud? * * * This is an ordinary remedy as to all other contracts. Leake, Cont. 320, 321. Why not as to this? On page 802 Mr. Leake says: 'In the case of a releasing creditor having been induced to give the release by the fraud of the debtor, he may avoid it at his election without the aid of the court, and he may meet a plea of release in an action by replying that the release was obtained by fraud.'"

While the release involved in the instant case is in form a sealed instrument, yet long prior to its execution the use of such seals was abolished in Tennessee by statute, which declares that:

"The addition of a private seal to an instrument of writing hereafter made, shall not affect its character in any respect." Shannon's Code (Ed. 1895) § 3213.

Clear and positive enactment like this cannot be aided by construction; its intent was at once to abolish the private seal and to destroy the accustomed effect of such a seal; the statute is more sweeping than that of Michigan, which was under consideration by this court in Wabash Western Ry. Co. v. Brow, 65 Fed. 941, 952, 13 C. C. A. 222.

Further discussion is unnecessary. After careful consideration of all the assignments we are satisfied that none of them presents reversible error. The judgment is affirmed, with costs.

In re NEW YORK COMMERCIAL CO. Ex parte BROWN BROS. & CO. Appeal of LOWE et al.

(Circuit Court of Appeals, Second Circuit. May 8, 1916.)

No. 119.

1. BANKRUPTCY ⊂=308—ESTATES—CLAIMS AGAINST.

Where two bankrupt estates were liable for the claim of a bank, the bank may prove its entire debt against each, and, though one of the bankrupts had furnished collateral security, which was not applied to the debt until after both bankruptcies, may assert its entire claim against the other, undiminished by the fact, receiving dividends until the whole claim is paid.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 496–507; Dec. Dig. ⊂=308.]

2. BANKRUPTCY ⊂=340—CLAIMS—EVIDENCE—SUFFICIENCY.

Where claimant made advances to two corporations, both of which became bankrupt, under an agreement whereby both were to be liable, and

the second corporation deposited security, *held*, under the evidence, that, despite the filing of a claim against the second corporation, which first became a bankrupt, tending to show an application of the security, there was no application of such security before the bankruptcy of the first corporation, and therefore the claim against such corporation was not paid pro tanto.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 527; Dec. Dig. ⊂⊃340.]

3. BANKRUPTCY ⊂⊃339—CLAIMS—ESTOPPEL.

Where claimant's first claim referred to collateral security, recited it was an unsecured creditor to at least a fixed amount, and reserved the right to file further claims, claimant is not estopped from filing a further claim asserting the full amount of the debt, on the theory that the security which had been furnished by another corporation, also bankrupt, had not been applied before bankruptcy, for a creditor has a whole year to prove the exact amount of his claim, and the trustee could not object to the mode.

[Ed Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 525, 526; Dec. Dig. ⊂⊃339.]

Appeal from the District Court of the United States for the Southern District of New York.

In the matter of the bankruptcy of the New York Commercial Company. The claim of Brown Bros. & Co. was allowed by the District Court, and John Z. Lowe, Jr., and others, trustees, appeal. Affirmed.

This cause comes here on appeal from an order entered on February 23, 1915, in the United States District Court for the Southern District of New York, confirming the report of a referee in bankruptcy allowing the claim of Brown Bros. & Co. against the estate of the New York Commercial Company, bankrupt, in the sum of $206,845.91.

John W. Ingram and Joseph M. Hartfield, both of New York City (Walter C. Noyes, of New York City, of counsel), for appellants.

Whitridge, Butler & Rice, of New York City (Edwin T. Rice, of New York City, of counsel), for appellee.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge. The bankrupt is a Virginia corporation. Its principal office is or was maintained in the city of New York. It was a large importer of rubber. On February 15, 1913, a receiver of the bankrupt, John Z. Lowe, Jr., was appointed by the court of common law of Norfolk, Va., and two days thereafter the said Lowe was appointed ancillary receiver by the Supreme Court of New York, and he thereafter qualified and acted in that capacity.

On April 12, 1913, a petition in bankruptcy was filed in the Southern District of New York against the New York Commercial Company, and it was subsequently adjudicated a bankrupt. It will be hereinafter referred to as the bankrupt. And at a meeting of the creditors held on April 25, 1913, John Z. Lowe, Jr., William A. De Long, and Joseph W. Harriman were duly elected trustees and qualified. On April 25, 1913, Brown Bros. & Co., hereinafter referred to

as the claimants, filed proof of claim, hereinafter referred to as the original proof of claim, against the bankrupt for the gross amount of $225,542.94.

The bankrupt had intimate business relations with the firm of George A. Alden & Co., hereinafter called the Alden firm, a copartnership carrying on business as rubber merchants in the city of Boston. The Alden firm made an assignment for the benefit of its creditors on February 16, 1913, and was thereafter duly adjudicated bankrupt in the District Court of the United States for the District of Massachusetts, upon a petition filed February 21, 1913. In filing the original proof of claim the following reservation was made:

"Messrs. Brown Bros. & Co. request and reserve the right to file an amended proof of claim in a larger or smaller amount when it becomes possible to arrive at a definite statement of the account between them and the bankrupt."

After referring to certain collateral of an estimated value of $121,530, the claimants concluded as follows:

"Deducting such amount from the balance shown on the annexed statement of $225,542.94, would leave Brown Bros. & Co. an unsecured creditor to the extent of at least $104,012.94."

The collateral referred to in the original proof of claim was received wholly from the Alden firm, but its source was not at that time disclosed.

The claimants are bankers having their head office in New York, maintaining a branch house in Boston, and a London house, known as Brown, Shipley & Co. For many years prior to the bankruptcy, the Alden firm had transacted business with the claimants in Boston, an important part of which was the issue by the claimants of commercial letters of credit, under which the correspondents of the Alden firm might draw for the cost of rubber purchased abroad by the Alden firm. In order to establish and maintain the credit of the latter with the claimants in Boston, deposits of collateral security were made from time to time.

The business of the bankrupt which was also the importation of rubber, mainly from Para, also required the issue of commercial letters of credit. Instead of applying directly to the claimants in New York for such letters of credit, the bankrupt obtained credits from the claimants in Boston through the Alden firm as intermediaries. The reason for so doing was to enable the bankrupt to obtain a line of credit based in part upon the collateral security deposited by the Alden firm.

The underlying basis of the issue of credits by the claimants in Boston to either the bankrupt or the Alden firm, was an agreement, bearing date December 21, 1908. This agreement recites that the bankrupt and the Alden firm—

"hereby jointly and severally unconditionally guarantee to Brown Bros. & Co. the full and complete performance of any and all promises and obligations which the undersigned or either of them may make or incur in connection with any letters of credit issued by Brown Bros. & Co. to or at the instance or request of the undersigned or either of them and the full payment when due of the amount of any and all drafts which may be drawn and accepted thereunder or by virtue thereof."

The agreement also provides that the claimants may surrender merchandise under trust receipts, may take additional guaranties and collateral, and grant extension of time for payment—

"and that neither the taking, surrender, sale or other disposition of any such guaranties, security or collaterals * * * shall in any way impair or affect this guaranty or the liability of the undersigned hereunder. Notice of the surrender of any security or collateral or of any default of the undersigned or either of them * * * is hereby expressly waived."

The guaranty, subject to the right to terminate it by giving notice, was declared to be a continuing obligation applicable to all letters of credit at any time issued by the claimants. This agreement was in force at the time of the failure of the bankrupt, and in reliance upon it the claimants had issued in Boston the four letters of credit enumerated in their amended proof of claim.

These letters of credit authorized drafts on the claimant's London house of Brown, Shipley & Co. at 90 days' sight, accompanied by bills of lading and other usual documents representing shipments of rubber. The rubber for which these letters of credit were issued was Para rubber purchased for account of the bankrupt either in London by Messrs. A. H. Alden & Co., Limited, or in Para by Adelbert H. Alden, Limited. Under these four letters of credit, 23 drafts were drawn upon Brown, Shipley & Co., all at 90 days after sight or 3 months after date, between December 23, 1912, and January 31, 1913. The drawers of all the drafts were subsidiaries of the bankrupt. All the drafts matured after the failure of the Commercial Company, the earliest in the latter part of March, 1913, and the latest in May, 1913.

No question was raised by the trustees of the bankrupt in the court below as to the amount of the drafts, or any of them, nor as to the fact that they were wholly unpaid by the bankrupt, except by the sale of undelivered merchandise represented by the bills of lading accompanying the drafts, and the application of the net proceeds toward such payment. At the time of the failure of the Alden firm, as well as of the bankrupt, the claimants held certain collateral, including 1,110 shares of preferred stock of the Commercial Company, 83 shares of Glendale Elastic Fabric Company, certain preferred and common stock of the Seamless Rubber Company, and stock of the East Hampton Rubber Thread Company. This collateral was all received by the claimants from the Alden firm and was the property of that firm.

[1] The claimants clearly had a demand against the bankrupt, and they also had a demand against the Alden firm, likewise a bankrupt, and, having a demand against two insolvent estates, had a right to prove against each for the full amount, and could assert their right against one unimpaired by the fact that they held security against the other. They could recover dividends from the two bankrupt estates upon the full amount of their claim at the time the petition in bankruptcy was filed therein until from all sources they received full payment of their claim, but no longer. Board of Commissioners of Shawnee County v. Hurley, 169 Fed. 92, 94 C. C. A. 362 (1909). Remington on Bankruptcy (2d Ed.) § 1519.

[2] We do not understand that counsel for appellants question the principle above laid down. They deny its application to the facts of

this case. Their contention is that prior to the time when the bankruptcy occurred the claimants had liquidated their claim as against the Alden firm by the application of the collateral, and in doing so had liquidated it as against the bankrupt herein, so that their claim, instead of being secured, had been partly paid.

In turning over the collateral to the claimants the Alden firm, by a writing dated November 18, 1909, expressly authorized the former "to sell all or any part of the same without demand or notice either at public or private sale, on the nonperformance of any of said obligations" due credit to be given for any balance; and it was also provided "that the claimants may purchase at any such sale." It is asserted that this gave the claimants the power to apply the collateral to the indebtedness of the Alden firm at any time after default by that firm.

That the collateral was actually applied was testified to by the bookkeeper of the claimants, who stated that:

"Our claim against George A. Alden & Co. was reduced to about $100,000 by applying the collateral."

It is observed that this testimony is wholly vague and inconsequential. It affords no light upon the important question as to when the collateral was applied. There is no direct evidence as to the precise time when this was done. After filing the original claim as above set forth, the claimants, in the exercise of the right which they had expressly reserved, filed an amended claim against the bankrupt. The original claim was for the balance due after deducting or crediting the value of the Alden collateral. The amended claim is for the total indebtedness due from the bankrupt, without regard to or credit of the Alden collateral.

The important question to be considered, therefore, is whether, under the terms of the agreement of December, 1908, the bankrupt is liable to the claimants for the maximum amount of the unpaid drafts under the letters of credit issued by the claimants, or whether the claim of the claimants against the bankrupt is only for such maximum amount after giving credit for any amount they may have collected from the estate of the Alden firm, including the value of the collateral held by the bankers belonging to that estate.

The referee in bankruptcy reported that in his opinion the trustees of the bankrupt were not entitled in the first instance to the credit of the value of the collateral held by claimants belonging to the estate of the Alden firm. In his opinion the claimants were entitled to prove against either or both of the estates of the bankrupt or of the Alden firm, pari passu, until from either or both sources they had collected and received 100 per cent. of their debt. And this right he held was in no way impaired by the fact that the claimants held additional security belonging to the estate of one of the two debtor concerns, and that neither debtor was entitled to any credit for any collections that had been received by the claimants, in dividends or by liquidation of collateral, from the estate of the other debtor—always with the proviso that all collections must stop when the aggregate thereof reached 100

per cent. of the creditor's debt, which no one contends, however the present controversy is decided, will be the case here.

The District Judge concurred in this view of the matter. The statement that there is indirect evidence that the claim had been reduced prior to February 21, 1913, when the Alden firm was adjudicated a bankrupt, is not persuasive upon a consideration of the testimony as a whole. It is said to be shown by the proof of claim made by a member of the firm of the claimants and which was sworn to, stating that the Alden firm was at and before the filing of the petition in bankruptcy, and still is, indebted to the claimants in the sum of $104,012.94.

This refers to a proof of claim made by Louis Curtis on May 14, 1913. It is pointed out that this claim was presented as an unsecured claim, and that it was averred that the claimants had not "had or received any manner of security for said debt whatever." And we are informed that the claimants could not have had an unsecured claim for a balance of advances of $104,012.94 in February, 1913, unless the collateral the claimants held had been taken over by them before that time. They say it necessarily follows that there was an application of the collateral to the claim before the filing of the petition in bankruptcy. They insist that the only alternative is that the claimants, although secured creditors, proved their debt as unsecured creditors, and if they did this they waived their security. But it seems to us that to give the recognition to this proof of claim that counsel ask us to give it is to ignore other testimony and is unwarranted. A certified copy of his proof of claim was shown Mr. Curtis when on the stand at the trial, and he was asked if he had ever seen the original and the reply was, "I don't remember it." He was asked if he recalled having executed it and answered, "I don't remember it." His testimony showed that he had very little accurate and detailed knowledge about the relations of the Alden firm with his own. In view of the original proof of claim and the amended proof of claim, one filed before and one after Mr. Curtis' statement, and contradictory of it, we cannot allow what appears in his statement to be controlling.

The statement of account shows that the debts amounted to $269,042.47; that there were estimated miscellaneous receipts which it was expected, if they materialized, would reduce this sum to $225,542.94. It also shows, as it was required to show, what collateral was held, and stated that the value thereof was "uncertain" but estimated at $121,530. In view of the filing, after the bankruptcy, of the statement of account showing that at that time claimants held as collateral the various stocks specified therein to the amount of $121,530, the argument that prior to that time this collateral had been actually applied to the reduction of the debt is not persuasive.

The original proof of claim was sworn to on April 25, 1913, by Mr. T. N. Brown, a member of claimants' firm. He stated in his sworn statement that the bankrupt "was at and before the filing" of the petition for adjudication in bankruptcy, "and still is, justly and truly indebted" to the claimants in the sum of at least $225,542.94. He added:

"The shares of stock held as collateral by Messrs. Brown Bros. & Co., as shown in the annexed statement, upon information and belief, are not of a

value greater than $121,530. Deducting such amount from the balance shown on the annexed statement, of $225,542.94, would leave Brown Bros. & Co. an unsecured creditor to the extent of at least $104,012.94."

The amended proof of claim sworn to by Mr. Morean Delano, a member of the claimant's firm, and which was sworn to on February 17, 1914, gives the amount of the indebtedness then due from the bankrupt as $221,487.06 and that no part of the indebtedness had been paid.

We cannot, therefore, concur in thinking that the collateral had ever actually been applied to a reduction of the indebtedness prior to the bankruptcy. The conclusion of the master and of the District Judge respecting the matter commends itself to us upon a consideration of the testimony as a whole. It is not necessary for us to attempt to explain Mr. Curtis' statement, which is irreconcilable with the other testimony. But evidently he did not prepare the statement himself, and whoever prepared and explained it to him was mistaken in his facts. No reduction of the debt had taken place prior to the bankruptcy. The case is therefore subject to the principle heretofore referred to in this opinion and laid down in Board of Commissioners of Shawnee County v. Hurley, supra.

[3] It is urged upon us, however, that claimants are now estopped from enforcing their amended claim against the estate of the bankrupt. It is said the bankrupt was liable only as a guarantor of the obligations of the Alden firm; that the Alden firm, having procured the letters of credit, was liable to the claimants as the principal debtor, and that the bankrupt was the guarantor. But this is error. The contract of guaranty in this case is joint and several, binding both equally for the debt of either. So far as the suggestion of estoppel is based on any theory of principal and surety it is without merit. In their brief the counsel say:

"Assuming, then, that if the claimants had originally presented their amended claim, the trustees would have had the right to prove over against the Alden estate, it follows that they were estopped from presenting it at a later time if the trustees were misled by their action and lost such right. And it is evident that the trustees did lose their rights. When they saw the claimants' demand presented against the Alden estate for $104,012.94, and a similar demand presented against their own estate, they had a right to rely upon that amount as the limit of the claimants' demand. Having done so, and the Alden bankruptcy having been settled by a composition proceeding, the trustees were remediless when, after nearly a year, the claimants filed their amended claim."

But in taking the position above outlined counsel ignore the fact that the original proof of claim contained a proviso expressly reserving the right to file an amended proof of claim in a larger or smaller amount, when it should be possible to arrive at a definite statement of the account between the claimants and the bankrupt. We know of no reason why the claimants were not entitled to exercise that right, as they did, within the statutory year. Fellow creditors have no right to object to the proving of a creditor's claim at its correct amount at any time within the statutory year, so that the creditor may receive his correct pro rata share of the estate, if not already distributed.

And the bankrupt cannot object to the exercise of such a right by a claimant. We do not see how anybody's rights have been in the least degree prejudiced by the action taken.

The order is affirmed.

LACOMBE, Circuit Judge, heard the arguments, participated in the consultation, and indicated concurrence in the conclusions above expressed, but did not see the text of the opinion.

MOUND COAL CO. v. JEFFREY MFG. CO.

(Circuit Court of Appeals, Fourth Circuit. May 15, 1916.)

No. 1369.

1. APPEAL AND ERROR ⟸544(1)—ASSIGNMENTS OF ERROR—BILL OF EXCEPTIONS.

In detinue, assignments of error relating to rulings as to ownership cannot be reviewed, where not based upon a bill of exceptions, as required by the court rules.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2412; Dec. Dig. ⟸544(1).]

2. APPEAL AND ERROR ⟸194(6)—ASSIGNMENTS OF ERROR—NECESSITY.

Though defendant pleaded over after the overruling of its demurrer to the declaration, went to trial, and failed to renew the demurrer, and ask for verdict under all the evidence at the close of the case, the sufficiency of the declaration to state a cause of action may be reviewed as an unassigned error appearing on the record.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1245; Dec. Dig. ⟸194(6); Pleading, Cent. Dig. §§ 1375–1394, 1397–1407.]

3. DETINUE ⟸17—ACTIONS—DECLARATION.

Declaration in detinue, averring that a purchaser of machinery, having paid to plaintiff the cash payment provided in the agreement of sale, and not having made any further payment, and having no right to possession, with intent to defraud plaintiff, delivered possession to defendant, which, participating in the fraudulent purpose, refused to surrender the machinery on plaintiff's request, and that defendant did wrongfully and unjustly detain it from plaintiff, to its damage, sufficiently charges an unlawful detainer and plaintiff's right to possession.

[Ed. Note.—For other cases, see Detinue, Cent. Dig. §§ 26–33; Dec. Dig. ⟸17.]

4. DETINUE ⟸17—DECLARATION—SUFFICIENCY.

In such case the declaration is sufficient to negative any right of defendant to possession of the machinery between the time of delivery to the purchaser and the time demand was made upon it for surrender.

[Ed. Note.—For other cases, see Detinue, Cent. Dig. §§ 26–33; Dec. Dig. ⟸17.]

5. APPEAL AND ERROR ⟸248, 544(1)—REVIEW—EXCEPTIONS.

An exception, and a bill of exceptions based thereon, containing evidence in narrative form, duly submitted to the trial court before expiration of the term, are necessary to secure review of rulings of the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1432, 1468, 2412; Dec. Dig. ⟸248, 544(1).]

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6. APPEAL AND ERROR ⟸657(1)—BILL OF EXCEPTIONS—NECESSITY.

A bill of exceptions is unavailing, unless based on an exception to the record; and where there was none a writ of error will not be remanded, to compel the trial court to settle and include therein a condensed statement in narrative form of the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2830, 2831; Dec. Dig. ⟸657(1).]

In Error to the District Court of the United States for the Northern District of West Virginia, at Wheeling; Alston G. Dayton, Judge.

Detinue by the Jeffrey Manufacturing Company against the Mound Coal Company. There was a judgment for plaintiff (215 Fed. 222), and defendant brings error. Affirmed.

Hubbard & Hubbard, of Wheeling, W. Va., for plaintiff in error.

W. Wilson Carlile, of Columbus, Ohio (J. Coleman Simpson, of Moundsville, W. Va., and J. B. Sommerville, of Wheeling, W. Va., on the brief), for defendant in error.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

PRITCHARD, Circuit Judge. This is an action in detinue, in which the defendant in error, the Jeffrey Manufacturing Company, claims title and the right to possession of certain machinery sold to the Mound City Coal Company, a copartnership, under three conditional sale contracts dated May 17, 1911. The plaintiff in error will hereafter be referred to as defendant, and the defendant in error as plaintiff; such being the respective positions occupied by the parties in the court below.

This machinery was shipped under the conditional sale contracts mentioned to the Mound City Coal Company, at Moundsville, W. Va., in the latter part of June, 1911, and the contracts were duly recorded on the 19th day of August, 1911, in the office of the clerk of the court for the county of Marshall, to which county the property was delivered. Title to the property mentioned in the contracts was reserved in the vendor until full and final payment of the purchase money. No part of the purchase money was ever paid to the vendor. The defendant was the owner of the mining property upon which the machinery was delivered. It had leased the property to one L. G. Orr before the execution of the contracts referred to. Orr was a member of the copartnership known as the Mound City Coal Company, the purchaser; but the lease was a personal lease to Orr, and the Mound City Coal Company was not a party to the lease, either directly or by assignment. The lease was made for a term of 12 years, and was not recorded, and it is conceded, if important, that the plaintiff, vendor, had no knowledge of its provisions.

The machinery in question consisted of one mine locomotive, four electric coal-cutting machines, and one electric generator set, consisting of a Ridgeway engine and Jeffrey generator. On or about October 2, 1911, and about 3 months after the delivery of the machinery, Orr, the lessee, abandoned the property and the lessor re-entered and took possession. At the time of the re-entry the generator set had been

mounted, but had not been used, nor was any of the machinery delivered used until the defendant re-entered the property, prior to the issuance of the writ in detinue by the plaintiff. The defendant received royalties under the lease amounting to $3,244.11 from the lessee, and also collected the sum of $1,615.76 from the sale of the assets of the Mound City Coal Company in bankruptcy proceedings, making a total of $4,869.87, before the expiration of the first 6 months of the lease.

The stipulation of facts states that the lessee was entitled to a credit, entirely unexplained, of $2,230.34, but royalties amounting to $4,859.87 were admittedly paid during the first 6 months of the lease. The minimum provided to be paid each 6 months was $5,000. The machinery in question was never seized nor attached under any distress warrant or other legal process for the purpose of enforcing a landlord's lien, nor were any measures taken by the defendant for the assertion of any legal right, title, or interest in the property until after re-entry and the present suit was brought, nor was the property in dispute seized or removed by any officer of the law under process issued at the instance of any claimant. Quoting from the transcript of record, page 38, first paragraph:

"Mr. Carlile: It is stipulated that the defendant has not proceeded to enforce the lien by distress warrant.

"Mr. Hubbard: The defendant has never sued out a distress warrant on any of the property in controversy, nor taken legal steps to enforce its claim of a landlord's lien thereon except in this suit.

"Mr. Carlile: Nor has the property in dispute been seized or removed by any officer of the law under process issued at the instance of any third party or other party. That is one of the points where you might have a lien without issuing a distress warrant.

"Mr. Hubbard: Nor has the said property been seized or removed from the premises of the landlord defendant by any officer of the law acting under any process issued at the instance of any other claimant."

The conditional sale contracts referred to, under which the plaintiff claims the right to possession of the property and which were duly recorded, as stated, on the 19th day of August, 1911, and prior to the re-entry by the defendant, contain the following clause:

"The title and ownership of the property called for and furnished under the terms of this contract shall remain in the Jeffrey Manufacturing Company until the full and final payment therefor shall have been made according to the terms agreed upon, and notes, if any, shall have matured and been paid in full. In case of default in any of the payments above provided for the Jeffrey Manufacturing Company may repossess itself of the withinmentioned property and all additions thereto wherever found, and shall not be liable in any action at law on the part of said Mound City Coal Company for such reclamation of its property, nor for the repayment of any money or moneys which may have been paid by said Mound City Coal Company, in part payment for said installation and equipment.

"It is further agreed by the parties hereto that any machinery or parts delivered pursuant to the terms of this contract shall not become a fixture by reason of being attached to real estate, but the same may be separated from the real estate and sold or reclaimed in the manner provided by the law governing conditional sales upon default in payment and without liability on the part of the Jeffrey Manufacturing Company or its agents for such sale or removal."

The machinery was on the premises belonging to the landlord at the time of its re-entry, but there was no assertion of title on the part of the landlord, and the latter has made no attempt to fasten a lien upon this property. It is admitted that the title of the property resides in the plaintiff.

The defendant claims right to the possession of the property which is the subject of this suit, and the plaintiff claims title and the right to possession under its recorded conditional sale contracts. It was stipulated at the trial of the case that, in the event the court found in favor of plaintiff, a money judgment should be entered in place of an order directing the return of the property and an assessment of damages for its detention, and a judgment for the sum of $8,726.85 was entered pursuant to the stipulation.

[1] The defendant seeks to have certain questions as respects this controversy reviewed by this court, but the assignments of error are not based upon bills of exception as required by our rules. However, the first assignment of error relates to the court's action in overruling defendant's demurrer to the plaintiff's declaration.

[2] It appears that the defendant pleaded to the declaration, went to trial, and submitted testimony, and did not, at the conclusion of the trial, renew the demurrer and ask for a verdict under all the evidence. The plaintiff insists that the course pursued by the defendant amounted to a waiver of the demurrer, and "there can be no valid assignment of error to the action of the District Court in overruling it originally." This position is untenable for the reason that this court has the power to pass upon the question as to whether the declaration states a cause of action. Therefore the ruling of the lower court in this respect will be treated as a plain unassigned error appearing on the record. Teal v. Walker, 111 U. S. 242, 4 Sup. Ct. 420, 28 L. Ed. 415; Lehnen v. Dickson, 148 U. S. 71, 13 Sup. Ct. 481, 37 L. Ed. 373.

[3] It is insisted by defendant that the demurrer to the declaration should have been sustained upon the ground that plaintiff "fails to aver the right of possession in the plaintiff below." The declaration, among other things, contains the following language as to the possession of the property by the plaintiff, to wit:

"Still doth wrongly and unjustly detain the same from the said plaintiff, who is entitled to recover the same and have the present right of possession."

Among other things, the declaration contains the following allegation as respects this point:

"Plaintiff avers that on or about the ——— day of October, 1911, the said Mound City Coal Company, not having paid to plaintiff the said sum of two thousand ($2,000.00) dollars, the cash payment provided in said agreement of sale, and not having paid any consideration whatever for said machinery and property, or otherwise complied with any of the terms of said agreement of sale, and not having paid any or either of said notes, and having no right to the possession of said machinery and property under said agreement of sale, with intent to defraud plaintiff of the said machinery and property, and the consideration therefor, delivered the possession of said machinery and property to the defendant, Mound Coal Company, the said defendant having notice and participating in the fraudulent purpose of the said Mound City Coal Company; and the said defendant, Mound Coal Company, fails and re-

fuses to surrender the said machinery and property to the plaintiff, although the said plaintiff did, on the 11th day of October, 1911, request the said defendant to surrender and give up to the said plaintiff the machinery and property aforesaid, and the said defendant then refused to deliver said machinery and property, or any part thereof, to plaintiff, and still refuses so to do, although requested as aforesaid, to the damage of the plaintiff in the sum of ten thousand ($10,000.00) dollars."

Also the following:

"And not having paid any or either of said notes and having no right to the possession of said machinery and property under said agreements of sale, the said defendant Mound Coal Company, wrongfully and unlawfully entered into and took possession of said machinery and property without the consent of the said plaintiff, and fails and refuses to surrender the said machinery and property to the plaintiff, although said plaintiff did, on the 11th day of October, 1911, request the said defendant to surrender and give up to the said plaintiff the machinery and property aforesaid. * * * Yet the said defendant, well knowing the said last-mentioned machinery and materials and personal property, goods, and chattels to be the property of the said plaintiff, and of right to belong and appertain to it, hath not as yet delivered the said last-mentioned machinery and materials and personal property, goods, and chattels, or any or either of them, or any part thereof, to the said plaintiff, although it was afterwards, to wit, on the 11th day of October, 1911, requested by the said plaintiff so to do, but hath hitherto refused and still refuses so to do, and still doth wrongly and unjustly detain the same from the said plaintiff, who is entitled to recover the same, and has the present right of possession, to the damage of the said plaintiff in the sum of $10,000.00, and therefore it brings this suit."

These allegations are clear and unambiguous, and leave no doubt as to the idea intended to be conveyed thereby, to wit, that the defendant is in the unlawful possession of the property and unjustly detains the same from the plaintiff, and that plaintiff is entitled to recover the same by virtue of its right of possession.

[4] The next ground of demurrer is that it appears from the declaration that the voluntary delivery of the machinery to the Mound City Coal Company was made two months before the conditional sale contracts were recorded, and that such delivery was made without collecting any part of the purchase money; further, that the declaration "does not negative the lawful accrual to the plaintiff in error of the right of possession or the machinery between the time of such delivery and the time of demand made upon it." We think that the extracts which we have quoted sufficiently allege that the defendant had no right of possession. We have carefully considered the declaration in its entirety, and are of opinion that the complainant has stated a cause of action, and that therefore the court below was warranted in overruling the demurrer.

The other assignments of error relied upon by defendant cannot be considered, for the reason that in the first instance no exception was taken to any ruling of the court which is now sought to be reviewed, nor is there in the record any bill of exception as required by the rules of this court upon which to base such assignments of error.

[5, 6] Among other things it appears that, instead of taking exceptions to the rulings of the lower court during the trial of the case, and preparing bill of exceptions based thereon containing the testimony in narrative form, and presenting the same to the trial judge during

the term, counsel for defendant only submitted to the learned judge who heard the case in the court below a statement of what purported to be the evidence in narrative form, and moved the court for an order approving the same, and directing the clerk to use such evidence in lieu of the full testimony in preparing the record for transmission to this court. The court below refused to grant such motion.

Counsel for defendant now submits a motion to remand this case to the lower court, "with instructions to settle and include in the record for the purpose of the writ of error a properly condensed statement in narrative form of the evidence which was heard and considered upon the trial of the cause in the said District Court." The course pursued by counsel for defendant in the court below as respects this matter was not in compliance with the rules of this court, which, as we have stated, require (a) that an exception be taken to any ruling of the court which the party may seek to review; (b) that a bill of exception based thereon, containing the evidence in narrative form, be submitted to the trial judge before the expiration of the term. The record shows that these requirements have not been met by the plaintiff in error.

In the case of Scaife v. Western North Carolina Land Co., 87 Fed. 310, 30 C. C. A. 661, this court, in an opinion by the late Circuit Judge Simonton, said:

"* * * An exception must show that it was taken and reserved at the trial, and this must appear affirmatively on the record. But it may be drawn out in form, and signed or sealed afterwards by the judge. U. S. v. Carey, 110 U. S. 51, 3 Sup. Ct. 424 [28 L. Ed. 67]. Each bill of exception must be considered as presenting a substantial case, and it is the evidence stated in it alone on which the court will decide. Jones v. Buckell, 104 U. S. 554 [26 L. Ed. 841]. The bill of exceptions must be prepared and settled during the term at which the case was tried, unless there be an express order, made by the judge during the term, extending the time beyond the term, or full consent of parties, express or implied from stringent circumstances. Muller v. Ehlers, 91 U. S. 251 [23 L. Ed. 319]; U. S. v. Breitling, 20 How. 253 [15 L. Ed. 900]; U. S. v. Jones, 149 U. S. 262, 13 Sup. Ct. 840 [37 L. Ed. 726]; Railroad Co. v. McGee, 8 U. S. App. 86, 2 C. C. A. 81, 50 Fed. 906; Lumber Co. v. Chapman, 20 C. C. A. 503, 74 Fed. 444. A bill of exceptions ought to be upon some point of law, either in admitting or denying evidence, or a challenge on some matter of law arising on facts not denied, in which either party is overruled by the court. Ex parte Crane, 5 Pet. 190 [8 L. Ed. 92]. It should contain only the rulings of the court upon matters of law, with so much of the testimony as may be necessary to explain the bearing of the rulings upon the issues involved. Duncan v. The Francis Wright, 105 U. S. 381 [26 L. Ed. 1100]; Improvement Co. v. Frari, 8 U. S. App. 444, 7 C. C. A. 149, 58 Fed. 171. Every bill of exceptions should point out distinctly the errors of which complaint is made. It ought also to show the grounds relied upon to sustain the objection presented, so that it may appear that the court below was informed as to the point to be decided. Duncan v. The Francis Wright, supra."

No bill of exception can be allowed by the court below, nor entertained by this court, unless it appears from the record that an exception was taken to the ruling of the court below. Prioleau v. United States, 143 Fed. 320, 74 C. C. A. 458.

Also, in the case of Oxford & Coast Line Railroad Co. v. Union Bank, 153 Fed. 723, 82 C. C. A. 609, this court, among other things, said:

"While it is not the policy of the court to dismiss writs of error and cases on appeal on account of slight technicalities, at the same time the rules of this court, as well as the rules of the Circuit Court, are plain and easily understood. In this instance the provision of the statute relating to the question at issue is mandatory and must be enforced. It is incumbent upon attorneys who practice in the federal courts to observe and strictly follow the rules of practice and procedure in preparing and presenting bills of exceptions. In the case of Michigan Ins. Bank v. Eldred, 143 U. S. 298 [12 Sup. Ct. 450, 36 L. Ed. 162], the court, among other things, said: 'The duty of seasonably drawing up and tendering a bill of exceptions, stating distinctly the rulings complained of and the exceptions taken to them, belongs to the excepting party, and not to the court. The trial court has only to consider whether the bill tendered by the party is in due time, in legal form, and conformable to the truth; and the duty of the court of error is limited to determining the validity of exceptions duly tendered and allowed.' It is essential to the orderly procedure of the courts that attorneys should comply with the rules relating to the same; otherwise, it would be useless to promulgate rules for the guidance of those who may seek to review the action of the lower court."

Even if this case should be remanded and the evidence put in narrative form, it would not avail defendant, inasmuch as it has not complied with the rules of this court, to which we have referred, so as to enable it to have the rulings of the lower court reviewed on a writ of error.

For the reasons stated, the motion to remand this case is denied, and the judgment of the lower court is affirmed.

THE YANKEE.

(Circuit Court of Appeals, Third Circuit. May 18, 1916.)

No. 2083.

1. MARITIME LIENS ⊂=24—SUPPLIES—"FURNISHED SUPPLIES TO A VESSEL."

The dredge Yankee chartered to a dredging company was being used by it in dredging in the Delaware river below Philadelphia. Libelants furnished supplies on orders of the dredging company, which specified that they were for the Yankee and contained shipping directions pursuant to which the supplies were forwarded by rail and other carriers to a designated wharf in Philadelphia, from which they were taken by the dredging company to the dredge where it was at work. *Held*, that such supplies were "furnished * * * to a vessel," within the meaning of Act June 23, 1910, c. 373, § 1, 36 Stat. 604 (Comp. St. 1913, § 7783), relating to maritime liens.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. § 30; Dec. Dig. ⊂=24.

For other definitions, see Words and Phrases, First and Second Series, Furnish.]

2. MARITIME LIENS ⊂=21—SUPPLIES—FEDERAL STATUTE.

Under such act one furnishing supplies for a vessel on proof of an order therefor from the owner or from a person to whom the management of the vessel has been lawfully intrusted at the port of supply, and of delivery to the vessel, has a prima facie right to a maritime lien.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. § 26; Dec. Dig. ⊂=21.]

3. MARITIME LIENS ⊂⊃65—SUPPLIES—FEDERAL STATUTE.

The provision of section 3 (Comp. St. 1913, § 7785) that the act shall not be construed to confer a lien when the furnisher knew, or by the exercise of reasonable diligence could have ascertained, that the person ordering the supplies was without authority to bind the vessel therefor, contemplates the removal of the presumption of authority only when there are circumstances which require the exercise of reasonable diligence to ascertain the authority and places upon one attacking the presumption the burden of removing it by establishing such circumstances by affirmative evidence.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. § 103; Dec. Dig. ⊂⊃65.]

4. MARITIME LIENS ⊂⊃21—SUPPLIES—PRESUMPTION OF AUTHORITY TO BIND VESSEL.

That one furnishing supplies for a vessel had knowledge that the company ordering the same, which was in possession of the vessel, was in financial difficulty, does not put him on inquiry as to its ownership or authority to bind the vessel, so as to defeat the presumption of authority arising under the statute.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. § 26; Dec. Dig. ⊂⊃21.]

5. MARITIME LIENS ⊂⊃65—SUPPLIES—PROOF OF DELIVERY.

One furnishing supplies for a vessel *held* not entitled to a maritime lien therefor, where the evidence did not show that the supplies were actually delivered to or used by the vessel.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. § 103; Dec. Dig. ⊂⊃65.]

Appeal from the District Court of the United States for the Eastern District of Pennsylvania; J. Whitaker Thompson, Judge.

Suit in admiralty by John S. Latta, trading as John S. Latta & Co., Charles H. Whitney and S. Wheaton Smith, copartners as Charles H. Whitney & Co., the Benjamin F. Shaw Company, the Glen Brook Coal Company, and Paul J. Devitt against the dredge Yankee, the Rivers & Harbors Improvement Company, claimant. Decree for claimant, and libellants appeal. Modified.

Howard M. Long, George W. Harkins, and Howard H. Yocum, all of Philadelphia, Pa., for appellants.

Russell T. Mount, of New York City, and Bruce A. Metzger, of Philadelphia, Pa., for appellee.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

WOOLLEY, Circuit Judge. This is an appeal from a decree of the District Court, affirming the report of a Commissioner and dismissing five libels filed against a vessel for supplies. As the report was affirmed and the decree entered without an opinion, we must assume that the Commissioner's findings were accepted by the court as an expression of its views.

It is not necessary to recite or even summarize the testimony of each case. It will be sufficient to state only so much thereof as will present to the best advantage the theory of the law upon which the claimant made its defense and the Commissioner based his findings.

The dredge Yankee was a centrifugal blower dredge, owned by the Rivers and Harbors Improvement Company and leased to the Breakwater Construction Company under covenants which prohibited the lessee "to suffer or permit any lien or liens, maritime or other, to attach" to the vessel. The Yankee was then chartered or "rented" by the Breakwater Company to the Atlantic Dredging Company, for use in its dredging operation on the River Delaware. A written charter was prepared but not executed. There was an exchange of letters between the officers of the two companies stating the terms upon which the Yankee was to be used. These letters were lost, but their contents were proven. For the purpose of this discussion we will assume, without deciding, that this correspondence constitutes a charter party, that thereby the Dredging Company derived from the Breakwater Company no greater power than the latter company acquired under the lease, and that therefore the Dredging Company was without authority to bind the vessel for supplies and necessaries.

It is conceded that the possession of the dredge by the Dredging Company was not tortious or unlawful, and it is not denied that the Dredging Company, in its relation to the dredge, was in the position described by the statute, of a "person to whom the management of a vessel at the port of supply is entrusted."

[1] The Dredging Company was engaged in dredging the channel of the Delaware river south of Philadelphia under contract with the United States. The Yankee was procured to enlarge the fleet already assembled and to promote the operation then under way. In preparing the Yankee for work, and during its progress, certain repairs, supplies and necessaries were required. These were ordered from the libellants on one occasion by the captain and on all others by the Dredging Company. Each order specified the supplies to be for the Yankee, and in each instance the supplies were forwarded to her pursuant to shipping instructions accompanying the order. These instructions varied according to the source of the supplies and to the railroad over which they were to be shipped, but in each instance the instructions designated a wharf or pier in Philadelphia to which the supplies were to be delivered, whence they were carried either by tugs or barges of the Dredging Company or by other river craft to the Yankee in her position on the lower river.

The transaction of delivery which best presents the position of the claimant, is that of Charles H. Whitney and Company. The Dredging Company inquired of that company its price for dredge pipe. Whitney and Company replied, quoting price "f. o. b. works" at an interior point in Pennsylvania, "freight allowed to Philadelphia." The Dredging Company gave the order as follows:

"Ship to Atlantic Dredging Company at Christian Street Wharf, % Armstrong and Latta Company, via P. R. R., marked 'For Dredge Yankee,' immediately, 1000 feet I. D. pipe."

Pursuant to these instructions, the pipe was marked and billed "For Dredge Yankee," and shipped over the Pennsylvania Railroad to Christian Street wharf in Philadelphia, at which place it was unloaded by

the Dredging Company and then loaded on one of its barges and towed to the Yankee, and by her received and used as a part of her tackle and equipment. The claimant maintained, and the Commissioner found, that as these supplies were not delivered by the libellant directly to the vessel, but were delivered to her by means of transportation instrumentalities which were not the agents of the libellant, the transaction, therefore, did not constitute "furnishing * * * supplies * * * to a vessel" within the meaning of the act conferring a maritime lien, but constituted a delivery to the Dredging Company at the interior point of consignment in completion of a common law sale to that company.

The act of June 23, 1910 (36 Stat. 604, c. 373 [Comp. St. 1913, §§ 7783–7787]), which is recited in full in the margin,[1] affords a maritime lien, under certain circumstances, to any person "furnishing repairs, supplies or other necessaries * * * to a vessel." It is maintained by the claimant, that this expression had received judicial interpretation prior to its use in the act, that the expression, as employed by the act, conveys the meaning judicially given it, and that that meaning supports the contention of the claimant and the finding of the Commissioner. Of the cases on which the claimant relies for authority, several have been decided since the enactment of the statute and two before. The later cases are Ely v. Murray, 200 Fed. 368, 118 C. C. A. 520; The Geisha (D. C.) 200 Fed 865; The Bethulia (D. C.) 200 Fed. 879. These do not require discussion, for they do not bear upon

[1] "Section 1. Any person furnishing repairs, supplies, or other necessaries, including the use of dry dock or marine railway, to a vessel, whether foreign or domestic, upon the order of the owner or owners of such vessel, or of a person by him or them authorized, shall have a maritime lien on the vessel which may be enforced by a proceeding in rem, and it shall not be necessary to allege or prove that credit was given to the vessel.

"Section 2. The following persons shall be presumed to have authority from the owner or owners to procure repairs, supplies, and other necessaries for the vessel: The managing owner, ship's husband, master, or any person to whom the management of the vessel at the port of supply is intrusted. No person tortiously or unlawfully in possession or charge of a vessel shall have authority to bind the vessel.

"Section 3. The officers and agents of a vessel specified in section two shall be taken to include such officers and agents when appointed by a charterer, by an owner pro hac vice, or by an agreed purchaser in possession of the vessel, but nothing in this act shall be construed to confer a lien when the furnisher knew, or by the exercise of reasonable diligence could have ascertained, that because of the terms of a charter party, agreement for sale of the vessel, or for any other reason, the person ordering the repairs, supplies, or other necessaries was without authority to bind the vessel therefor.

"Section 4. Nothing in this act shall be construed to prevent a furnisher of repairs, supplies, or other necessaries from waiving his right to a lien at any time, by agreement or otherwise, and this act shall not be construed to affect the rules of law now existing, either in regard to the right to proceed against a vessel for advances, or in regard to laches in the enforcement of liens on vessels, or in regard to the priority or rank of liens, or in regard to the right to proceed in personam.

"Section 5. This act shall supersede the provisions of all state statutes conferring liens on vessels in so far as the same purport to create rights of action to be enforced by proceedings in rem against vessels for repairs, supplies, and other necessaries."

the matter before us except as they cite with approval a certain expression found in the two earlier cases. The earlier cases are the Vigilancia (D. C.) 58 Fed. 698, decided by the District Court of the United States for the Southern District of New York in 1893, and the Cimbria (D. C.) 156 Fed. 378, decided by the District Court of the United States for the District of Massachusetts in 1907.

The Vigilancia was libeled for supplies. The circumstances were unique. The vessel was lying in her home port of New York, and the supplies ordered by her owner were furnished by the libellants from the State of New Jersey. They consisted of oleomargarine, the sale and delivery of which within the State of New York were prohibited by the laws of that state. As delivery of supplies of this kind to the vessel lying in New York would be an infraction of the law, and as delivery of supplies of any kind to the vessel at her home port would not at that date raise a maritime lien, the libellants disclaimed delivery in New York and maintained that the supplies had been furnished to the vessel in the State of New Jersey and a maritime lien had there been acquired under an arrangement with the owner that the sale and delivery were intended to be completed in Jersey City upon their delivery to truck-men for transfer to the ship in New York.

In The Cimbria, supra, the facts were strikingly similar to those of The Vigilancia. Equipment for that vessel had been shipped f. o. b. New York on the owner's order. The vessel was lying in Bangor, Maine, her home port. Because of this impediment to a maritime lien, the libellant disclaimed delivery to the ship at her home port, and maintained that delivery had been made to the ship in New York at the time of consignment.

In each of these cases the court was called upon to determine a question then always present in cases of maritime liens, namely, whether the supplies were furnished the owner upon his credit or the ship upon her credit. The courts in the two cases decided, that to hold a vessel in rem for supplies or cargo, actual delivery thereof must be made *to the vessel.* Pollard v. Vinton, 105 U. S. 7, 9–11, 26 L. Ed. 998; and that when supplies are concededly delivered at a port distant from the port in which the vessel lay, there can be no constructive delivery to the absent vessel, and the delivery must therefore be to her owner. In neither case did the court decide, that a materialman at an interior point could not ship and actually deliver supplies to a vessel lying in a distant port. In announcing its decision with reference to facts which precluded actual delivery to the vessel, the court in The Vigilancia repeated a well recognized principle of maritime law, that:

"There can be no delivery to a ship, in the maritime sense, whether of supplies or of cargo, so as to bind the ship in rem, until the goods are either actually put on board the ship, or else are brought within the immediate presence or control of the officers of the ship."

The claimant has grasped this expression and clings to it as authority for its contention that when a materialman does not himself deliver supplies directly to the ship, but delivers them by the indirect means of rail and water carriers, the delivery is made at the point of consignment. The difference in fact between The Vigilancia and The Cim-

bria and the cases under consideration, as well as the difference in the law effected by the act of Congress of 1910, deprives those cases of a bearing upon the question under consideration. In The Vigilancia and The Cimbria, actual delivery to the vessels, either by direct or indirect means, was impossible and was specially disclaimed because of the necessities of the situation. In the cases before us, supplies could actually be delivered and in fact were actually delivered to the vessel at her port of supply. The question in these cases is not whether there was a constructive delivery to the vessel, but whether the delivery made was to the charterer at the source of the supplies or to the vessel at their destination. What proof does the law require to determine this question?

The liability of a ship for materials and services has been the subject of controversy in maritime jurisprudence, running through the centuries. Its origin is obscured by antiquity and its continuance has been characterized by confusion and perplexity, an appreciation of which may be obtained from the exhaustive opinion of Judge Lowell in The Underwriter (D. C.) 119 Fed. 713. Until recently the right of a materialman to a maritime lien rested upon a variety of considerations. Stated very briefly, it depended upon whether the supplies had been furnished in a foreign or domestic port, whether they had been furnished upon the credit of the ship's representative or upon the credit of the ship, and then whether upon the order of the owner or the master. The enforcement of these rights was made difficult by reason of rules of evidence respecting the burden of proof and because of conflict of jurisdiction claimed and asserted by different courts. The City of Milford (D. C.) 199 Fed. 956; Ely v. Murray, 200 Fed. 368, 118 C. C. A. 520; Trust Co. v. Bermuda A. S. Co. (D. C.) 211 Fed. 989, 996; The Underwriter, supra. By the Act of June 23, 1910, 36 Stat. 604, Congress attempted to simplify the law and to quiet its controversies by defining when and under what circumstances a maritime lien may be acquired. Compliance with requirements of a state statute as a condition precedent to the assertion of a lien, as held by some cases, is disposed of by making the federal act supersede the provisions of all state statutes. The distinction between foreign and domestic ports is abolished. The allegation and proof that credit was given to the vessel is no longer required, and a maritime lien, enforceable by a proceeding in rem, is afforded "any person furnishing repairs, supplies or other necessaries * * * to a vessel * * * upon the order of the owner or owners of such vessel, *or of a person by him or them authorized.*" To stay controversy as to whether another person has been authorized by the owner to procure supplies and bind the vessel, the statute affords a presumption of such authority in certain designated persons or officers, thereby relieving the libellant of the difficulty and sometimes the impossibility of presenting proof of that authority. They are "the managing owner, ship's husband, master, or *any person to whom the management of the vessel at the port of supply is entrusted.*" Those so entrusted include "officers and agents of a vessel * * * appointed by a charterer or by an owner pro hac vice, or by an agreed purchaser in possession of the vessel."

[2] The effective provisions of this act, by which Congress disposed of the controversial features of the law of maritime liens, are those which dispense with proof that credit was given the vessel, and substitute a presumption in lieu of proof of the authority of the owner and of a person other than the owner to procure supplies and pledge the vessel. Being relieved of the necessity of proving credit to the vessel and being clothed with the presumption of the validity of the order, the libellant, upon proving delivery to the vessel, enters court with a prima facie right to a maritime lien.

Thus came the libellants in the cases before us. What did these prima facie cases show? They disclosed, first, an order for supplies given by the Dredging Company, which was lawfully in possession of the vessel and was the "person to whom the management of the vessel at the port of supply [had been] entrusted"; second, the presumption, afforded by the act in lieu of proof, that the Dredging Company, as such person, had "authority from the owner" to give the order and "procure * * * supplies * * * for the vessel"; and third (excepting in one case), actual delivery of the supplies to the vessel. To these prima facie cases the claimant made a twofold defense; first, that delivery was not made to the vessel but was made to the charterer; and second, if made to the vessel, then the libellants are within an exception to the presumption afforded by the act, and are without right to maritime liens. With respect to the first ground of defense we may say, that we do not hold that a materialman may not waive the right to a maritime lien, for the act especially provides for such a waiver, or that he may not forfeit the right under circumstances showing delivery not to the ship but to the owner or charterer. Ely v. Murray, 200 Fed. 368, 371, 118 C. C. A. 520. But as against the contention of the claimant, we hold that a materialman may make actual delivery of supplies to a vessel in the maritime sense, by causing them to be transported by rail and water carriers by interrupted stages from their point of origin to the vessel side, when the transaction is begun by a valid order indicating that the supplies are for the vessel and are to be delivered to her, and is completed by an actual delivery to the vessel consistent with the instructions of the order and the intentions of the parties giving and accepting it. Without discussing the evidence, we are satisfied that in four cases supplies were furnished to the vessel in the maritime sense by deliveries actually though indirectly made by the libellants to the vessel at her port of supply.

But it is contended by the claimant, that even if it should be found that actual deliveries had been made to the vessel, they were made upon orders of the charterer under circumstances which destroyed the statutory presumption of its authority. Unquestionably the presumption of the statute may be removed and the right to a lien based upon it destroyed by affirmative proof which actually displaces it. The Patapsco, 80 U. S. (13 Wall.) 329, 20 L. Ed. 696. This the statute contemplates by prescribing that no lien is conferred "when the furnisher knew or by the exercise of reasonable diligence could have ascertained, that because of the terms of a charter party, agreement

for sale of the vessel, or for any other reason, a person ordering repairs, supplies or other necessaries, was without authority to bind the vessel therefor." This proviso is nothing more than a statutory declaration of a principle long recognized in maritime jurisprudence and repeatedly announced by the Supreme Court of the United States. The Kate, 164 U. S. 458, 17 Sup. Ct. 135, 41 L. Ed. 512; The Valencia, 165 U. S. 264, 17 Sup. Ct. 323, 41 L. Ed. 710. It is in effect that no lien shall be afforded and no presumption given in aid of a materialman who furnishes supplies under circumstances which put him on inquiry as to the authority of the one giving the order to bind the vessel. That is, no one with knowledge that supplies are ordered by one without authority to pledge the vessel, or no one awake to circumstances which suggest inquiry as to that authority, may shut his eyes to what he sees or to what he could see by looking, and avail himself of the remedies or the presumptions of the law.

[3, 4] What are the circumstances upon which the claimant relies to bring the libellants within the proviso of the act? They consist, first, of the libellants' knowledge of the financial difficulties of the Dredging Company, and second, of the failure of the libellants to inquire concerning the authority of the Dredging Company to bind the Yankee for supplies. The circumstance of financial difficulty of the Dredging Company would not have deprived a materialman of a right to a lien had the Dredging Company owned the Yankee. Therefore, knowledge of the Dredging Company's embarrassment suggested nothing concerning that company's ownership of the Yankee or its authority to pledge her for supplies. Nor did there devolve upon the materialman the duty to inquire concerning its ownership and the authority of the Dredging Company without attendant circumstances raising the question. Such circumstances must include something more than a mere order from a new customer, and without circumstances suggesting or compelling inquiry the statute does not require a supplyman to ascertain the authority of the one giving the order, if he be a person designated by the statute. If such a duty devolved upon a materialman to be performed at his peril in all instances and without regard to circumstances, then the act would impose upon the materialman the duty to ascertain with absolute certainty the validity of an order as a condition precedent to a maritime lien. If this were true, the presumption of authority afforded by the act would be without purpose and the very object of the act defeated.

But the law contemplates the removal of the presumption of authority to pledge the vessel only when there are circumstances which require the exercise of reasonable diligence to ascertain the authority, and places upon the one attacking the presumption the burden of removing it by establishing such circumstances by affirmative evidence. The Patapsco, 80 U. S. (13 Wall.) 329, 20 L. Ed. 696; The Iola (D. C.) 189 Fed. 972, 979; The Ha Ha (D. C.) 195 Fed. 1013; The Lucille (D. C.) 208 Fed. 424. Such evidence, in our opinion, was not produced by the claimant. In all the cases, excepting one presently to be mentioned, the testimony discloses that the libellants did not know that the Yankee was under charter to the Dredging Company, and

fails to disclose any circumstance which gave an inkling to the libellants that the Yankee was under charter to the Dredging Company. The course of dealing in every instance (save one) was an order from the Dredging Company to the materialman for supplies for the Yankee, accompanied by shipping instructions. The negotiations developed nothing as to the charter of the Yankee and suggested nothing otherwise than that the Yankee was owned by the Dredging Company. It is in just such a case as this, that the statute affords the presumption of authority of the person ordering supplies to bind the vessel therefor, and intends that the presumption shall remain and control until removed.

Hesitating, as we always do, to disturb facts found by a trial court in an equity case, we are constrained to hold that in four cases there is a clear mistake of fact as well as a misapplication of the law, and we therefore direct that the decree be reversed in so far as it relates to the libels of John S. Latta and Company, Charles H. Whitney and Company, Paul J. Devitt and Glen Brook Coal Company.

With respect to the claim of the last named libellant, which grew out of a contract to supply coal for the whole fleet, we are satisfied that in giving the order, the quantity to be supplied to and daily consumed by the Yankee, was mentioned and considered by the parties, and that of the total amount of coal supplied, a definite portion was appropriated for and furnished to the Yankee within the rule of law applicable in such cases. The Kiersage, Fed. Cas. No. 7762; The Murphy Tugs (D. C.) 28 Fed. 429; McRae v. Bowers Dredging Co. (C. C.) 86 Fed. 344.

[5] The decree is affirmed in so far as it relates to the libel of Benjamin F. Shaw Company. In that case the Commissioner found as a fact that the evidence does not disclose that the supplies were actually delivered to or received by the dredge or used in connection with her. In this we think he was correct. It follows, therefore, that the libel of the Benjamin F. Shaw Company is squarely within the law of The Vigilancia and The Cimbria, for the delivery here made, not having been made to the vessel, must have been made to the charterer, and even if made to the vessel, was made under circumstances with regard to knowledge of the charter, that precluded the right to a maritime lien. From these circumstances it appears that Townsend W. Miller was secretary and treasurer of the libellant and was also a member of a creditors' committee of the Dredging Company. The supplies were shipped by the libellant under his supervision, and the affairs of the Dredging Company were known to him, at least to the extent that the Yankee was not owned by the Dredging Company, but was in its possession under rental. These are circumstances such as are contemplated by the proviso of the act, which suggest a doubt and compel inquiry with reasonable diligence. In this instance, the knowledge of its secretary and treasurer was knowledge of the libellant, and as the libellant forwarded supplies without pursuing inquiry as to the doubtful authority of the one ordering them to pledge the vessel, it is without right to recover against the vessel. A modification of the decree in harmony with this opinion is directed.

McKEY v. CLARK et al.

In re TOMLINSON-HUMES, Inc.

(Circuit Court of Appeals, Ninth Circuit. July 10, 1916.)

No. 2721.

1. SALES ⟸197—OPTION CONTRACTS—PASSAGE OF TITLE.
Where the owner of valuable paintings gave a dealer an option to purchase and allowed the dealer to take possession, it appearing that he sold such paintings, no title passed to the dealer, his possession being merely that of one with an option to purchase.
[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 512, 513; Dec. Dig. ⟸197.]

2. PRINCIPAL AND AGENT ⟸129—AGENTS' CONTRACTS—SALES—TITLE ACQUIRED.
Where the holder of an option to purchase paintings agreed with defendant to purchase them for defendant's benefit, defendant furnishing the purchase price, the holder of the option is bound, on completing the purchase, to transfer the paintings to defendant.
[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 451–457; Dec. Dig. ⟸129.]

3. BANKRUPTCY ⟸140(3)—AGENCY—REVOCATION.
Where defendant commissioned a dealer in paintings to purchase them for him and to resell them on commission, at the dealer's bankruptcy, possession of the paintings being delivered to the dealer, revoked the agency.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 225; Dec. Dig. ⟸140(3).]

4. BANKRUPTCY ⟸140(3)—CONSTRUCTION—PASSAGE OF TITLE.
A dealer having an option to purchase paintings, agreed to purchase the paintings for defendant, who furnished the purchase price, and then to act as defendant's agent to resell the paintings on commission. To enable the dealer to negotiate for a reduced price, defendant's connection with the transaction was concealed, but after the owner transferred the paintings to the dealer, the dealer executed a bill of sale to defendant, whose agent, after receiving possession, redelivered the pictures to the dealer for sale. Thereafter the dealer became bankrupt, and his trustee asserted title to the paintings. *Held*, that the dealer was a mere conduit of title, and no title vested in it which could be asserted by the trustee.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 225; Dec. Dig. ⟸140(3).]

Appeal from the District Court of the United States for the Southern Division of the Southern District of California; Oscar A. Trippet, Judge.

Suit by Frank M. McKey, trustee in bankruptcy of Tomlinson-Humes, Incorporated, bankrupt, against Eli P. Clark and another. Judgment for defendants. Plaintiff appeals. Affirmed.

Mulford & Dryer and Wilbur Bassett, all of Los Angeles, Cal., for appellant.

Herbert J. Goudge and Hartley Shaw, both of Los Angeles, Cal., for appellees.

Before GILBERT, MORROW, and HUNT, Circuit Judges

HUNT, Circuit Judge. McKey, trustee in bankruptcy of the estate of Tomlinson-Humes, Incorporated, bankrupt, brought suit in equity against E. P. Clark and Los Angeles Warehouse Company, a corporation, to recover possession of certain valuable Hogarth paintings, alleging that the paintings are part of the assets of the bankrupt estate. Defendants admitted that defendant Clark was in possession and control of the paintings, and alleged that the defendant Los Angeles Warehouse Company had no right or title in the paintings except as agent and warehouseman for the defendant Clark, but denied that the paintings were any part of the assets of the estate of the bankrupt, and alleged that they belonged to the defendant Clark. There was a trial, which resulted in the dismissal of the bill, and from the order of dismissal the plaintiff has appealed.

The facts are substantially as follows:

Prior to February, 1912, Thomas Myers, of Buffalo, N. Y., owned the paintings. Tomlinson-Humes, of Chicago, was then engaged in the business of selling pictures. During 1911, Myers, the owner of the pictures, and Humes, for Tomlinson-Humes, entered into a written agreement concerning the pictures. This agreement was not produced upon the trial, but Humes, president of Tomlinson-Humes, referred to it as a written "option" of purchase from Myers to his corporation, and said that it contained authority in Tomlinson-Humes to sell the pictures. About March 13, 1912, the paintings were shipped by Myers from New York to Tomlinson-Humes in Chicago, and efforts to sell were made. On March 28, 1912, Tomlinson-Humes and E. P. Clark, of Los Angeles, appellee herein, entered into a written agreement, in substance as follows:

It recited that, whereas Tomlinson-Humes "now has an option" on the Myers paintings, "and second party hereby agrees to purchase same from first party" at an aggregate price of $79,000; and whereas the "first party have in their possession by reason of their option from Mr. Myers, certain newspaper clippings; * * *" and "whereas second party hereby engages the services of first party, from March 28, 1912, to July 28, 1914, to resell such paintings for him at a profit, and in order that first party may be compensated for their services in discovering these paintings and presenting this option to second party and for the work which they will be expected to do and for the expenses to which they will be put by reason of this undertaking as provided for herein in preparing a campaign for a resale of said paintings as provided for herein * * * second party hereby purchases from first party above named * * * paintings * * * (paying them a profit over and above their option price from the said Thomas Myers) for a total price of $125,000, and contemporaneously herewith makes payment for such paintings with four (4) promissory notes of thirty-one thousand two hundred fifty dollars ($31,250) each, with interest * * *—it being understood that second party allows first party to make the profit represented by the difference between the price which they have to pay Mr. Myers and the purchase price herein named," by reason of the provisions in the agreement contained requiring the

party of the first part to stand all expenses, etc. The agreement also provides:

"It is further understood that if first party can obtain any concession by way of commission or reduction in price from said quoted option price from the said Thomas Myers, they are to have the same as compensation for their work in bringing the matter to the attention of second party and of disposing of them for Mr. Myers."

The second party—

"employs first party as his agents and brokers from March 28, 1912, to July 28, 1914, and first party hereby accepts this employment and agrees to serve second party as brokers and agents in the sale and disposition of said paintings."

Then follow provisions with respect to prices for which the paintings are to be sold and the methods of sale, and it was agreed that in case of sale, the first moneys received were to be applied to the payment of the four notes of $31,250 each and interest until the notes should be entirely paid. Further clauses relate to compensation, to the rights of Clark, within the expiration of a year from the date of the contract, to withdraw the paintings by the payment of certain sums, and provide that if the right of withdrawal was not exercised, the paintings were to remain in the hands of Tomlinson-Humes for sale until the expiration of the contract.

The Tomlinson-Humes people were to use their best efforts to make a sale, and were to pay all expenses and to keep the paintings insured in the name of Clark, and were by the agreement "clothed with full power and authority" to sell the pictures as provided in the agreement, and "to assign, transfer and deliver the same" on making sales, and to receive and receipt for the purchase price thereof, and to make all reasonable and necessary provision for their safe-keeping, exhibition, and insurance.

On April 10, 1912, the corporation, by Humes, its president, wrote to Clark at Los Angeles that he would like to have Bennett, Mr. Clark's agent, go to Buffalo the following week; that he would take the attorney of the Tomlinson-Humes corporation with them—

"to see that the transfer of title is properly made, and we will use every precaution to fully protect your interests in the matter and see that you get a clear and perfect title to the paintings."

The paintings at that time were in Chicago, in the possession of Tomlinson-Humes. The letter stated that the Tomlinson-Humes people did not have the original documents which Mr. Myers was under contract to deliver to them—

"but we will obtain them when we go to Buffalo to make payment to him of the purchase price. We are making great plans for a successful campaign for selling these paintings for you."

In a subsequent letter, dated at Chicago, May 3, 1912, Humes, as president of Tomlinson-Humes, again wrote to Clark, at Los Angeles, telling him that they had obtained sufficient money on Clark's paper to pay Myers, and that they were leaving that night for the East to make payment to Myers. The letter added:

"We will have the transfer of the pictures made in a manner which will satisfy both Mr. Bennett and our attorney."

It appears in evidence that Mr. Humes, accompanied by Mr. McArdle, attorney for Tomlinson-Humes, went to Buffalo with the understanding that Mr. Bennett was to meet them in Buffalo after some matters regarding the title to the paintings had been looked into by Mr. McArdle. As soon as Mr. McArdle was satisfied that everything was "all right," and that Tomlinson-Humes "were in shape to close the deal," they were to telegraph Mr. Bennett to come to Buffalo from Chicago. They telegraphed to Bennett, who reached Buffalo next day after Tomlinson, Humes, and McArdle arrived. The pictures were shipped to Buffalo, where Mr. Myers lived.

On May 11, 1912, the several persons concerned met at the Lafayette Hotel. Mr. Humes, Mr. Tomlinson, and Mr. McArdle were there. They had three connecting rooms. The pictures were in the middle, or Tomlinson's, room. Mr. McArdle, after stating that Humes asked him how the transaction between Clark and Tomlinson-Humes could be carried out so as to vest the title absolutely in Clark without disclosing to Myers the name of Mr. Clark, testified:

"I said the only way that could be done was to have Mr. Myers, after he had fixed the terms of his deal with them, make a bill of sale, and Tomlinson-Humes execute a similar bill of sale to Mr. Clark, and make delivery of it. He told me in this same interview that Mr. Bennett would be on [hand] to represent Mr. Clark in the closing of the deal, and that there was one thing particularly that Mr. Clark desired, and that was that Mr. Bennett should be present and Mr. Myers should identify all of those paintings.

"Mr. Humes, Mr. Tomlinson and I went to Buffalo, putting up at the Lafayette Hotel, occuping each a room in a series of three. * * * After arriving in Buffalo, we met Mr. Myers and his daughter at the office of his attorney, Mr. Spaulding. Then we took up the question of obtaining by Tomlinson-Humes, Incorporated, a reduction in price named in the contract between Mr. Myers and Tomlinson-Humes, Incorporated. When that was done I investigated the title as shown by the papers they produced. Amongst them were Defendants' Exhibits 15, 16, and 17. Those negotiations covered two or three interviews. I believe we made a couple of visits to our rooms, and I found on one of the earlier visits to our rooms that 14 pictures had been placed in the middle room occupied by Mr. Tomlinson.

"We were in Buffalo a day before the papers were finally executed, some time during the forenoon of the day after we arrived there, and on the same day the papers were signed Mr. Bennett came to the rooms. I was introduced to him, or he to me, as Mr. Clark's nephew or representative. Mr. Humes said that Mr. Clark understood that he was to have me for his attorney to look after Mr. Clark's interest, and that he was desirous to have Mr. Bennett present when Mr. Myers would identify those pictures. It was then stated that it would be arranged that Mr. and Miss Myers and their attorney would come to the hotel, identify the pictures, and the deal would be closed right then and there, and the pictures turned over and the possession given to Mr. Bennett for Mr. Clark. We then went to Mr. Spaulding's office again; where eventually Tomlinson-Humes, the two Myers, and Mr. Spaulding had arranged the question of price and other details and papers were drawn up, amongst them Defendants' Exhibit 2. The question then came up as to how the property should be placed in Mr. Clark, and we had drawn up Defendants' Exhibit 3. I believe there were some other papers drawn up. Exhibit 17 was produced at the time, and Exhibits 15 and 16 were prepared while these negotiations were going on. When everything was ready, an appointment was made by which the parties were to meet in Mr. Humes' room. We came over from the office; by arrangement Mr. Bennett was there. Mr.

Myers and Miss Myers were introduced to Mr. Bennett, and I think it was after we entered Mr. Humes' room in the suite that Mr. Myers identified those pictures to Mr. Bennett. About this I am not sure. Mr. Myers, Miss Myers, Mr. Tomlinson and myself entered Mr. Humes' room, and Mr. Humes turned over to Mr. Myers and his daughter and attorney the money and notes. Mr. Myers, his attorney and daughter, turned over Defendants' Exhibits 2, 15, 16, and 17. Possibly there were some other papers. To these were then attached Defendants' Exhibit 3, which had already been signed by Mr. Humes, and we left the room. Mr. Bennett was in the adjoining room where the pictures were. Mr. Myers identified them to him, going to one after another, stating where he got them and giving a short history of each picture. Then these papers, Defendants' Exhibits 2, 3, 15, 16, and 17, were delivered to Mr. Bennett. Mr. Bennett was told by either Mr. Humes or myself, There were the pictures, now, for him to take possession of; that they were his. Then the Myerses and their attorney left, and a discussion arose between Mr. Humes and Mr. Bennett and Mr. Tomlinson about the protection of those pictures overnight. We all left the room, Tomlinson and myself to surrender our rooms and get transportation for home that night, and Mr. Humes and Mr. Bennett to arrange for the pictures. When we returned I learned that Mr. Tomlinson had surrendered his room just as I had, and Mr. Bennett was assigned to Mr. Tomlinson's room where these pictures were located. I then sat down, and after the witness clause I wrote upon it this receipt, which now appears on it, on Defendants' Exhibit 3. When I had completed my writing, Mr. Humes signed in the place where it now appears. We were then right in the room with the pictures. This took place in the afternoon of the 11th, and Mr. Tomlinson and myself left and came home."

Exhibits 2 and 3, referred to by Mr. McArdle, are bills of sale; Exhibit 2 being bill of sale of the pictures made in usual form from Thomas Myers and his daughter to Tomlinson-Humes, Incorporated, the consideration named being $2 and other good and valuable consideration. Exhibit 3 is a bill of sale of the same pictures by Tomlinson-Humes to Clark for a consideration of $2 and other valuable considerations, paid by Clark. This latter bill of sale conveys the paintings to Clark—

"under and subject to the terms of sale contained in agreement of March 28, 1912, between the parties hereto and pursuant to the sale therein contained."

Except for this clause, it is similar to the bill of sale from Myers to the Tomlinson-Humes corporation.

On May 14, 1912, Humes wrote from Buffalo to Clark, in Los Angeles, to the effect that they had obtained money on his notes, and that on Saturday, when Mr. Bennett was present, they had made the transfer of the pictures from Myers to themselves and from themselves to Clark, and that the transfer was pronounced perfect. Bennett, Clark's representative, testified that when in Buffalo, Myers identified each picture, and that then the deeds and papers were all turned over to him (Bennett), and that he took possession of them, and that this was done in the same room with the pictures; that he then made arrangements to store the paintings that evening; and that he then told Tomlinson that he desired a receipt for the paintings, and that thereupon a receipt was drawn on the bottom of the bill of sale, Exhibit 3 heretofore referred to, from Tomlinson-Humes to Clark. This receipt, signed by Tomlinson-Humes, acknowledged the receipt—

"from Henry C. Bennett agent for E. P. Clark assignee in above bill of sale the paintings therein assigned to hold the same under the terms of the con-

tract of March 28, 1912, therein referred to, the possession being delivered in the Lafayette Hotel, Buffalo, N. Y., after the paintings had been identified by Mr. Thomas Myers mentioned in said contract of March 28, 1912."

After the execution of this receipt, Bennett took possession of the room in which the pictures were.

Thereafter the pictures were taken back to Chicago by the Tomlinson-Humes corporation. About February, 1913, the paintings were taken from Chicago to New York, where, under the direction of S. J. Thurber, an employé of Tomlinson-Humes, they were delivered at the residence of Mr. W. A. Clark. An effort was made by Thurber to sell them to Mr. W. A. Clark, but he declined to buy them. The custodian in charge of the house of Mr. W. A. Clark testified that Mr. Thurber told him that the pictures belonged to E. P. Clark, of Los Angeles, that after Mr. W. A. Clark declined to buy them, Mr. Thurber asked if the pictures could be left at Mr. W. A. Clark's for a little time, as he wished to show them to some one else in New York, and that as custodian of Mr. W. A. Clark's premises, he allowed the pictures to remain at Mr. Clark's house. On July 17, 1913, in the United States District Court in Illinois, Northern District, Eastern Division, petition in bankruptcy was filed against Tomlinson-Humes, and on July 30th the corporation was adjudged a bankrupt, and the appellant herein was appointed trustee. Afterwards, in September, 1913, in accordance with a letter to him from Mr. Bennett, the custodian of the Clark residence in New York shipped the pictures to E. P. Clark, at Los Angeles. Shortly after demand upon the custodian of the Clark house in New York on November 26, 1913, the trustee filed the bill in this suit.

[1] Looking first into the original agreement between Myers, owner of the pictures, and Tomlinson-Humes, we find nothing to show that Myers transferred his property in the paintings for a consideration paid by Tomlinson-Humes. What Myers did, however, was to give to Tomlinson-Humes an option or right to buy the pictures upon payment of certain sums of money, and he turned the possession of the pictures over to the optionee in order that it might better effect a sale. It is not hard to understand how such a transaction might come about. It must be generally true that the market for highly valuable paintings is very limited, and dealers in them must be comparatively few in number; and it might well be that a dealer, not having the means to buy outright, would obtain from the owner an option, and, to help bring about sale, that the owner might intrust his pictures to the holder of the option, so that such holder could exhibit them at its established place of sale and thus be in a better position to deal with purchasers and deliver readily in the event a buyer is found. But, in the case before us, until the option was determined, no title passed from Myers, the owner, to Tomlinson-Humes, and in the absence of clear evidence to the contrary, it is not to be presumed that the owner intended that title should pass until the purchase price was paid. Guss v. Nelson, 200 U. S. 298, 26 Sup. Ct. 260, 50 L. Ed. 489. If the accident of fire had destroyed the pictures while Tomlinson-Humes had them under the option contract with Myers, unquestionably Myers,

not Tomlinson-Humes, would have been the loser, because the latter's possession was not as owner, but only as holder of an option, with possession intrusted to it for special purposes. The transaction seems plain thus far, and, considering the character of the property, it does not impress us as at all peculiar.

[2-4] We may therefore turn to the subsequent incident, that which arose between Tomlinson-Humes and Clark, of Los Angeles. Tomlinson-Humes, with its valuable option, wanted to make some money by finding a purchaser for the pictures at a sum above the option price given to it by Myers. Its plan evidently was to find a buyer who would pay in advance at least sufficient money to cover the option price, then to pay Myers with the money so advanced by the customer, take formal title to themselves under the terms of the option, and then transfer formal title to the new purchaser. In intent and effect, this plan was carried out. Finding a buyer in Clark, on March 28, 1912, at Los Angeles, Tomlinson-Humes made the agreement heretofore substantially recited. When this agreement was made, Clark knew of the Myers option to Tomlinson-Humes, and the agreement refers in express terms not once, but several times, to an "option," which by common, as well as legal, understanding, is simply a contract by which the owner of property agrees with another that he shall have a right to buy at a fixed price within a certain time. Clark also knew that there was no obligation on the part of Tomlinson-Humes to buy from Myers, and he knew that there was no title to the pictures in Tomlinson-Humes corporation on March 28th, when he negotiated with it. But evidently he wanted to acquire the pictures in order to sell them at a profit, and to that end he agreed with Tomlinson-Humes, the holder of the option, to advance to it money sufficient to take up the option, and also an additional sum, and at the same time he made an agreement which, in his belief, would assure to him, not the option contract with Myers, but the pictures which were the subject-matter of the option contract, but which he knew could not become his unless Tomlinson-Humes exercised its option. The Tomlinson-Humes corporation, wishing to make profits to accrue if Clark should buy and then sell through it as his agent, agreed to the plan, and it was paid money considerably more than enough to take up the option, and it was agreed that it should be made agent for Clark in selling the pictures. The arrangement obviously contemplated that the option should be taken up by Tomlinson-Humes. There was no formal assignment of the option, and it is plain that neither Clark nor Tomlinson-Humes meant to substitute Clark for Tomlinson-Humes with the right to deal personally directly with Myers.

In explanation for proceeding as they did, the testimony is that Tomlinson-Humes was anxious to suppress the name of their purchaser, and wished title formally to pass through their corporation, because, if Clark's name should appear, they might have difficulty in securing concessions which they hoped to obtain by buying from Myers at a price less than the option called for. The formalities of transfer were carried out at Buffalo, N. Y. The pictures were there; attorneys repre-

senting Myers and Tomlinson-Humes and Clark, and all the parties except Clark, were there. With money previously obtained from Clark, Tomlinson-Humes, who had possession of the pictures, paid Myers and received a formal bill of sale from him. Then Tomlinson-Humes made a bill of sale to Clark and delivered the possession of the pictures to Clark's agent, who formally took possession of them, and, after making provision for their safe-keeping overnight, turned them over to Tomlinson-Humes, who had, by the agreement of March 28th, been appointed Clark's agents and brokers to sell the pictures. Clark, according to the evidence, acted in the best of faith, and at the time of the transactions between himself and Tomlinson-Humes there was nothing to arouse any suspicion on his part as to the solvency and good faith of Tomlinson-Humes; nor is there any evidence to show bad faith or wrong on the part of Tomlinson-Humes. Nothing is to be inferred against Clark by reason of his turning the possession of the pictures over to Tomlinson-Humes. It is true that corporation had been in possession while it held the option given by Myers. But Clark had a right to make Tomlinson-Humes his agent in selling the pictures after he took them. Tomlinson-Humes was engaged in the business of selling valuable pictures, had a place of business in Chicago, had expert restorers, and having made a sale to Clark, it was natural that he should repose confidence in that company and make it his agent to take the pictures and sell them to other possible buyers. As it was evidently intended should be done, Tomlinson-Humes took Clark's money to buy formally for itself from Myers. In this way title in a legal way would pass to Tomlinson-Humes, and Myers would be eliminated. But inasmuch as Clark had purchased from Tomlinson-Humes the property itself which it but expected to acquire, and paid the consideration named in the option before the exercise of the option, as between Clark and Tomlinson-Humes, the latter is to be regarded as having made an equitable assignment of the property it might acquire under the option; hence Tomlinson-Humes became bound to transfer the property and formal title thereto to Clark just as soon as it would receive it from Myers, the legal owner. Field v. New York, 6 N. Y. 178, 57 Am. Dec. 435; Mitchell v. Winslow et al., Fed. Cas. No. 9673.

The agreement between Clark and Tomlinson-Humes was somewhat complex, yet, when considered with the predominating facts shown, the clear intent throughout the whole transaction was that Tomlinson-Humes would buy the pictures and deliver them to Clark when acquired, and that thereafter Tomlinson-Humes would be agent of Clark to sell for Clark's account. Clark received them into his possession at Buffalo, and thereafter Tomlinson-Humes, although it held possession, had no interest in them, except by way of commissions in the event of sale under the provisions of the agreement. And considering the nature of the contract of agency, the effect of the bankruptcy of Tomlinson-Humes was to revoke the authority of its agency. Mechem on Agency, § 267; Cushman v. Snow, 186 Mass. 169, 71 N. E. 529; Jetter Brewing Company v. Scollan, 48 Misc. Rep. 546, 96 N. Y. Supp. 274, 15 Am. Bankr. Rep. 300.

In the final analysis, the Tomlinson-Humes corporation was really but a conduit, taking title in its own name, but with money furnished by Clark, and subsequently transferring to Clark, who bought in good faith and took possession without any intent to defraud creditors or purchasers. The law, therefore, will not regard Tomlinson-Humes as having had an interest in the pictures to which a judgment lien could have attached, or which passed to the creditors when bankruptcy came. Williston on Sales, § 137; Story's Equity Jurisdiction, §§ 1040, 1040b; Bailey v. Baker Ice Machine Company, 239 U. S. 268, 36 Sup. Ct. 50, 60 L. Ed. 275.

The equities of the case are with Clark, and the lower court was correct in sustaining his claim of ownership and right of possession.

The decree is accordingly affirmed.

ROBINSON v. ROE.

(Circuit Court of Appeals, Second Circuit. May 23, 1916. On Petition for Rehearing, June 14, 1916.)

No. 257.

1. BROKERS ⟸8(3)—AUTHORITY—EVIDENCE.

Evidence *held* to show that a customer of brokers, retaining title himself, authorized them to hypothecate for the requirements of their own business securities deposited with them, and also delivered securities to hypothecate to raise funds to carry them over a period of temporary financial distress.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 9; Dec. Dig. ⟸8(3).]

2. BANKRUPTCY ⟸165(2)—"PREFERENCE"—WHAT CONSTITUTES.

Where a customer of brokers, who authorized them to generally hypothecate securities deposited with them, and delivered to them securities to carry them over a period of financial distress, retained his title to the securities so hypothecated, and the brokers, though insolvent, satisfied the loans for which the securities were pledged and redelivered them, such transaction did not constitute a "preference," voidable by the trustee in bankruptcy of the brokers subsequently appointed.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 259, 266; Dec. Dig. ⟸165(2).

For other definitions, see Words and Phrases, First and Second Series, Preference.]

3. BANKRUPTCY ⟸165(1)—CLAIMS—CONVERSION.

In such case the fact that the brokers did not on demand return the securities did not, where time was extended, amount to a conversion leaving the customer only a right of action which could be proved as a claim in bankruptcy, and therefore the return did not amount to a preference.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 259, 266; Dec. Dig. ⟸165(1).]

4. BANKRUPTCY ⟸140(3)—PROCEEDINGS—PROOF OF CLAIM.

That one who loaned securities to brokers proved his claim for the value of such securities does not prevent him from reclaiming the actual securities themselves, provided he reserved the right to do so.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 225; Dec. Dig. ⟸140(3).]

On Petition for Rehearing.

5. PRINCIPAL AND SURETY ⊂=15—SURETIES—WHO ARE.

Where securities belonging to a customer of certain brokers were pledged by them to secure their own debt, the customer, though the pledge was authorized, was not a surety for the brokers' debts, for, in case the security was insufficient to discharge them, no personal liability attached.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. § 34; Dec. Dig. ⊂=15.]

Appeal from the District Court of the United States for the Southern District of New York.

Bill by Beverley R. Robinson, as trustee in bankruptcy of John B. Van Schaick and Derby Crandall, individually and as copartners composing the firm of Van Schaick & Co., against Charles F. Roe. From a judgment for defendant, complainant appeals. Affirmed.

Walter C. Noyes, of New York City, for appellant.
H. W. Taft, of New York City, for appellee.

Before WARD and ROGERS, Circuit Judges, and MAYER, District Judge.

WARD, Circuit Judge. This is a bill in equity by Beverley R. Robinson, as trustee in bankruptcy of John B. Van Schaick and Derby Crandall individually and as copartners composing the firm of Van Schaick & Co., stockbrokers, against Charles F. Roe, under section 60 of the Bankruptcy Act, to recover preferences alleged to have been received by him. The special master advised a judgment against the defendant for the sum of $88,490.77, with interest, and upon exceptions to his report Judge Hough dismissed the bill. The complainant appeals.

The defendant, Roe, had dealt with the bankrupts and their predecessors for some 40 years. He bought and sold stocks through them on a large scale, but never on margin, and drew checks on them for considerable sums as he required them. To secure the bankrupts he left in their keeping large amounts of securities, never less than twice the amount of his debit balance, which were, as he supposed, all in his own name, indorsed by him in blank, but in fact a few, without his knowledge, were in the name of the bankrupts. The value of the securities averaged $1,000,000 and his debit balance was often as much as $500,000 or $600,000.

[1, 2] The first dispute between the parties is whether the bankrupts were authorized to hypothecate the defendant's securities only so far as necessary to secure his debit balance, or whether they had the additional privilege of hypothecating them for the requirements of their own business also. There is much criticism in the briefs as to inconsistencies between the pleadings, testimony, and final attitude of counsel on either side on this question, which we need not go into; our duty being to determine what really was the fact, and about it we have no doubt. No specific agreement giving the bankrupts the right to hypothecate the defendant's securities for their own benefit is proved, except upon two occasions, viz., in October, 1907, and August,

1911, to be presently considered. It is quite clear, however, that the bankrupts had continuously for many years pledged the securities carried in his account in excess of the debit balance as they needed money, and the statements of account which they furnished to him three or four times a year all bore on their face at the beginning the following:

"It is understood and agreed that all securities carried in this account or deposited to secure the same may be carried in our general loans and may be sold or bought at public or private sale without notice when such sale or purchase is deemed necessary by us for our protection."

Twice in the history of the firm it applied to the defendant to help them over a financial crisis, viz., in October, 1907, and in August, 1911, after all his securities in their possession had been hypothecated. In answer to this application he did not refer them to his securities in their box not needed to cover his debit balance, but on each occasion went to his own box for additional securities, showing plainly that he knew they had hypothecated all of his securities they had. These securities were, of course, given for the express purpose of being hypothecated for their benefit. The securities advanced in 1907 went into the bankrupts' box and remained there, and were continued to be treated in the accounts exactly as all the other securities of the defendant had been. We think it a necessary inference that both parties understood that these securities also were subject to the bankrupts' general privilege of hypothecating them for their own requirements. There is no such long history connected with the securities advanced by the defendant August 22, 1911, because the bankrupts made an assignment for the benefit of creditors September 12, 1911, but we see no difference between the two classes in principle.

The complainant contends that the securities advanced in 1907 and 1911 were loaned and that the title to them passed from the defendant to the bankrupts. Doubtless securities may be loaned to be used by the borrower generally and returned in kind in such a way as to transfer title to the borrower, just as if they were money. But these were not loaned absolutely and unconditionally to the bankrupts for any and all purposes, but for the specific purpose of being hypothecated in bank loans to aid them in their difficulties. We think the title remained in the defendant in all his securities in the possession of the bankrupts and that it was their duty to return them on demand or if there were a debit balance against him, then as to such as were needed to cover that balance on payment of the same. The transaction of October 23, 1907, involved the use of securities to "tide them [the brokers] over." The testimony of Mullener as to the conversations with Roe of August 11 and 12, 1911, and the handing to him by Roe of the securities at the Lincoln Trust Company show a transaction similar in purpose to that of October 23, 1907. Both transactions, while not in writing, were on all the evidence in this case, in our opinion, of the same character and effect as the written contract between Mary H. Hudson and T. A. McIntyre & Co., in Re T. A. McIntyre & Co., 181 Fed. 955, 959, 104 C. C. A. 419.

In August, 1911, when the last securities were advanced, the firm

was insolvent, and an involuntary petition in bankruptcy was filed against it November 17, 1911. August 22 the defendant's account showed a debit balance of $259,098.76, and the bankrupts had his securities to the market value of $1,118,603.50, all of which they had hypothecated, except 1,100 shares of Distillers' Securities. August 30th by the sale of some of the defendant's hypothecated securities he paid off this debit balance in full and made formal demand of the bankrupts for the return of the remaining securities, agreeing to give them the necessary time to do so. Obviously they could not do so at once.

September 12, 1911, the bankrupts made an assignment for the benefit of creditors. Between August 22d and that date the defendant employed accountants to go over the bankrupts' books and kept a representative in their office; the purpose of both parties being to ascertain in what particular bank loans his securities were, and so to distribute them that they should as far as possible represent the margin of the loans. All the other securities in the bank loans belonged to the bankrupts or were treated by both parties to this cause as theirs, and properly to be exhausted before resort was had to the defendant's securities. Therefore, as between the defendant and the bankrupts, all their loans from the banks may be treated as one indebtedness, as to which the defendant was their surety to the banks. The bankrupts, by using their own securities and cash in this way, released and returned to the defendant out of the bank loans a large quantity of his securities before the assignment for the benefit of creditors, and the banks after the assignment, on closing out the loans, returned further securities and some cash. The complainant contends that, as to such of these securities as were by the use of bankrupts' assets returned to the defendant, he received a preference within four months of the filing of the petition. There could be no objection, under the Bankruptcy Act or otherwise, to these dealings between the bankrupts and the defendant, unless he were at the time a creditor. Richardson v. Shaw, 209 U. S. 365, 28 Sup. Ct. 512, 52 L. Ed. 835, 14 Ann. Cas. 981. They were simply returning him his own.

[3, 4] The complainant, however, contends that he was a creditor on the ground that, it being the duty of the bankrupts to return his securities to him on demand August 30th, when they were not in a position to do so, they were guilty of a conversion, which, being a provable claim, constituted him a creditor, and the release of the securities thereafter by use of the bankrupts' assets was a preference to the amount of assets so applied. Assuming, for the purposes of argument, that this is so, there could be no conversion, notwithstanding that the defendant had demanded the return of his securities August 30th, so long as he was willing to give the bankrupts time to do so. He was entirely willing and they did return them, so that there was no conversion. However, we think that, even if he had made a present demand which the bankrupts were unable to comply with, his title to the securities remained in him, and he had a right to pursue them specifically, and although he also had a right to treat the act of the bankrupts as a conversion, and to prove his claim as a creditor in

the bankruptcy proceeding, he could not be compelled to do so, and in fact did not do so. Indeed it seems he could prove his claim reserving his right to reclaim. Thomas v. Taggart, 209 U. S. 385, 28 Sup. Ct. 519, 52 L. Ed. 845.

The decree is affirmed.

On Petition for Rehearing.

Robert Forsyth Little and B. W. B. Brown, both of New York City (Walter C. Noyes, of New York City, of counsel), for appellant.

William C. Cammann, of New York City (Henry W. Taft and George Coggill, both of New York City, of counsel), for appellee.

Before WARD and ROGERS, Circuit Judges, and MAYER, District Judge.

PER CURIAM. [5] The petitioner relies upon the following sentence in our opinion as showing that Roe was a creditor of the bankrupts and as such received a preference:

"Therefore as between the defendant and the bankrupts all their loans from the banks may be treated as one indebtedness, as to which the defendant was their surety to the banks."

This sentence would have better expressed our thought if it had concluded thus:

"* * * As to which the defendant's securities were their surety to the banks."

There was no contract between Roe and the banks at all. They were entire strangers. He was not their surety, and they could not have collected anything from him, nor could he derive anything from them by way of subrogation. The banks as secured creditors could have proved under section 57e (Act July 1, 1898, c. 541, 30 Stat. 560 [Comp. St. 1913, § 9641]) the amount of their claims over the value of the securities they held, whereas Roe could have proved the whole value of his securities, if not returned to him. Even if he had such a provable claim, he was not obliged to prove it, but could, as we have heretofore held, have reclaimed his securities specifically. As between the bankrupts and Roe his securities are to be regarded as their surety to the banks, in the sense that their securities should be exhausted in paying the banks before his are resorted to. If all of Roe's securities had been in one loan, which was sufficiently secured by the bankrupt's securities, there would have been no wrong done if the bankrupts had obtained them from the banks and handed them over to him. Because there were no other securities pledged to the banks than those belonging to the bankrupts and to Roe, we were able to treat the bankrupts' whole indebtedness to the banks as single and to be wholly paid out of their securities. Therefore there was no preference to Roe as a creditor when the securities were redistributed, so as to leave his in a situation to be last resorted to.

The petition for a rehearing is denied.

UNITED STATES v. INMAN-POULSEN LUMBER CO.

(Circuit Court of Appeals, Ninth Circuit. May 1, 1916.)

No. 2687.

PUBLIC LANDS ⊂=88(2)—RAILROAD GRANT—EFFECT OF RELINQUISHMENT—RIGHT TO RECOVER FOR TIMBER UNLAWFULLY REMOVED.

Act July 1, 1898, c. 546, 30 Stat. 597, 620, provided that lands within the grant to the Northern Pacific Railroad Company, which had been disposed of by the United States or occupied by settlers, might be relinquished to the United States, and other lands selected in lieu thereof, and that on such relinquishment "such tracts shall be treated under the laws * * * in the same manner as if no rights thereto had ever vested in the railroad grantee." *Held*, that the effect of such relinquishment of patented or unpatented lands was to revest title in the United States as of the time of the grant, or at latest as of the time of acceptance of the act by the railroad company, and to restore to the United States all rights incident to the ownership of the land, including the right to pursue any remedy for injury to the land, or for timber removed therefrom, as against any person other than the railroad company or persons holding under it.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 267; Dec. Dig. ⊂=88(2).]

In Error to the District Court of the United States for the District of Oregon; R. S. Bean, Judge.

Action at law by the United States against the Inman-Poulsen Lumber Company. Judgment for defendant (211 Fed. 679), and the United States brings error. Reversed.

The United States brings its writ of error to review the judgment of the court below in sustaining a demurrer and dismissing the complaint in an action brought to recover the value of timber cut upon land of the United States. The complaint alleged in substance that the land at all the times referred to in the complaint was, and still is, public land of the United States; that it became vested in the Northern Pacific Railroad Company by virtue of the grant of Congress to that corporation of July 2, 1864, and by the definite location of the road on September 22, 1882, and that a patent issued therefor to the railroad company on May 24, 1895; that in the Act of Congress of July 1, 1898, c. 546, 30 Stat. 597, it was provided that certain lands within the grant, which prior to January 1, 1898, had been disposed of by the United States or occupied by settlers, as provided in the act, might be relinquished by the railroad company to the United States, and other lands taken in lieu thereof; that in accordance with that act the railroad company relinquished the said land in controversy to the United States, the land having been listed for relinquishment by the Secretary of the Interior on May 2, 1905; that on August 5, 1907, the railroad company deeded said land to the United States, and the conveyance was accepted January 3, 1908; that by reason of the foregoing facts and the provisions of the act that all right, title, and interest of the railroad company in any lands relinquished under the act shall revert to the United States, "and such tract shall be treated under the laws thereof in the same manner as if no right thereto had ever vested in the said railroad grantee," the said land became and now is public land of the United States, for all intents and purposes in the complaint set forth; that on January 28, 1908, the homestead application of one Stanley on said land was accepted by the officers of the General Land Office by virtue of his claim of settlement thereon from and after the year 1891, for which he had made and filed a homestead application on December 30, 1896; that on April 6, 1908, said Stanley relinquished his homestead entry to the United States; that

while he was in the occupation of said land as a homestead settler, in the years 1900, 1901, 1902, and 1903, Stanley, with others, wrongfully and unlawfully cut and removed from his said homestead 1,100,000 feet of timber for sale and speculation, and not in the course of clearing and improving the land, which timber they wrongfully and unlawfully sold and delivered to the defendant in error; that the land has never been cleared, cultivated, or improved, and was not intended to be cleared, cultivated, or improved by said Stanley; that said timber was so cut and removed without the knowledge, consent, or permission of the railroad company or of the United States. The complaint alleges demand upon the defendant in error for the payment of $5,500, the value of said timber. The demurrer of the defendant in error to the complaint, on the ground that it failed to state facts sufficient to constitute a cause of action, was sustained by the court, and a judgment was thereafter entered dismissing the action.

Clarence L. Reames, U. S. Atty., and John J. Beckman, Asst. U. S. Atty., both of Portland, Or.

Cake & Cake, of Portland, Or., for defendant in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). The defendant in error contends that the United States has no cause of action to recover the value of the timber, for the reason that at the time when the timber was cut and removed from the land the title to both the land and the timber was vested in the railroad company. If the contention is correct, we have here a case in which a wrong has been committed for which there is no remedy, for the railroad company, having accepted the provisions of the act of 1898, and having relinquished the land and accepted other land in lieu thereof, can show no damage to itself on account of the unlawful cutting and removal of the timber.

From the allegations of the complaint it would appear that the chief value of the land was the timber standing thereon, and that while Stanley entered it ostensibly as a homestead, he entered it in fact for the purpose of cutting and removing the timber, which was sold to the defendant in error. The complaint alleges that this was done after the land had been patented to the railroad company, but that it was done without that company's knowledge or consent. It is clear that Stanley claimed no right under the railroad company's title. His claim was in opposition to that title. He cut and removed the timber, relying solely upon his right to do so as a homestead settler.

The right of the plaintiff in error to recover in the present case depends upon the act of 1898, and particularly upon that portion thereof which provides that, upon the delivery to the railroad of a list of the several tracts claimed by settlers or purchasers, all right, title, and interest of the railroad which it "may relinquish hereunder shall revert to the United States, and such tracts shall be treated under the laws thereof in the same manner as if no rights thereto had ever vested in the said railroad grantee." We are of the opinion that it is the meaning and purpose of the act to revest title in the United States as of the time of the grant to the railroad company, or at the latest as of the time of the acceptance by the railroad company of the act of 1898, and to restore to the United States all rights incident to the

ownership of such land, and, as included therein, the right to pursue any remedy for injury to the land, or for the timber removed therefrom, as against any person other than the railroad grantee, or persons holding under it. Stanley was not in privity with the railroad company. He claimed the land at all times under the homestead laws of the United States. The effect of the act is to reinvest the United States with the ownership of the land which he claimed, with all the rights at least that would have attached, had the land been deeded to the United States in 1898, immediately upon the acceptance of the terms of the act.

And such we think is the meaning of the decision in Humbird v. Avery, 195 U. S. 480, 25 Sup. Ct. 123, 49 L. Ed. 286, in which the court discussed the nature and purpose of the act of July 1, 1898, and held that it embraced all lands granted to the railroad company, whether patented or not, which had been settled upon or claimed in good faith by qualified settlers under color of title or claim of right under any law of the United States or ruling of the Interior Department. The court further held that the railroad company, after having accepted the provisions of the act, could do no act to affect the title to the lands which it held under the conditions specified in the act, and that all those lands became subject to the power conferred upon the Land Department by that act. The decision is necessarily based on the recognition of a right in the United States in the lands from and after the railroad company's acceptance of the terms of the act, and its meaning is that after that date the railroad company could not sell the land from which the timber in controversy here was removed, nor could it destroy, or give authority to others to destroy, the value of that land, which consisted in the timber thereon.

The case is different from United States v. Loughrey, 172 U. S. 206, 19 Sup. Ct. 153, 43 L. Ed. 420, cited by the defendant in error. In that case the United States had granted lands in fee to the state of Michigan on the condition subsequent that, if the railroad should not be completed within 10 years, the unsold lands should revert to the United States. It was held that after the forfeiture and reversion the United States could not maintain an action for trespass against a person who had entered upon and cut and removed timber from the land during the time while the state held the title. The court said:

"Whilst the timber was standing, it constituted a part of the realty; being severed from the soil, its character was changed. It became personalty; but its title was not affected. It continued, as previously, the property of the owner of the land, and could be pursued wherever it was carried."

But in that case there was no exchange of lands, and the language of the act restoring the property to the United States contained no provision revesting the same in the same manner "as if no rights thereto had ever vested in the railroad grantee"; but it simply provided, "There is hereby forfeited to the United States, and the United States may resume title," etc. To resume title under such an act is to take it again as of the date of the forfeiture. In the case at bar, although in the original grant there was no provision that the United States

should again be vested with the property in the manner ultimately accomplished by the act of 1898, the acceptance of the terms of that act by the railroad company subjected it to all the provisions of the act with the same effect as if those provisions had been incorporated in the original grant. Stanley was in no position to question the provisions of the act, for he never recognized any right in the railroad company.

The United States having acquired by the railroad's acceptance of the act an inchoate right which subsequently became merged in the legal title, justice requires that the relinquishment to the United States be held to relate to the date of the acceptance. The doctrine of relation is defined in Gibson v. Chouteau, 13 Wall. 92, 100, 20 L. Ed. 534, as follows:

"By the doctrine of relation is meant that principle by which an act done at one time is considered by a fiction of law to have been done at some antecedent period. It is usually applied where several proceedings are essential to complete a particular transaction, such as a conveyance or deed. The last proceeding which consummates the conveyance is held for certain purposes to take effect by relation as of the day when the first proceeding was had."

That doctrine was applied in Knapp v. Alexander Co., 237 U. S. 162, 35 Sup. Ct. 515, 59 L. Ed. 894, a case in which, at the time when the timber was cut, the plaintiff had neither the possession nor the right of possession of the land, and had done no more than to file a homestead entry. The court held that the title long afterwards given him by his patent related back to the filing of the entry, and that at the time when the timber was cut he had an inchoate title upon which he could thereafter bring an action for the value of the timber cut. So in Peyton v. Desmond, 129 Fed. 1, 63 C. C. A. 651, a case before the Circuit Court of Appeals for the Eighth Circuit, it was shown that Desmond, the plaintiff, made a homestead settlement in 1890, and 8 years later received patent for the land. One Judd also settled on the land at the same time with Desmond, and upon adverse proceedings it was at first ruled that Judd was entitled to the homestead. In 1893 Judd commuted his entry and obtained a certificate of title. A further contest resulted in a final decision in favor of Desmond. The question presented by the case was whether the defendant, to whom Judd had conveyed his interest in 1893, and who in 1893 and 1894 had cut the timber from the land, the legal title to which then still remained in the United States, could be required to answer to the plaintiff in trover for the timber so cut and removed. The court answered the question in the affirmative, and said:

"From what has been said, it is clear that the defendants are liable to the plaintiff or to the United States for the conversion of the timber, and that their only lawful concern is that they be made to respond only to the rightful claimant."

And the court held that the plaintiff's title under the patent related back to a time anterior to the cutting of the timber, notwithstanding that at the time when the timber was cut the plaintiff's right was subject to the power of Congress to terminate the same. Another case

illustrating the application of the doctrine of relation is United States v. Anderson, 194 U. S. 394, 24 Sup. Ct. 716, 48 L. Ed. 1035.

To hold the defendant in error herein liable by relation upon the facts alleged in the complaint is not to create by relation a liability which otherwise would not exist. There can be no question but that the acts of Stanley and the defendant in error created at the time when they were done a liability, certainly to the railroad company, if not to the United States. So far as the complaint states the facts, no rights of innocent third person will be impaired by the application of the doctrine of relation, nor will its application result in injustice to any one.

The judgment is reversed, and the cause is remanded for further proceedings.

INTERNATIONAL SILVER CO. et al. v. NEW YORK JEWELRY CO. et al.

In re NEW YORK JEWELRY CO.

(Circuit Court of Appeals, Sixth Circuit. June 30, 1916.)

No 2819.

1. BANKRUPTCY ⟸84—PROCEEDINGS—INVOLUNTARY PETITION.

Where an involuntary petition was filed within four months after the act of bankruptcy was committed, the petition, which alleged a preferential transfer in the language of the statute, omitting only the information necessary to enable the bankrupt to meet the charge, may, notwithstanding a subsequent adjudication in bankruptcy on a voluntary petition and the passage of more than four months since the transfer, be amended with the consent of the bankrupt so as to properly charge a preferential transfer.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 126–129; Dec. Dig. ⟸84.]

2. BANKRUPTCY ⟸84—PETITION—AMENDMENT.

That an application to amend an involuntary petition in bankruptcy was not in writing does not deprive the court of jurisdiction, where notice was waived by the express written consent of the bankrupt to the amendment.

[Ed. Note.—For other cases, see Bankruptcy. Cent. Dig. §§ 126–129; Dec. Dig. ⟸84.]

3. BANKRUPTCY ⟸84—PETITION—AMENDMENT—VERIFICATION.

Though an amendment to an involuntary petition in bankruptcy was not verified as required by General Order in Bankruptcy No. 11 (18 Sup. Ct. v), yet where the order allowing the amendment stated that it was made accordingly on the face of the petition, it is within the power of the court to allow subsequent verification, and the order cannot be attacked on that ground.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig §§ 126–129; Dec. Dig. ⟸84.]

4. BANKRUPTCY ⟸41—PROCEEDINGS—INVOLUNTARY PETITION.

The mere pendency of an involuntary petition in bankruptcy does not deprive the court of jurisdiction to entertain a voluntary petition and adjudicate thereunder.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 40; Dec. Dig. ⟸41.]

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5. BANKRUPTCY ⊂⊃84—PETITION—AMENDMENT—ALLOWANCE.

After creditors had filed an involuntary petition averring a preferential transfer by the bankrupt, the bankrupt, more than four months after the date of the transfer, filed an involuntary petition and was adjudicated a bankrupt thereunder. A refusal to allow the petitioning creditors to amend would defeat their rights to set aside the transfer, it having occurred more than four months before the filing of the voluntary petition. *Held* that, where the transfer was alleged in the words of the statute, and the petition was defective only in that it failed to contain information necessary to enable the bankrupt to meet the charge, an amendment to the involuntary petition, which will preserve the rights of the creditors, should, upon the case presented, have been allowed.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 126–129; Dec. Dig. ⊂⊃84.]

6. BANKRUPTCY ⊂⊃51—ADJUDICATION—EFFECT OF.

In such case, the adjudication under the involuntary petition need not be set aside; but the order of adjudication should be amended, so as to preserve the rights of creditors as against the alleged preferential transfer, and the proceedings may be consolidated.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 49; Dec. Dig. ⊂⊃51.]

7. BANKRUPTCY ⊂⊃363—CREDITORS—RIGHTS OF.

In such case, the fact that the petitioning creditors upon the adjudication on the voluntary petition filed their claims with the referee and a trustee was elected does not estop them from asserting their rights to attack the transfer.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 550–554; Dec. Dig. ⊂⊃363.]

Petition for Revision of Proceedings of the District Court of the United States for the Western District of Tennessee, in Bankruptcy; John E. McCall, Judge.

In the matter of the bankruptcy of the New York Jewelry Company. On motion of the National City Bank of Memphis, an order granting leave to the International Silver Company and two others to amend their involuntary petition in bankruptcy was dismissed, and the petition referred to the referee and consolidated with the voluntary bankruptcy proceedings, and the petitioning creditors petition to revise. Order reversed in part, and cause remanded, with directions.

Auvergne Williams, of Memphis, Tenn., for petitioners.

W. W. Swift and Charles W. Anderson, both of Memphis, Tenn for respondents.

Before KNAPPEN and DENISON, Circuit Judges, and SATER, District Judge.

KNAPPEN, Circuit Judge. The New York Jewelry Company is a Tennessee corporation, lately doing business at Memphis. On November 27, 1914, the three petitioners, who are creditors of the Jewelry Company, filed in the District Court below a petition asking that the Jewelry Company be adjudged bankrupt; the act of bankruptcy charged (so far as material here) being the transfer on or about an unnamed date in August, 1914, while insolvent, of portions of its property to one or more of its creditors with intent to prefer such creditors.

The Jewelry Company demurred to the petition on the grounds, here material: (1) That the allegation charging the act of bankruptcy in question is insufficient in law, in failing to state "time, place, persons or circumstances or sufficient facts upon which to base proof of an act of bankruptcy"; and (2) that the petition fails to show the business in which the Jewelry Company is engaged, and whether such as to make it subject to the Bankruptcy Act. The demurrer amounted in legal effect to a motion to dismiss.

On March 15, 1915, after the submission of and before action on the demurrer, the Jewelry Company filed a voluntary petition, adjudication was at once made thereon and the matter referred to a referee, without notice to petitioning creditors. On April 5th following the attorneys for petitioning creditors and the bankrupt approved a draft of an order which was filed in the involuntary proceeding, allowing amendment of the petition: (a) By alleging the transfer by the Jewelry Company, while insolvent, on September 27, 1914, of certain of its assets amounting in value to more than $2,500 to the respondent National City Bank, with intent to prefer the bank as a creditor; and (b) by stating the bankrupt's business. The amendment was allowed in open court. It was not entered for the reason that the attorney of the bank notified the clerk that he objected to its entry.

On May 11, 1915, the bank filed a motion to set aside the order granting leave to amend the petition for involuntary bankruptcy and to dismiss the original petition upon the demurrer, for the reasons: (a) That no formal application for leave to amend was made, as required by General Order No. 11; (b) that the act of bankruptcy in question was not charged in the original petition, and occurred more than four months before amendment was asked for; and (c) that it was error to permit amendment after filing of the voluntary petition, the adjudication thereon and proceedings thereunder.

On June 12, 1915, the petitioning creditors moved to vacate the adjudication on the voluntary petition, alleging, among other things, that the bank received preferential payment to the extent of $6,000 within four months of the filing of the petition for involuntary bankruptcy, and with full knowledge of the Jewelry Company's insolvency; and that the interests of creditors demand that adjudication be had on the involuntary petition, because the voluntary petition was not filed within four months before the alleged preference was given. The bank answered, admitting its receipt, at its request, from the Jewelry Company on September 22, 1914, of additional collateral to the face amount of $4,200 as security for a pre-existing indebtedness of more than $5,000 from the Jewelry Company, denying, however, any knowledge of the latter's insolvency or that the security was preferential. On June 22, 1915, upon hearing of the respective petitions of the bank and the petitioning creditors, the order granting leave to amend the original petition in the involuntary proceeding was set aside, the creditors' petition of June 12th dismissed, and the cause referred to the referee (without amendment of the original involuntary petition and without adjudication thereunder), to be consolidated with the voluntary proceeding "under which petition the administration of bankrupt's estate shall proceed."

The meat of the situation is this: If the order complained of stands, and the petition in involuntary bankruptcy is finally disallowed, all opportunity to inquire into the alleged preference to the bank is forever gone, for the voluntary petition was filed more than four months after the giving of the alleged preference; on the other hand, if the amendment of the petition in involuntary bankruptcy is allowed, and adjudication is had thereunder, opportunity for such inquiry remains. It is presumable from the record that the voluntary petition was filed at the bank's instance and in its sole interest. The contest below and here was and is entirely between the petitioning creditors and the bank; the latter alone has answered and defends against the petition for revision.

The controlling questions are: (1) Whether the court had jurisdiction to permit amendment of the petition in the involuntary proceeding more than four months after the alleged preferential transfer; and, if so (2), whether the amendment should have been allowed and the case proceeded with under that petition.

[1] We entertain no doubt on the question of jurisdiction. The court had jurisdiction of the subject-matter and of the parties. The petition alleged a preferential transfer in the language of the statute, omitting only the information necessary to enable the bankrupt to meet the charge. The bankrupt consented to the amendment, thus removing the objection of lack of notice to the one directly concerned therewith. While the act of bankruptcy occurred more than four months previous to the amendment, it was within four months of the filing of the original petition. Jurisdiction thus existed. In re Shoesmith (C. C. A. 7) 135 Fed. 684, 688, 68 C. C. A. 322; In re Plymouth Cordage Co. (C. C. A. 8) 135 Fed. 1000, 68 C. C. A. 434; Hark v. Allen (C. C. A. 3) 146 Fed. 665, 77 C. C. A. 91; In re Brown Com. Car Co. (C. C. A. 7) 227 Fed. 387, 142 C. C. A. 83; 1 Loveland on Bankruptcy (4th Ed.) pp. 419–426. The amendment showing that the alleged bankrupt was subject to the act was also within the court's jurisdiction. Armstrong v. Fernandez, 208 U. S. 324, 28 Sup. Ct. 419, 52 L. Ed. 514; Ryan v. Hendricks (C. C. A. 7) 166 Fed. 94, 92 C. C. A. 78; Dodge v. Kenwood Ice Co. (C. C. A. 8) 204 Fed. 577, 123 C. C. A. 103.

[2, 3] The fact that the application to amend was not in writing did not affect jurisdiction to act. Notice was waived by express written consent to the amendment. While the amendment does not affirmatively appear to have been verified, as required by General Order in Bankruptcy No. 11 (18 Sup. Ct. v)—the order stated that "said amendment was made accordingly on the face of the bill," meaning, of course, the petition—it was within the power of the court to permit verification later. Millan v. Exchange Bank (C. C. A. 4) 183 Fed. 753, 106 C. C. A. 327.

[4, 5] The exercise of the jurisdiction to amend was of course within the sound discretion of the court, having in mind the interests of creditors. While the mere pendency of the involuntary petition did not take away jurisdiction to entertain the voluntary petition and to adjudicate thereunder, the duty arose to choose the course for the best

interests of creditors. In many cases such interests are best subserved by adjudicating upon a voluntary petition, thus saving delay, litigation and expense in procuring an adjudication; but notice of the filing of the voluntary petition should have been given to the petitioning creditors, and opportunity thus afforded to determine the course most likely to conserve the interests of the estate. The fact, however, that adjudication was made under the voluntary petition did not preclude jurisdiction to protect the rights of creditors under the involuntary petition. The record does not make it clear whether the action of June 26th, under review, was taken upon a consideration of the merits, or because of a supposed lack of jurisdiction to grant petitioners the relief asked. If upon the merits, we think that on the record here presented discretion was improvidently exercised.

[6] But this conclusion does not necessarily require the setting aside of the adjudication already had. It is still within the power of the court to preserve the rights of creditors as against the alleged preferential transfer by amending the order of adjudication so as to make it without prejudice to the rights of creditors gained by the filing of the involuntary petition, and by permitting petitioners to have action on their petition if found necessary to protect rights which would be lost under the adjudication on the voluntary petition alone; and while it was entirely proper to consolidate the voluntary and involuntary proceedings, relief under the involuntary petition is, at the least, doubtful without the amendment asked. We cite several decisions which we think support the views we have expressed. In re Dwyer (D. C.) 112 Fed. 777 (opinion by Judge Amidon); In re Stegar (D. C.) 113 Fed. 978 (opinion by Judge Jones); In re New Chattanooga Hardware Co. (D. C.) 190 Fed. 241 (opinion by Judge Sanford); In re Lachenmaier (C. C. A. 7) 203 Fed. 32, 121 C. C. A. 368.

[7] We may add that we think it clear that petitioners are not, by the filing of their claims before the referee, or by the election of a trustee, estopped from obtaining relief.

The order appealed from will be reversed so far as it sets aside the order of amendment in question, and so far as it denies petitioners an adjudication as to the act of bankruptcy in question under the involuntary petition; and the record is remanded to the district court with directions to take such action in the premises as may appear for the best interests of the estate, not inconsistent with this opinion.

GRAND TRUNK RY. CO. OF CANADA v. KNAPP.

(Circuit Court of Appeals, Sixth Circuit. June 30, 1916.)

No. 2774.

1. COMMERCE ⟸27—"INTERSTATE COMMERCE"—WHAT CONSTITUTES.
A carpenter, riding on a train which carried the equipment for repair of a bridge used by railroad company in interstate commerce, is, where the repairs were to be made by him, engaged in "interstate commerce."
[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 25; Dec. Dig. ⟸27.
For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.]

2. MASTER AND SERVANT ⟸346—INJURIES TO SERVANT—FEDERAL EMPLOYERS' LIABILITY ACT.
Recovery by an injured servant under the Michigan Workmen's Compensation Act (Pub. Acts Ex. Sess. 1912, No. 10) does not depend on the master's negligence.
[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. ⟸346.]

3. COMMERCE ⟸8—EXCLUSIVE POWER—INJURIES TO SERVANT—WORKMEN'S COMPENSATION ACT—FEDERAL EMPLOYERS' LIABILITY ACT.
Plaintiff, a bridge carpenter, who was a member of a crew of a work train, was injured while on the way to repair a railroad bridge used both in intra and inter state commerce. The federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [Comp. St. 1913, §§ 8657–8665]) governs actions by employés of railroad companies injured through the negligence of the master while engaged in interstate commerce. The Michigan Workmen's Compensation Act, providing for compensation to employés injured regardless of the employer's negligence, conclusively imputes knowledge of the employer's election to come under the act to the employé, and part 6, § 4, declares that the provisions of the act shall apply to employers and workmen engaged in intrastate commerce, also to those engaged in interstate or foreign commerce for whom a rule of liability or method of compensation has been or may be established by the Congress of the United States only to the extent that their mutual connection with intrastate work may be and shall be clearly separable and disinguishable from interstate or foreign commerce, but that any such employer and any of his workmen working only in the state may, subject to the approval of the Industrial Accident Board, accept and become bound by the provisions of the act with the same force and effect as provided for other employers and workmen. The railroad company, which was engaged in both intra and inter state commerce, filed an election to come within the act, but plaintiff did not accept the act. *Held*, that as the injuries received by plaintiff resulted from the railroad company's negligence, and as the federal Employers' Liability Act is exclusive in so far as it applies, Congress having jurisdiction over interstate commerce, recovery by plaintiff must be based on the federal act, and not on the Michigan Workmen's Compensation Act, for as to such injuries the latter act was inapplicable.
[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 5; Dec. Dig. ⟸8.]

4. MASTER AND SERVANT ⟸358—INJURIES TO SERVANT—WORKMEN'S COMPENSATION—ACCEPTANCE OF ACT.
In such case, the fact that the defendant railroad company paid defendant's hospital and doctor's bills during the first three weeks after the injury, as required by the Michigan Workmen's Compensation Act, does not, there having been no assent on the part of plaintiff that such pay-

ment was in compliance with the act, establish plaintiff's acceptance of the act, excluding action under the federal Employers' Liability Act.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. ⟸358.]

5. APPEAL AND ERROR ⟸932(1)—PRESUMPTIONS—RECOVERY—DIMINUTION.

Where the master, who paid some of the hospital and medical expenses of an injured servant, made no request that the award of damages be diminished on that ground, the award will not be disturbed on appeal, for it will be presumed that it was so diminished.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3782; Dec. Dig. ⟸932(1).]

In Error to the District Court of the United States for the Western District of Michigan; Clarence W. Sessions, Judge.

Action by Albert E. Knapp against the Grand Trunk Railway Company of Canada. There was a judgment for plaintiff, and defendant brings error. Affirmed.

H. R. Martin, of Detroit, Mich., for plaintiff in error.

S. A. Anderson, of St. Paul, Minn., for defendant in error.

Before KNAPPEN and DENISON, Circuit Judges, and EVANS, District Judge.

KNAPPEN, Circuit Judge. Defendant is a railway carrier engaged in interstate and intrastate commerce. Plaintiff was employed by defendant as a bridge carpenter; while such employé, and while as such a member of a crew in charge of a work train, on which was a pile driver, service water tank, etc., on the way to repair defendant's railway bridge used by defendant for the passage thereover of trains both in interstate and intrastate commerce, plaintiff, without negligence on his part, received serious injuries through a collision (occasioned by defendant's negligence) between defendant's freight train and the train on which plaintiff was riding. Plaintiff recovered verdict and judgment in a suit for such negligent injuries, under the federal Employers' Liability Act. Act April 22, 1908, c. 149, 35 Stat. 65, amended April 5, 1910 (36 Stat. 291, c. 143 [Comp. St. 1913, §§ 8657–8665]).

But two questions are presented: First, whether plaintiff was at the time of the accident employed in interstate commerce; and, second, whether the federal Employers' Liability Act supersedes, as to plaintiff's right of action, the Michigan Workmen's Compensation Act (Act No. 10, P. A. Mich. Ex. Sess. 1912).

[1] We have no doubt that plaintiff was at the time of the accident employed in interstate commerce, within the meaning of the federal Employers' Liability Act. The case is ruled by Pedersen v. D., L. & W. R. R. Co., 229 U. S. 146, 33 Sup. Ct. 648, 57 L. Ed. 1125, Ann. Cas. 1914C, 153, unless distinguished by the fact that plaintiff in the instant case was riding upon a train which carried also the equipment for the repair, while in the Pedersen Case the employé was walking and carrying his own repair equipment. We cannot think this difference important. The case is not brought within Ill. Central R. R. Co. v. Behrens, 233 U. S. 473, 34 Sup. Ct. 646, 58 L. Ed. 1051, Ann.

Cas. 1914C, 163. See, also, N. Y. Central R. R. Co. v. Carr, 238 U. S. 260, 35 Sup. Ct. 780, 59 L. Ed. 1298, and P., C., C. & St. L. R. Co. v. Glinn (C. C. A. 6) 219 Fed. 148, 135 C. C. A. 46.

[2, 3] The Michigan act, with certain exceptions hereafter stated so far as important, applies to all persons, firms and corporations (including public service corporations) who elect to become subject to its provisions, such election to be effected by filing with the Industrial Accident Board a written statement of the acceptance of the act and the adoption of one of several methods provided for the payment of compensation. By failing to come under the act the employer is deprived of the defenses of contributory negligence, unless willful, negligence of fellow servants and assumption of the risk. Knowledge of the employer's election to come under the act is conclusively imputed to the employé, and the latter is conclusively presumed to have consented to come under the act unless he gives written notice to the contrary. Compensation Act, pt. 1, § 8, and pt. 3, § 4; Mackin v. Detroit-Timkin Axle Co. (Mich.) 153 N. W. 49.

Recovery does not depend upon, and is not affected by, the employer's negligence. Andrejwski v. Wolverine Coal Co., 182 Mich. 298, 302, 148 N. W. 684. The statute is based on the theory that personal injury losses in industrial pursuits are properly chargeable to the business as a part of the cost of production. Compensation for injuries causing death takes the form of a payment of one-half the employé's weekly wages for a certain number of weeks, subject to a maximum and minimum, as respects both wages and aggregate recovery. Compensation for injuries not resulting in death is on the same general basis as for fatal injuries, the period for which compensation is paid being made to depend upon the nature and extent of the injury. The procedure to recover is by filing claim with the Industrial Accident Board and arbitration in case of disagreement between employer and employé, with a right of review by the Accident Board of the arbitrator's findings, the action of the Board being final except that the Supreme Court may review questions of law involved. Final judgment in a court of record may be entered, as of course, upon a final award.

By section 4, part 6, of the act, its provisions are made to apply to employers and workmen engaged in intrastate commerce, but not to those engaged in interstate commerce, "for whom a rule of liability or method of compensation has been or may be established by the Congress of the United States," except to the extent that "their mutual connection with intrastate work may and shall be clearly separable and distinguishable from interstate or foreign commerce." There is also provision for express and voluntary acceptance of the act by "any such employer and any of his workmen working only in this state," if done with the approval of the Industrial Accident Board. The section is printed in full in the margin.[1]

[1] "Sec. 4. The provisions of this act shall apply to employers and workmen engaged in intrastate commerce, and also to those engaged in interstate or foreign commerce, for whom a rule of liability or method of compensation has been or may be established by the Congress of the United

The defendant, previous to the accident, filed its election to come under the act. The plaintiff has never accepted it, unless his acceptance is conclusively presumed by his failure, previous to the accident, to give written notice of his nonassent.

Defendant being an interstate carrier by railroad and plaintiff having been employed in interstate commerce when his injuries occurred, the federal Employers' Liability Act unquestionably prescribes a remedy. The jurisdiction of Congress over interstate commerce, and thus over remedies against employers therein for injuries sustained by employés while engaged in such commerce, is paramount; and so far as Congress has occupied the field of such liability, its jurisdiction is exclusive. Second Employers' Liability Cases, 233 U. S. 1, 55, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44; Mich. Cent. R. R. Co. v. Vreeland, 227 U. S. 59, 66, 33 Sup. Ct. 192, 57 L. Ed. 417, Ann. Cas. 1914C, 176; Seaboard Air Line R. R. Co. v. Horton, 233 U. S. 492, 501, 34 Sup. Ct. 635, 58 L. Ed. 1062, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475. As expressed by Mr. Justice Lurton in the Vreeland Case:

"By this act Congress has undertaken to cover the subject of the liability of railroad companies to their employés while engaged in interstate commerce. This exertion of a power which is granted in express terms must supersede all legislation over the same subject by the states. * * * It therefore follows that in respect of state legislation prescribing the liability of such carriers for injuries to their employés while engaged in interstate commerce this act is paramount and exclusive."

The defense that the employé was at the time of his injuries engaged in interstate transportation has been sustained as defeating recovery under state laws. Pecos, etc., Ry. Co. v. Rosenbloom, 240 U. S. 439, 36 Sup. Ct. 390, 60 L. Ed. 730; C., B. & Q. Ry. Co. v. Harrington, 241 U. S. 177, 36 Sup. Ct. 517, 60 L. Ed. 941.

The general doctrine that the paramount jurisdiction of Congress when actually exercised, is exclusive, has been applied to a variety of subjects, including, among others, contracts between carrier and shipper in interstate commerce, Adams Express Co. v. Croninger, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257; hours of service of employés in such commerce, No. Pacific R. R. Co. v. Washington, 222 U. S. 370, 32 Sup. Ct. 160, 56 L. Ed. 237; Erie R. R. Co. v. New York, 233 U. S. 671, 34 Sup. Ct. 756, 58 L. Ed. 1149, 52 L. R. A. (N. S.) 266, Ann. Cas. 1915D, 138; safety appliances on cars engaged in interstate commerce, Southern Ry. Co. v. R. R. Commission of Indiana, 236 U. S. 439, 35 Sup. Ct. 304, 59 L. Ed. 661; Texas & Pacific R. R. Co. v. Rigsby, 241 U. S. 33, 41, 36 Sup. Ct. 482, 60 L. Ed. 874; Spokane & Inland Empire R. R. Co. v.

States, only to the extent that their mutual connection with intrastate work may and shall be clearly separable and distinguishable from interstate or foreign commerce, except that any such employer and any of his workmen working only in this state, may, subject to the approval of the industrial accident board, and so far as not forbidden by any act of Congress, voluntarily accept and become bound by the provisions of this act in like manner and with the same force and effect in all respects as is hereinbefore provided for other employers and their workmen."

Campbell, 241 U. S. 497, 36 Sup. Ct. 683, 60 L. Ed. 1125 (decided by the Supreme Court June 12, 1916), where, in an action upon the federal Employers' Liability Act and the federal Safety Appliance Act (Act March 2, 1893, c. 196, 27 Stat. 531 [Comp. St. 1913, § 8605]), it was said that the "employé's right to recover against his employer depends upon acts of Congress, to which all state legislation affecting the subject-matter must yield." There can be no doubt that the federal Employers' Liability Act provides exclusive remedy for at least negligent injuries to employés of interstate railroad carriers while actually engaged in interstate commerce.

It is urged, however, that Congress has not entered the field of liability for *nonnegligent injuries* to employés in interstate commerce. It was said in the Horton Case (233 U. S. 501, 502, 34 Sup Ct. 635, 58 L. Ed. 1062, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475) that by the Employers' Liability Act "it was the intention of Congress to base the action upon negligence only, and to exclude responsibility of the carrier to its employés for defects and insufficiencies not attributable to negligence" (see, also, Gray v. Southern Ry. Co., 241 U. S. 333, 36 Sup. Ct. 558, 60 L. Ed. 1030, decided May 22, 1916), and it is here urged that as under the Michigan Workmen's Compensation Act recovery does not depend upon, and is not affected by, the employer's negligence, that act, and the federal Employers' Liability Act are not in pari materia, and therefore the state act is not superseded by the federal act. It is of course true that, when the federal and state governments have jurisdiction in the same field, the state may legislate upon subjects within that field until Congress shall occupy it (Reid v. Colorado, 187 U. S. 137, 23 Sup. Ct. 92, 47 L. Ed. 108; Asbell v. Kansas, 209 U. S. 251, 28 Sup. Ct. 485, 52 L. Ed. 778, 14 Ann. Cas. 1101; Savage v. Jones, 225 U. S. 501, 32 Sup. Ct. 715, 56 L. Ed. 1182); and had plaintiff proceeded under the state statute, the question whether that statute was altogether superseded by the federal act might become material. The decisions involving that question are not entirely harmonious. In Staley v. Ill. Central R. R. Co., 268 Ill. 356, 109 N. E. 342, L. R. A. 1916A, 450, it was held, upon elaborate discussion, that the field covered by the federal Employers' Liability Act is the employer's liability to employés for injuries received by them while engaged in interstate transportation by rail, and that the federal act thus excludes all other liability for such injuries (even though nonnegligent) imposed by either the common law or by statutes such as the Workmen's Compensation Act of Illinois, which belongs to the same general class as the Michigan act. So in Smith v. Industrial Accident Commission, 26 Cal. App. 560, 147 Pac. 600, the state commission was held without jurisdiction to award compensation to an employé engaged in work directly related to interstate commerce.

On the other hand, Hammill v. Penn. R. R. Co., 87 N. J. Law, 388, 94 Atl. 313, Rounsaville v. Central R. R. Co., 87 N. J. Law, 371, 94 Atl. 392, and Winfield v. N. Y. C., etc., R. R. Co., 216 N. Y. 284, 110 N. E. 614, Ann. Cas. 1916A, 817 (followed in Moore v. Lehigh Valley R. R. Co., 169 App. Div. 177, 154 N. Y. Supp. 620), hold that under the Workmen's Compensation Acts of the states referred to,

recovery not being based upon negligence, such acts were not superseded by the federal Employers' Liability Act with respect to actions for nonnegligent injuries. In none of these cases, however, was it held, or even suggested, that the state act was not excluded by the federal act with respect to actions for negligent injuries. On the contrary, it was expressly said in the Winfield Case that the portion of the state act "which affects accidental injuries caused by negligence resulting to those engaged in interstate commerce, which are within the federal Employers' Liability Act, is as ineffective and inoperative as if it had not been enacted." In the instant case we are not called upon to decide whether the state act would apply had plaintiff's injury occurred without defendant's negligence.

In the instant case recovery was and could have been had only for negligent injuries. Defendant contends that because the bridge plaintiff was on his way to help repair was used in both interstate and intrastate commerce plaintiff was, at the most, engaged in interstate commerce not "clearly separable and distinguishable from intrastate * * * commerce," and his employment was thus within the jurisdiction declared by section 4, pt. 6, of the state act, and not within the field covered by the federal act. This contention may be briefly answered:

We think it clear not only that by the section invoked the Legislature declared that "it did not intend to enter any field from which it had been or should be excluded by the action of the Congress of the United States" (Jensen v. Southern Pacific R. R. Co., 215 N. Y. at page 522, 109 N. E. 600, L. R. A. 1916A, 403); but that plaintiff's employment was directly within the federal act, as authoritatively determined in the Pedersen Case. This case thus does not belong to the class illustrated by cases such as D., L. & W. R. R. Co. v. Yurkonis, 238 U. S. 439, 35 Sup. Ct. 902, 59 L. Ed. 1397, and Shanks v. D., L. & W. R. R. Co., 239 U. S. 556, 36 Sup. Ct. 188, 60 L. Ed. 436, and C., B. & Q. R. Co. v. Harrington, 241 U. S. 177, 36 Sup. Ct. 517, 60 L. Ed. 941, where the service in question, although affecting interstate transportation, was held to be too remote from it to be practically a part of it.

[4] There has been no express agreement between plaintiff and defendant, approved by the Industrial Accident Board, whereby plaintiff voluntarily accepted and became bound by the provisions of the state act.

We therefore have no difficulty in holding that the Michigan act does not give (and was not intended to give) an action for the negligent injuries sustained by plaintiff in the instant case; for the mere fact that defendant paid plaintiff's hospital and doctor's bills during the first three weeks after the injury (as required in all cases by section 4, pt. 2, of the state act) could not in any event constitute an election by plaintiff after the injury to accept the act; the record is express that "there was no assent on the part of plaintiff that such payment was in compliance with such act"; and as the act did not apply to plaintiff's case, the provision for automatic acceptance falls to the ground.

[5] Whether defendant was entitled to have the payment of hospital and medical bills taken into account in the assessment of damages is unimportant, for no request to that effect was made, and presumably the recovery was less than it would have been but for such payment.

Whether the Michigan act constitutes a contract to enable the carrier "to exempt itself from any liability created" by the federal Employers' Liability Act, condemned by section 5 thereof, is not here presented, for no question of cumulative remedy or of set-off is involved.

The judgment of the District Court is accordingly affirmed, with costs.

SOUTHERN PAC. CO. v. STEWART.*

(Circuit Court of Appeals, Ninth Circuit. July 3, 1916.)

No. 2745.

1. CARRIERS ⟸228(3)—CARRIAGE OF LIVE STOCK—DAMAGES—EVIDENCE.
In an action for negligently unloading cattle for rest in pens which were dusty and unprotected from the sun, evidence that the pens were similar to pens on other portions of the carrier's line is inadmissible for it is no defense to the negligence charged that the carrier was guilty of similar acts of negligence.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 960; Dec. Dig. ⟸228(3).]

2. CARRIERS ⟸210—CARRIAGE OF LIVE STOCK—ACTIONS—DEFENSES.
The Twenty-Eight Hour Act (Act June 29, 1906, c. 3594, § 1, 34 Stat. 607 [Comp. St. 1913, § 8651]), requiring the unloading of cattle for resting and feeding within that time unless the shipper consents that they be carried for a continuous period of 36 hours, requires the cattle to be unloaded in properly equipped pens for resting, watering, and feeding, and a carrier cannot justify its act in unloading in hot and dusty pens by reason of the law.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 924; Dec. Dig. ⟸210.]

3. CARRIERS ⟸230(4)—CARRIAGE OF LIVE STOCK—ACTIONS—JURY QUESTION.
In an action for injuries to cattle which were unloaded for rest and food in a hot, dusty pen, unprotected from the sun, where until that time they were in good condition, the court cannot as a matter of law hold that the injuries to the cattle resulted, not from the place of unloading, but because they were transported from a cool climate to a hot, dry one.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 962; Dec. Dig. ⟸230(4).]

4. TRIAL ⟸252(7)—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.
Where the claim for injuries to cattle was that they were unloaded in hot, dusty pens, unprotected from the sun, an instruction on the shipper's failure to discharge his duty to load and reload the cattle at resting places en route is inapplicable to the evidence, and properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 602; Dec. Dig. ⟸252(7).]

5. TRIAL ⟸253(3)—INSTRUCTIONS—IGNORING ISSUES.
Where a shipper claimed that his cattle were injured because the carrier negligently unloaded them to water, feed, and rest in pens unprotected from the hot sun, an instruction to find for the carrier if it was more humane to unload the animals as done than to have continued the

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⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

*Rehearing denied October 9, 1916.

journey is improper, as ignoring the right of the shipper to control the shipment and require direct transportation upon executing a release for injuries for confinement beyond the 28-hour period.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 616; Dec. Dig. ⟸ 253(3).]

6. CARRIERS ⟸218(10)—CARRIAGE OF LIVE STOCK—WRITTEN NOTICE OF INJURY—NECESSITY.

Where a carrier was well acquainted with the injuries to plaintiff's cattle, and frequent communications were interchanged, the carrier's liability being recognized, recovery by the shipper cannot be defeated on the ground that he failed to give written notice within 10 days after unloading at destination, as required by the contract of shipment.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 674–696, 947; Dec. Dig. ⟸218(10).]

7. CARRIERS ⟸218(7)—CARRIAGE OF LIVE STOCK—ACTIONS—DAMAGES.

Where a contract for the shipment of live stock fixed the maximum recovery at $30 per head for cattle injured or lost, a recovery for injuries to cattle may be had, though the value of the animals after the injuries exceeded the value fixed; the provision not fixing the maximum value for death and a proportional recovery for injuries.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 674–696, 946; Dec. Dig. ⟸218(7).]

8. APPEAL AND ERROR ⟸221 — PRESENTATION OF GROUNDS OF REVIEW IN COURT BELOW—NECESSITY.

Though a shipping contract provided that the damages should be adjusted on the basis of the value of the animals at the time and place of shipment, a carrier cannot complain, in action for injuries to a shipment of cattle, that damages were assessed on the basis of the value of the animals at the place of destination; evidence thereof being received without objection, and there being no showing that the value at the place of shipment differed from that at the place of destination.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1353–1355; Dec. Dig. ⟸221.]

9. APPEAL AND ERROR ⟸231(9)—PRESENTATION OF GROUNDS OF REVIEW IN COURT BELOW—GENERAL EXCEPTIONS.

Where part of a charge is correct, a general exception to the whole will not bring up for review those portions which are erroneous.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. ⟸231(9); Trial, Cent. Dig. §§ 689, 690, 694, 696.]

In Error to the District Court of the United States for the District of Arizona; Wm. H. Sawtelle, Judge.

Action by Frank R. Stewart against the Southern Pacific Company, a corporation. There was a judgment for plaintiff, and defendant brings error. Affirmed.

The defendant in error, as plaintiff in an action in the court below, recovered a judgment against the defendant therein in the sum of $2,090 damages for injuries to dairy cows shipped by the plaintiff on July 1, 1913, from San Luis Obispo, Cal., over the defendant's road and that of its connecting carrier, to Phœnix, Ariz. In the complaint it was alleged that the defendant negligently unloaded the animals on July 4, 1913, at Yuma, Ariz., when the weather was extremely hot, and into pens which were dusty and unprotected from the sun, instead of transporting them to their destination. To this it was answered that at the time when the cattle arrived at Yuma they had been confined in the cars for about 20 hours without feed, water, or rest, and that it was necessary to unload them at that place in order to comply with the Twenty-Eight Hour Law. Further answer was made that the cat-

tle were being transported under a contract in writing whereby the plaintiff agreed that, in case of loss or damage to the cattle, notice in writing should be given to the defendant within 10 days after unloading at destination, that otherwise all claims for loss or damage were waived, and that the plaintiff failed to give such notice within the time specified. It was further alleged that in said writing it was further stipulated that the agreed value of the cattle was the sum of $30 per head, and that, in case of loss or damage for which the carrier might be liable, the amount claimed for each animal so lost or damaged should be adjusted on the basis of that agreed value, and that the contract was made and entered into in consideration of the plaintiff obtaining a lower freight rate than would have been assessed, had a higher valuation been placed upon the animals.

J. C. Forest, of Phœnix, Ariz., and Francis M. Hartman, of Tucson, Ariz., for plaintiff in error.

Hayes & Laney, of Phœnix, Ariz., for defendant in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). [1] Several assignments are addressed to alleged errors of the trial court in sustaining objections to testimony offered by the defendant, the object of which was to show that the feeding and rest pen at Yuma was maintained in as good condition as was customary with railroads in the Southwest, and in as good condition as pens and corrals at El Paso, Tex., Tucson, Bowie, and Phœnix, Ariz., and Indio, Cal. The evidence so offered would have tended only to show that the treatment of the plaintiff's cattle at Yuma was the usual and ordinary treatment of cattle by the defendant and other carriers in that section of the country, or sections similar in climate. The evidence, if admitted, would not have tended to acquit the defendant of negligence. It would have been no defense to the negligence charged to prove that the defendant committed similar acts of negligence elsewhere. G. Trunk R. R. Co. v. Richardson et al., 91 U. S. 454, 23 L. Ed. 356.

[2, 3] Error is assigned to the denial of the defendant's motion for an instructed verdict in its favor. The grounds of the motion were that it was necessary for the defendant to unload the cattle at Yuma in order to comply with the Twenty-Eight Hour Law, that the plaintiff abandoned his cattle at that point, and that the damage was the result of his own gross negligence. The evidence was undisputed that the defendant's cattle pens at Yuma were open corrals in the sand, wholly without shade or covering of any kind, that the weather was very hot, that the cattle arrived at Yuma in good condition, and that the plaintiff earnestly and repeatedly protested against unloading the same at that point, and offered to sign and deliver to the defendant a release of all liability for forwarding the shipment to Gila, at which point the defendant had feed and rest pens. It is clear that under the pleadings and the evidence the defendant was not entitled to an instructed verdict. Twenty-Eight Hour Act, § 1, required that the unloading should be into "properly equipped pens for rest, water, and feeding." Act June 29, 1906, c. 3594, 34 Stat. 607 (Comp. St. 1913, § 8651). The evidence tended strongly to show that the pens at Yuma were not properly equipped for rest, and there was evidence tending to show

that the cattle could have been carried to Gila within the 28-hour period, and to Phœnix within the 36-hour period, and that, but for the defendant's persistent refusal to go further, the plaintiff would have given it a written consent to carry the cattle on to Phœnix without unloading. In charging the jury the court said:

"It is for you, and you alone, to determine whether or not the corrals and pens provided by the defendant company at Yuma were such as the law requires railroads to furnish for the proper unloading, feeding, and resting and watering of cattle."

The court would not have been justified in ruling, as a matter of law, that the injury to the cattle resulted from their shipment from a cool, moist climate into an extremely hot climate, or that it resulted solely from the climatic conditions at Yuma. It is not disputed that the cattle arrived there in good condition, and it may be assumed that they might have been carried on their way without injury, if they had not been unloaded into the pens which the jury evidently found unfit for the purpose for which they were used.

[4] Error is assigned to the refusal of the court to instruct the jury that if the plaintiff failed or neglected to attend to unloading and reloading his cattle at Yuma, or failed or neglected properly to care for his cattle at Yuma, the defendant will not be liable for any loss or damage due to such failure on the plaintiff's part. It is contended that the defendant was entitled to that instruction, for the reason that the plaintiff had agreed and bound himself to unload and reload the cattle at the resting places, and to feed and water the same at his expense, and to accompany and attend to them en route. The requested instruction was not appropriate to any of the evidence in the case. The cause of injury to the cattle was not the manner of their unloading or their care, but the fact that they were placed in pens unfit for rest and feeding.

[5] Nor do we find that the trial court erred in denying the special instruction requested by the defendant to the effect that if the jury believed that at the time when the cattle arrived at Yuma they had been confined in the cars approximately 19 hours without feed or rest, and that it was more humane and better for them to be unloaded at Yuma for feed and rest than to transport them beyond that point and keep them confined in the cars, their verdict should be in favor of the defendant, and that, if they believed it was less injurious to said animals to unload them at Yuma than to have kept them confined for 9 hours or 18 hours longer, they should find for the defendant. These instructions were open to the objection that they ignored the right of the plaintiff to control the shipment. He had the right, if he so elected, to require the defendant to carry them on under his release in writing, which he repeatedly offered to execute. Again, the effect of the instructions, if given, would have been to permit the jury to disregard all the evidence of the defendant's negligence in failing to maintain at Yuma proper pens for feeding and rest.

[6] The defendant urges that the court below erred in refusing to charge, as requested, that the plaintiff could not recover for any loss or damage to the cattle, for the reason that he failed to make written

demand on the defendant within 10 days after unloading at the final destination, when he knew of all the damage to the cattle, or could, by the exercise of reasonable diligence, have known the same. The requested instruction was in accordance with the defense pleaded in the defendant's answer. To that defense the plaintiff had replied that he was relieved from compliance with the provision as to notice in writing within 10 days by the facts that on July 4, 1913, and at all times subsequent thereto, the defendant had full knowledge and notice of the injuries and damages to the plaintiff's cattle; that prior to reloading the cattle on that day, 5 of them had died; that the defendant found it necessary to provide an additional car in which to reload 13 of the crippled and sick cattle; that at various points between Yuma and Phœnix the train officials in charge of the shipment received telegraphic inquiries from other officials of the defendant inquiring as to the condition and welfare of the cattle; that after arrival at Phœnix, one of the crippled animals remained in the defendant's car for more than a week; that from the unloading of the shipment at Phœnix until October 21st of that year the plaintiff and the agents of the defendant and its connecting carrier were almost daily in communication relative to the damages sustained by the plaintiff; that the nature and extent of the injuries to the cattle which arrived alive were such as to render it impossible to determine the amount and extent thereof within the 10-day period; that a number thereof died many days after their arrival at Phœnix as the result of such injuries; and that the defendant on many occasions prior to October 21st recognized the plaintiff's right to recover on account of his damages. There was proof tending to sustain all the facts so alleged in the reply. We think, therefore, that the court below committed no error in instructing the jury that in view of the evidence, if they found it to be true, the plaintiff was relieved and released from giving notice within the 10 days. Cockrill v. Missouri, K. & T. Ry. Co., 90 Kan. 650, 136 Pac. 322, and cases there cited; Pierson v. Northern Pac. Ry. Co., 61 Wash. 450, 112 Pac. 509; Chicago, R. I. & P. Ry. Co. v. Spears, 31 Okl. 469, 122 Pac. 228; Missouri, K. & T. Ry. Co. v. Frogley, 75 Kan. 440, 89 Pac. 903; Adams v. Colorado & S. Ry. Co., 49 Colo. 475, 113 Pac. 1010, 36 L. R. A. (N. S.) 412.

[7] In the contract between the plaintiff and the defendant it was stipulated, in consideration of the freight rate, that the value of the cattle should be taken and deemed to be $30 per head. The plaintiff in his complaint demanded the sum of $30 per head for 11 cows lost, and $20 per head for injury to 87 head that survived. The defendant contends that it was entitled to have the jury instructed that if the animals after delivery at destination were still of the value of $30 per head, together with the freight charges, plaintiff was not entitled to recover anything for damages thereto. We think the defendant was not entitled to the requested instruction. The stipulation as to the amount recoverable for loss or damage to cattle was intended only for the purpose of fixing a limit to the amount to be recovered in case either of loss or damage. It did not fix the value as $30 for loss, and for a proportionate limit in case of damage. 5 Am. & Eng. Enc. of Law, 335; Starnes v. Railroad, 91 Tenn. 516, 19 S. W. 675.

[8] The defendant assigns error to the court's instruction to the jury that the measure of damages for the cattle injured would be the difference between the market value of such cattle in their normal condition after making the trip from the point of shipment to Phœnix, and the condition in which they were actually delivered at Phœnix, not to exceed $30 per head. It is said that this instruction is contrary to the provision of the shipping contract, which stipulated that damages would be adjusted on the basis of value at the "time and place of shipment, not exceeding the declared value." The defendant is in no position to claim reversible error in the instruction so given. All the testimony as to value was given with reference to the value of the cattle after their arrival at Phœnix. No exception was taken to the evidence so given, nor does it appear that the values of the cattle at Phœnix were different from their values at San Luis Obispo. It is not shown, therefore, that the defendant could have been prejudiced by the instruction.

[9] The record shows, also, that the defendant took no proper exception to that precise portion of the charge. The exception taken included a general charge covering other matters, some portions of which were not subject to objection. We find no error.

The judgment is affirmed.

CRAWFORD v. WASHINGTON NORTHERN R. CO. et al.

(Circuit Court of Appeals, Ninth Circuit. May 8, 1916.)

No. 2723.

1. CORPORATIONS ⟸480—MORTGAGES—PRIORITY OF LIENS.

By the terms of mortgages simultaneously executed by a timber company and a railroad company, securing bonds covering the same indebtedness, it was provided that payment of one of the timber company's bonds should operate as payment of one of the bonds of the railroad company, which should then be canceled or surrendered uncanceled at its option. The mortgage of the railroad company also covered all its after-acquired property. Later the two companies joined in another mortgage, by which, in addition to the property covered, they pledged the bonds of the railroad company "as they are from time to time released and delivered," under the terms of the first mortgages. The later mortgage was expressly made subject to the prior mortgages, which were recited therein. *Held*, that the pledge gave to the later mortgagee no present right in such bonds, but only entitled him to have the same reissued to him if and when they might be surrendered, and that even then they would be subject to the lien of the first mortgage under its after-acquired property clause.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. ⟸480; Mortgages, Cent. Dig. §§ 307-312.]

2. CORPORATIONS ⟸480—MORTGAGES—PRIORITY OF LIEN—ESTOPPEL OF SECOND MORTGAGEE.

A second mortgagee of a corporation, whose mortgage was expressly made subject to a prior mortgage, cannot defend against such mortgage because of transactions occurring before the execution of the second mortgage, by which it is claimed that a part of the proceeds of the

bonds secured by the first mortgage was used by the mortgagor in violation of the agreement under which they were issued and for a purpose which was ultra vires.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. ⊂=480; Mortgages, Cent. Dig. §§ 307–312.]

3. EQUITY ⊂=148(1)—JOINDER OF CAUSES OF ACTION.

A bill for the foreclosure of two mortgages *held* not multifarious, but within equity rule 26 (198 Fed. xxv, 115 C. C. A. xxv), which permits the joinder of causes of action when it will promote the convenient administration of justice.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 341–351; Dec. Dig. ⊂=148(1).]

Appeal from the District Court of the United States for the Southern Division of the Western District of Washington; Edward E. Cushman, Judge.

Suit in equity by the Mississippi Valley Trust Company and the Union Trust Company against the Washington Northern Railroad Company, the Oregon-Washington Timber Company, the Blazier Timber Company, and William W. Crawford, trustee. From the decree, Crawford, trustee, appeals. Affirmed.

See, also, *212 Fed. 776.*

On June 4, 1910, the Oregon-Washington Timber Company, hereinafter called the Timber Company, placed two mortgages on 10,800 acres of timber lands which it owned in Skamania county, Wash., a first mortgage of $600,000, and a second mortgage of $400,000. The Mississippi Valley Trust Company was the trustee of both mortgages. Thereafter the Union Trust Company of Detroit became, with that company, a cotrustee of the first mortgage. The Washington Northern Railroad Company, hereinafter called the Railroad Company, owned a logging road running to the timber lands owned by the Timber Company. Both companies were owned and controlled by substantially the same stockholders. On June 4, 1910, the Railroad Company executed a mortgage in the sum of $1,000,000 to the Mississippi Valley Trust Company. The debts secured by all three mortgages were evidenced by bonds of $1,000 each, and the mortgages made by both the Timber Company and the Railroad Company were given to secure the same debt, and there was a provision in the mortgages of the Timber Company that payment of one of the bonds of that company should have the effect to pay one of the bonds of the Railroad Company, which latter bond might be canceled or surrendered uncanceled to the Railroad Company at its option. On June 4th the Timber Company proposed to the Railroad Company to purchase all of that company's bonds and to pay therefor $400,000 of the Timber Company's second mortgage bonds and $540,000 in money, the money to be used for the following purposes: $150,000 for the retirement of a first mortgage then outstanding on the Railroad Company's property, $125,000 to pay the present floating indebtedness of a company of which the Railroad Company was the successor, $215,000 for extensions and betterments and equipment to the railroad property, and $50,000 to be loaned to the Timber Company on its note; and it further proposed to pledge to the Railroad Company $400,000 of the bonds so to be purchased as security for the payment of the $400,000 second mortgage bonds of the Timber Company. The proposition was accepted, and the contract was entered into. The stockholders of both the Railroad and Timber Companies were at that time substantially the same. Thereafter the parties in control of those two companies organized the Blazier Timber Company, which acquired some additional timber lands, and on March 1, 1912, that company executed a mortgage to Crawford, trus-

tee, to secure nominally $425,000, the actual consideration being $300,000, in which mortgage the Railroad Company and the Timber Company joined, thereby giving to Crawford a first lien on the property of the Blazier Company and a second lien on the property of the Timber Company, and, as found by the court below, a second lien on the property of the Railroad Company.

In the following year the Trust Companies brought a suit to foreclose both the first mortgage of the Railroad Company and the first mortgage of the Timber Company, and Crawford, trustee, filed a cross-bill to foreclose his mortgage and answering the bill of complaint interposed two affirmative defenses, which, on motion of the Trust Company, were ordered to be struck out. The first portion so struck out is in substance the following: That $175,000 of the cash paid by the Timber Company was not devoted to the purposes specified in the contract, but was used to acquire additional timber lands for the Timber Company, and $100,000 was paid out for logging equipment and camps of that company, and that this diversion of funds was made under the direction of a syndicate which acquired $600,000 of the first mortgage bonds, and $300,000 of the bonds represented by the trustees in the suit; that both the members of the syndicate and the Trust Company knew at the time of the purchase of the purposes to which, by the agreement between the parties, the $540,000 cash was to be applied; that a large portion of said bonds are still held by the members of the syndicate; that the Railroad Company was without power under its charter to issue bonds for the purchase of lands for the Timber Company, or for the building of camps and procuring of logging equipment for that company, and that the money so expended for those purposes was paid out by the Trust Company on the direction of the syndicate, the present holders of the $570,000 first mortgage bonds of the Timber Company, represented by the complainants in the suit, and that the syndicate are the holders of more than $300,000 of said $570,000 first mortgage bonds; that the complainants are estopped from sharing in the proceeds of the sale of the bonds of the Railroad Company, or the property of the Railroad Company, to the extent of said sum of $275,000, which was at their instance diverted from the proceeds of the sale of the first mortgage bonds of the Timber Company, and that none of the complainants ought in equity to be permitted to share in the proceeds of the sale of the bonds of the Railroad Company, or the sale of the property of the Railroad Company.

The second portion of the answer which was so struck out is in substance the following: In February, 1911, the Blazier Timber Company was incorporated. Thereafter the two timber companies and the Railroad Company authorized the execution by those three companies of two series of notes; series A to consist of $100,000 joint collateral trust notes, and series B to consist of $150,000 joint collateral notes. The notes were secured by indenture of the three companies to the Mississippi Valley Trust Company, to which trustee the Blazier Timber Company conveyed all its property, and the Railroad Company assigned the $400,000 second mortgage bonds of the Timber Company and $400,000 of its own first mortgage bonds, deposited as collateral security for those of the Timber Company. That the proceeds of series A notes were used as authorized, but that series B notes were delivered to the syndicate for the purchase of the Railroad Company's stock sold to the syndicate with the first mortgage bonds of the Timber Company. That the stock was not sold to the companies, or either of them, but to Blazier individually. That $150,000, the amount of these notes, has been paid to the members of the syndicate by the Railroad Company and the Timber Company, thereby diverting unlawfully the funds of the timber companies.

The appellant set forth these transactions as a payment upon and as an offset against the $570,000 of bonds on which the suit was brought, and prayed for an accounting of the funds, and that the members of the syndicate be brought into the suit, and that they be denied the right to participate in the proceeds of the sale upon foreclosure. On March 4, 1915, a final decree was entered foreclosing the first mortgage of the Railroad Company, and the first mortgage of the Timber Company, and the mortgages executed to Crawford, trustee. From that decree Crawford appeals.

Kerr & McCord, of Seattle, Wash., for appellant.

Snow & McCamant, of Portland, Or., and Huffer & Hayden, of Tacoma, Wash., and Edward C. Wright, of Kansas City, Mo., for appellees.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). [1] By the decree the court below postponed the right of the appellant to share in the proceeds of the railroad property until after the payment in full of the appellees. The court ruled that such was the effect and intention of the appellant's mortgage. The court also reached the same conclusion under the "after-acquired property" clause of the railroad first mortgage, holding that thereby the $400,000 group of bonds of the Railroad Company became a part of the appellee's security from and after the time when the Railroad Company became the owner of those bonds as collateral security for the second mortgage bonds of the Timber Company. We think the decree may be sustained on either ground. The appellant's mortgage contains the express recital that the property of the Timber Company so mortgaged to him is subject to the lien of the first and second mortgages of June 4, 1910, and that the property of the Railroad Company, so mortgaged to him, is subject to the lien of the mortgage made by that company of June 4, 1910; and the appellant admits in his answer that his mortgage embraces all of the property described in the mortgages of the Timber Company and the Railroad Company of June 4, 1910, and recognizes the priority of those mortgages.

But the appellant contends that when he acquired by his mortgage a pledge of $400,000 of the second mortgage bonds of the Timber Company, which were then secured to the Railroad Company by $400,000 of the first mortgage bonds of the latter company, the latter bonds so pledged to secure the former were negotiable instruments which he acquired in good faith as an innocent purchaser, and that therefore he was entitled to a first lien on the property mortgaged to secure the same. But the appellant did not become, by reason of the transactions set forth, either a holder or a purchaser of those bonds. They were never at any time in his possession, and he will acquire nothing under the pledge thereof until the bonds shall have been actually paid and surrendered and reissued by the Railroad Company, as contemplated by the antecedent agreements and instruments. They were assigned to secure him only after they had been surrendered from time to time under the terms of the first mortgage, and there is nothing to show that it was the intention of the contracting parties that the bonds, if paid and surrendered, should be reissued with even rank with the bonds still outstanding and unsurrendered. At the time when the suit was brought, they were still in the possession of the appellees, and were still held to secure the debt which was owing to them. In the appellant's mortgage is the provision that the Railroad Company pledges the $400,000 second mortgage bonds of the Timber Company, and the whole issue of the first mortgage bonds of the Railroad Company, "as they are from time to time released

and delivered" by the Trust Company under the terms of the first and second mortgages of the Timber Company, and there is also the provision that the Timber Company pledges to the mortgagee all its right, title and interest in and to its $400,000 second mortgage bonds, and also the bonds of the Railroad Company "as they are from time to time released and delivered" under the terms of the first and second mortgages of the Timber Company. The appellant was given no special pledge of the last 400 or of any particular portion of the Railroad Company's bonds; and the plain import of the provisions is that he took no present right in said $400,000 of first mortgage bonds of the Railroad Company, but took only the right to receive bonds of that company if and when they should be reissued, after the payment, release, and delivery of the same as provided in that company's original mortgage. Upon such reissuance such bonds would clearly have been subsequent in rank to the outstanding unpaid first mortgage bonds of the Railroad Company. New York Security & Trust Co. v. Equitable Mortg. Co. (C. C.) 77 Fed. 64. But that stage of the proceedings had not been reached at the time of the foreclosure suit, and the appellant was but the recipient of a conditional promise that the bonds, when paid and released, should be reissued to him. The appellant, to support his contention that the last 400 bonds of the Railroad Company were freed from the lien of the debt to the appellees, points to the collateral agreement of January 30, 1911; but we discover nothing in that agreement to show that the members of the syndicate, so called, ever waived or intended to waive any of their rights to the securities which they held.

[2] On the assignment of error that the court struck out portions of his answer the appellant argues that at the time when he took his mortgage he had no knowledge of the diversion of the Railroad Company's funds alleged in his answer, and that such diversion of funds could not have been accomplished, except through the active assistance of the Mississippi Valley Trust Company, and that the $300,000 bonds so held by the syndicate who brought about the diversion are not held by innocent purchasers or acquired in the ordinary course of business, and that the complainants in the foreclosure suit are merely representatives of these bondholders; that the $540,000 cash paid on the contract of June 4th was a trust fund in the hands of the Mississippi Valley Trust Company, but a portion of it was diverted from its proper use by the collusive and fraudulent acts of that company and the syndicate holders of the $300,000 of the bonds, in violation of the fiduciary relation which the Trust Company and the syndicate were bound to observe. The appellant admittedly took his mortgage expressly subject to the mortgage given by the Railroad Company, and also expressly subject to the mortgage of the Timber Company. The bonds in question have at all times been in the custody of the Mississippi Valley Trust Company. The appellant acquired no rights before March 1, 1912, the date of his mortgage, and subsequent to the time when the transactions so struck from the answer occurred. Those transactions cannot be held to create a defense to the foreclosure suit. If the allegations were true, they show that a debt is owing by the

Timber Company to the Railroad Company, and with the accompanying right on the part of the latter company to charge the property purchased for the Timber Company with that debt. The court below held properly, we think, that the matter so alleged, being essentially an allegation of ultra vires, was not available to the appellant whose debt had not then been created. Again we think the transactions as alleged amount to a set-off or counterclaim which the Railroad Company has its option to assert. Gillespie v. Torrance, 25 N. Y. 306, 82 Am. Dec. 355; 34 Cyc. 758. The appellant holding a subsequent mortgage, is in no position to assert it. He well knew when he took his mortgage that the bonds under the prior mortgages had been issued and negotiated. Bronson v. La Crosse Railroad Co., 2 Wall. 283, 17 L. Ed. 725; Jerome v. McCarter, 94 U. S. 734, 24 L. Ed. 136. Upon those bonds the total amount agreed to be paid between the parties for the bonds has been actually paid and has been received by the mortgagor. The allegations struck from the answer relate to matters which cannot be adjusted in the present suit. They concern the companies which participated in them, but they give the appellant no cause of suit.

[3] We find no merit in the contention that the bill should have been dismissed for multifariousness, in that it was brought to foreclose two mortgages in a single suit. The Twenty-Sixth equity rule (198 Fed. xxv, 115 C. C. A. xxv) permits a plaintiff to join in one bill as many causes of action cognizable in equity as he may have against a single defendant, but provides that if there be more than one defendant, there must be either the assertion of liability against all of the material defendants, or "sufficient grounds must appear for uniting the causes of action in order to promote the convenient administration of justice." The present case is, by the allegations of the bill, brought clearly within the provisions of the rule. The bill alleged that both mortgages were given to secure the same debt, and that the Timber Company's mortgage provided that, when the bonds secured thereby should be paid and canceled by the trustee, a like amount of the Railroad Company's bonds should also be canceled or delivered to the Railroad Company uncanceled. Under the facts alleged, the rights of the parties could be adequately protected only in a single suit.

Nor do we find error in the allowance which the court below made for attorney's fees. That feature of the decree was based on the testimony of one witness, an attorney, together with the stipulation of the parties to the suit that other attorneys of high standing at the bar would be deemed to have testified to the same effect, and no testimony was offered to the contrary. Under these circumstances, we would not be justified in disturbing the award.

We find no error. The decree is affirmed.

BUNCH v. MALONEY.

In re T. H. BUNCH COMMISSION CO.

(Circuit Court of Appeals, Eighth Circuit. June 16, 1916.)

No. 4537.

1. BANKRUPTCY ⟸467—PREFERENCES—SUIT TO AVOID—PRESUMPTIONS.

In a suit by a trustee in bankruptcy to avoid a chattel mortgage given by the bankrupt, where the record showed no lien creditors aside from the chattel mortgagee, it will be presumed that all other creditors were general creditors of the bankrupt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 929; Dec. Dig. ⟸467.]

2. BANKRUPTCY ⟸152—ACTIONS—AUTHORITY OF TRUSTEE.

Under Bankr. Act July 1, 1898, c. 541, § 47a, 30 Stat. 557, as amended by Act June 25, 1910, c. 412, § 8 (Comp. St. 1913, § 9631), declaring that the trustee, as to all property in custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon, the right of the trustee dates only from the filing of the petition in bankruptcy, and does not extend to transfers recorded within four months prior to the petition, though applicable to transfers thereafter.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 194; Dec. Dig. ⟸152.]

3. BANKRUPTCY ⟸184(2) — PREFERENCES — CHATTEL MORTGAGES — RECORDATION.

Bankr. Act, § 60b (Comp. St. 1913, § 9644), provides that if a bankrupt shall transfer property, and if at the time of the transfer, or of the recording or registering of the transfer, if by law recording or registering is required, and being within four months before the filing of the petition in bankruptcy, the bankrupt be insolvent, and the transfer operate as a preference, it shall be voidable by the trustee. Defendant took a chattel mortgage on the property of the bankrupt more than four months before the filing of the petition, but recorded it only a few days before the filing of the petition. Kirby's Dig. Ark. § 5396, declares that every mortgage, whether for real or personal property, shall be a lien on the mortgaged property from the time it is filed in the recorder's office and not before. The Supreme Court of Arkansas has held that a chattel mortgage, though not recorded, is good as against the mortgagor, his heirs, personal representatives, etc., and general creditors. *Held*, that, under state registry statutes like that of Arkansas, a trustee in bankruptcy as the representative of general creditors may invoke the remedy of section 60b, regardless of the local construction making a procedural distinction between creditors with a lien and those without.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 276; Dec. Dig. ⟸184(2).]

Appeal from the District Court of the United States for the Eastern District of Arkansas; Jacob Trieber, Judge.

Suit by J. S. Maloney, as trustee in bankruptcy of the T. H. Bunch Commission Company, bankrupt, against Mrs. Laura L. Bunch. From a decree for complainant (225 Fed. 243), defendant appeals. Affirmed.

J. H. Carmichael, W. E. Hemingway, G. B. Rose, D. H. Cantrell, J. F. Loughborough, and V. M. Miles, all of Little Rock, Ark., for appellant.

H. M. Trieber, of Little Rock, Ark., for appellee.

Before HOOK and SMITH, Circuit Judges, and REED, District Judge.

HOOK, Circuit Judge. The question in this case is one of voidable preference under section 60b of the Bankruptcy Act. The appellant took a chattel mortgage upon the property of the bankrupt more than four months before, but did not file it for record in the office of the recorder of the proper county until within a few days of the commencement of the bankruptcy proceedings. There was no denial of the existence of all the other operative conditions of a voidable preference. The trial court held with the trustee. In re T. H. Bunch Commission Co. (D. C.) 225 Fed. 243. The case turns on the question whether, within the meaning of section 60b, the filing or recording of the chattel mortgage was "required" by the laws of Arkansas, where the transaction occurred. A state statute provides that:

"Every mortgage, whether for real or personal property, shall be a lien on the mortgaged property from the time the same is filed in the recorder's office for record, and not before; which filing shall be notice to all persons of the existence of such mortgage." Kirby's Dig. § 5396.

[1] The Supreme Court of Arkansas, in construing this statute, has held that an unfiled or unrecorded mortgage is good between the parties and as against the heirs, personal representatives, devisees and donees of the mortgagor, and his receivers in insolvency; also as against his general creditors. Martin v. Ogden, 41 Ark. 186. It is void, however, as to subsequent purchasers and lien creditors. It does not appear from the record before us that at the time the bankruptcy proceedings were begun there were any lien creditors aside from the appellant with his chattel mortgage, and we must therefore assume that all the other creditors were general creditors of the bankrupt.

[2, 3] The trial court followed the doctrine of Bank v. Connett, 73 C. C. A. 219, 142 Fed. 33, 5 L. R. A. (N. S.) 148, and other similar cases in this circuit and the Sixth and Seventh circuits, that the word "required," in section 60b, refers to the character of the instrument rather than to the particular individuals who might or might not be affected, and held that the chattel mortgage in question was "required" to be recorded by the law of Arkansas. Since then Carey v. Donohue, 240 U. S. 430, 36 Sup. Ct. 386, 60 L. Ed. 726, has been decided. That case involved a deed of real estate in Ohio, and a state statute that as to such an instrument a failure to record or file for record was available only to a subsequent bona fide purchaser without knowledge. The Supreme Court of Ohio had construed the statute as exclusively defining the consequences of a failure to record or file. Though not of record, the deed was nevertheless good as to general creditors and creditors with an attachment, judgment, or ex-

ecution lien. The Supreme Court said in Carey v. Donohue that subsequent bona fide purchasers without knowledge, for whose sole benefit the Ohio statute inured, were not a class represented by the trustee in bankruptcy, were entirely outside the purview of the Bankruptcy Act, and that the deed was not "required" to be filed or recorded, within the meaning of section 60b.

Two views may be taken of the construction given by Carey v. Donohue to the recording requirement clause of section 60b: First, that it is for the benefit of creditors generally, because their rights are the concern of bankruptcy proceedings, but does not embrace those cases in which the requirement is in the interest of persons outside the purview of the Bankruptcy Act. Second, that as to the creditors themselves the clause picks up and adopts all the substantive and procedural limitations of the construction of the statute prescribing the requirement; and if in local practice creditors of a particular class, like general creditors, could not invoke the failure to record, a corresponding disability rests upon the trustee in bankruptcy. The difference between these views is of much importance in the administration of the Bankruptcy Act. The Connett Case, supra, and Mattley v. Giesler, 110 C. C. A. 90, 187 Fed. 970, in this court, were cited by the Supreme Court. Each involved a controversy between a chattel mortgagee, who had delayed recording his mortgage, and creditors, for whom a trustee in bankruptcy stood. Were it not for the apparent disapproval of the doctrine of those cases, it would be quite clear that the first and broader construction above mentioned is the correct one. We think, however, the same result fairly follows from the opinion of the Supreme Court and the considerations upon which it proceeded.

Many of the registry statutes of the states provide that unfiled or unrecorded mortgages shall be void as to creditors; and the term "creditors" is quite generally construed as meaning only those who have fastened a specific lien, though apparently broad enough to include general creditors as well. This construction is for the procedural reason that a general creditor has not by suit or otherwise secured a position for attack. That Congress has not been content with the effect of this rule upon the administration of the Bankruptcy Act of 1898, is shown by the efforts to amend and strengthen it against so-called secret liens. Manifestly the endeavor was largely in the interest of the general creditors. The chief duty of the trustee is to make the bankrupt estate available for the benefit of their claims. He has so little to do on behalf of those holding liens that it is sometimes said he is not their representative. Dudley v. Easton, 104 U. S. 99, 103, 26 L. Ed. 668. It was first held, as under prior Bankruptcy Acts, that the trustee stood in the shoes of the bankrupt, and that unrecorded transfers, good as to the bankrupt, as was almost always the case, were good as to him. This was what Congress set about to correct. One change was by the amendment of section 47a, which conferred upon the trustee the status of a lien or judgment creditor. But that status dates from the filing of the petition in bankruptcy; as regards the prior four months period, it is not retroactive. Bailey

v. Baker Ice Machine Co., 239 U. S. 268, 36 Sup. Ct. 50, 60 L. Ed. 275. While it is effective against transfers recorded after the petition is filed (Fairbanks Steam Shovel Co. v. Wills, Trustee, 240 U. S. 642, 36 Sup. Ct. 466, 60 L. Ed. 841, decided April 10, 1916), it is of no avail in the great majority of cases. Most of the controversies in bankruptcy cases over secret liens arise from transfers made before but recorded within the four months period. In comparatively few is the recording after the proceedings were begun. The status of the trustee in respect of the former was, therefore, of moment and concern. And, as we have already observed, the important aspect of the matter is the trustee's status as the representative of the unsecured or general creditors. If this were not so, if as regards transfers made before but recorded within the four months the disabilities under which general creditors would labor in the absence of bankruptcy proceedings were extended to the trustee, it is difficult to perceive much result of consequence in the amendment of 1910 of section 60b. Though twice amended for further effectiveness, it would be doubtful that the section, so construed, would accomplish anything of practical value. The relations between lien creditors and the holders of unrecorded transfers are fully covered by other sections of the act. If a lien creditor secures his priority over an unrecorded transfer prior to the four months period, he retains it; it does not inure to the trustee. On the other hand, if he secures it by legal proceedings within the four months period, it either falls or the trustee may take it for the general estate by subrogation under section 67f (Comp. St. 1913, § 9651). Globe Bank v. Martin, 236 U. S. 288, 35 Sup. Ct. 377, 59 L. Ed. 583; First Nat. Bank v. Staake, 202 U. S. 141, 26 Sup. Ct. 580, 50 L. Ed. 967. But, if the transfer is recorded after the petition in bankruptcy is filed, the lien status of the trustee has attached under section 47a. In none of the above cases is section 60b needed. The remedies are complete without it.

Again, original section 67a provides that "claims which for want of record or other reasons would not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate." If, under the applicable registry statute, "creditors" means lien creditors, it means the same under this section. Holt v. Crucible Steel Co., 224 U. S. 262, 32 Sup. Ct. 414, 56 L. Ed. 756. Section 70e (Comp. St. 1913, § 9654), provides that the "trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value," except from a bona fide purchaser for value. The remedies in the above cases would also seem complete without section 60b. But, notwithstanding all these definite provisions, Congress was still of the opinion that an evil existed, and it sought to remedy it by the further amendment of section 60b in 1910. In the report of the House judiciary committee accompanying the amendment it was said:

"The object of this amendment is further to protect against the evil of secret liens, against which evil this same section was amended in 1903, but in such an unfortunate way as not effectually to prevent such liens."

This report was concurred in by the Senate (Senate Report No. 691, Sixty-First Congress, 2d Sess. p. 8), and was cited in Carey v. Donohue as exhibiting the spirit and purpose of the legislation. See also (D. C.) 225 Fed. 243, 249.

The Supreme Court did not have before it in Carey v. Donohue the question which arises here. Its decision was that a trustee could not, under section 60b, avail himself of a recording requirement exclusively in the interest of some one outside the purview of the Bankruptcy Act and for whom he was not authorized to speak. But the language employed in the opinion in that case is broad enough to admit of the assertion of a voidable preference by the trustee as the representative of general creditors, though while without lien they may have been remediless under the local statute, had bankruptcy proceedings not intervened. Thus it was said:

"The natural, and we think the intended, meaning was to embrace those cases in which the recording was necessary in order to make the transfer valid as against those concerned in the distribution of the insolvent estate; that is, as against creditors, including those whose position the trustee was entitled to take. * * * In the present case there was no requirement of recording in favor of creditors, either general creditors or lien creditors."

Again:

"Rather, as we have said, we deem the reference to be to requirements of registry or record which have been established for the protection of creditors —the persons interested in the bankrupt estate, and in whose behalf, or in whose place, the trustee is entitled to act."

The reasonable conclusion is that, where the applicable registry statute provides generally that an unfiled or unrecorded transfer shall be void as to "creditors," or employs words of similar import, as in Arkansas, the trustee in bankruptcy, as the representative of general creditors, may invoke the remedy of section 60b, regardless of the local construction of the statute making a procedural distinction between creditors with a lien and those without.

The decree is affirmed.

AMERICAN LUMBER & MFG. CO. v. BERTHOLD & JENNINGS LUMBER CO.

(Circuit Court of Appeals, Third Circuit. July 11, 1916.)

No. 2116.

1. DEPOSITIONS ⇐86—ADMISSION IN EVIDENCE—INTRODUCTION.
Where, after defendant read the direct testimony in a deposition of one of its witnesses, plaintiff withdrew the cross-examination, and defendant thereafter read the cross-examination, it thereby made the cross-examination its own testimony.
[Ed. Note.—For other cases, see Depositions, Cent. Dig. §§ 234-236½; Dec. Dig. ⇐86.]

2. SALES ⇐181(5)—CONTRACTS—EVIDENCE.
In assumpsit for a balance due for railroad ties sold and delivered under an express contract, where defendant, claiming that the ties were

not up to specifications, introduced in evidence the result of an inspection by a railroad company which was the ultimate purchaser of the ties, plaintiff is entitled to show that the specifications of the contract between defendant and the railroad company were different from the specifications under which it was furnishing ties, and defendant, having introduced evidence of the inspection, cannot complain of the unfavorable result of such evidence; the court instructing the jury to disregard the existence of the contract between defendant and the railroad company, save in so far as the specifications explain the result of the inspection.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 480; Dec. Dig. ⊂⊃ 181(5).]

3. APPEAL AND ERROR ⊂⊃1039(13)—REVIEW—HARMLESS ERROR.

In assumpsit for balance due for railroad ties, where plaintiff relied solely on the express contract, the court permitted plaintiff to amend its statement of claim so as to rely on a quantum meruit. Defendant then moved for a continuance, and plaintiff withdrew the amendment; but thereafter evidence of the value of the ties received by defendant was introduced, and the parties contested that issue. *Held* that, as it appeared defendant introduced all evidence applicable to that issue, it could not complain of the action of the court, which, while erroneous, was not prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4086; Dec. Dig. ⊂⊃1039(13).]

In Error to the District Court of the United States for the Western District of Pennsylvania; Charles P. Orr, Judge.

Action by the Berthold & Jennings Lumber Company against the American Lumber & Manufacturing Company. Judgment for plaintiff, and defendant brings error. Affirmed.

R. B. Ivory, Ivory & McKay, and T. M. Gealey, all of Pittsburgh, Pa., for plaintiff in error.

Thomas M. Benner, of Pittsburgh, Pa., for defendant in error.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

WOOLLEY, Circuit Judge. This action was brought to recover a balance due for railroad ties sold and delivered under an express contract between the parties. The verdict was for the plaintiff (the vendor); the defendant (the vendee) sued out this writ of error.

Of the many errors assigned, only errors of two classes require discussion, though all have received consideration. Errors of one class relate to the materiality of testimony admitted. Those of the other concern the admissibility of testimony under the pleadings.

The contract is found in correspondence of the parties. It involves the sale by the plaintiff to the defendant of many thousand railroad ties to be consigned to the Grand Trunk Railway Company at various points on its line in Canada. The contract prescribes specifications for the ties; the controversy relates to the terms of the specifications.

The specifications first appear in a letter of the defendant directing the plaintiff to ship 15,000 ties of certain dimensions at a named price, and specifying:

"The above stock to be a good sound and square-edge grade of yellow pine either long leaf, or close grain short leaf, well manufactured, and free from wane."

These are the contract specifications as claimed by the plaintiff. The defendant admits them to be correct in so far as they go, but maintains that by subsequent correspondence it stipulated that the ties should "show a fair percentage of heart." The difference is in the absence or presence of heart.

The plaintiff delivered and the defendant accepted about 12,000 ties, the greater part of which was rejected by the Grand Trunk Railway Company when the defendant attempted delivery under a contract between it and that company, whereupon the defendant refused payment to the plaintiff.

Before this action was brought, three inspections of the ties had been made at their points of destination. The plaintiff caused one inspection to be made by McNally, its employé, under the above specifications, without any heart. The defendant caused an inspection by Hinkley, its employé, under substantially the same specifications, but calling for a fair percentage of heart. The Grand Trunk Railway Company caused an inspection to be made by one De Cew, upon its own specifications, which had nothing to do with the contract between the parties, and except for certain conduct of the defendant, would have had no bearing upon or relevancy to the matter in controversy.

[1] For compliance with the contract the plaintiff rested its case upon McNally's inspection. For defense the defendant introduced the inspection of its agent Hinkley, but it did not rest its case upon Hinkley's testimony alone. It developed that Hinkley made his inspection for the defendant at the time that De Cew made his inspection for the Grand Trunk. The result of De Cew's inspection was favorable to the defendant. Therefore, instead of relying upon the inspection of Hinkley, the defendant went further and produced De Cew as its witness and made his inspection in part the basis of its rejection of the plaintiff's ties. Although producing De Cew as its witness and desiring his testimony in so far as it related to the inspection and rejection of ties, it is apparent that the defendant was anxious to exclude from the testimony the specifications of the tie contract between it and the Grand Trunk under which De Cew made his inspection. While it is equally clear that the plaintiff was anxious to get those specifications on the record, nevertheless, with one exception, when the court ruled against it, the plaintiff did not attempt to make the contract between the defendant and the Grand Trunk a part of its case in chief. The trouble began when the defendant was presenting its case. Its first witness was its inspector, Hinkley, whose testimony had been taken by deposition. When counsel for the defendant had concluded reading Hinkley's direct testimony, counsel for the plaintiff withdrew the cross-examination. This was disconcerting to counsel for the defendant, for the cross-examination of Hinkley had developed matters to the advantage of the defendant, which he desired on the record. After colloquy between counsel and the court, counsel for the defendant proceeded to read the cross-examination of Hinkley, thereby making Hinkley's

cross-examination the defendant's own testimony. Magee v. Paul (Tex. Civ. App.) 159 S. W. 325; Herring v. Skaggs, 73 Ala. 446; Citizens' Bank v. Rhutasel, 67 Iowa, 316, 25 N. W. 261; Byers v. Orensstein, 42 Minn. 386, 44 N. W. 129. He read that which was responsive to the parts of the direct examination which had been admitted, and read and then argued against the admissibility of certain other parts, to which objections had been noted. The plaintiff claims that in this procedure the defendant itself offered the evidence, to the admissibility of which it now complains by writ of error. The defendant maintains that the objectionable evidence was read only to obtain the ruling of the court on objections previously noted. The result is inextricable confusion. As we read the record, we find that the court was careful to exclude from the testimony the contract and dealings between the Grand Trunk and the defendant until it came to the specifications of the contract under which De Cew had made his inspection. These the court admitted against the objection of counsel, which we will assume was made in a manner and under circumstances which do not preclude the defendant from asking for a review of the court's ruling.

[2] The ruling of the court raises a question of the materiality of the Grand Trunk specifications to the issue in this case. As previously stated, there were three inspections. The first was made by an employé of the plaintiff under given specifications, which did not include heart; the second, by an employé of the defendant under specifications which required a fair percentage of heart. If the evidence had stopped there, it is obvious that the only questions for the jury would have been which of the two specifications were the specifications of the contract, and whether the plaintiff had furnished ties in conformity therewith. Specifications of any other contract would not have been material. But the defendant sought to get the benefit of a third inspection, which, because of the number of ties rejected under it, was advantageous to its defense, and produced the witness De Cew, inspector for neither the plaintiff nor the defendant, but for the Grand Trunk Railway Company, yet opposed the admission of testimony showing under what specifications De Cew made his inspection. The court, however, admitted the specifications of the contract between the Grand Trunk and the defendant as directly bearing upon the evidentiary value of De Cew's inspection. These specifications called for

"Long Leaf Yellow Pine Sawn Cross-ties (of like dimensions)—To be Standard Heart, i. e. *All* Heart—with the exception of one inch of sap on each corner of each face—to be cut full size—from live timber, and shipped in 8′ lengths—multiples not accepted—inspection at final destination."

In what way was this testimony material to the issue between the parties? If the Grand Trunk specifications were the same as the specifications of the contract in suit, as found by the jury, then De Cew's testimony was of value in showing non-performance by the plaintiff, and in being cumulative of the testimony of Hinkley. If, on the other hand, the specifications under which De Cew made his inspection were different from those which the jury found to be the specifications of the contract between the parties, then De Cew's testimony wholly lost its value as evidence of the plaintiff's non-performance.

As the defendant produced De Cew as its witness and insisted that the standard pursued by De Cew in his inspection was the standard by which the jury should determine the plaintiff's liability, the plaintiff had a right to know and the jury a right to be informed, by what standard De Cew made his inspection. If it happened to be a standard that was a part of the contract between the defendant and the Grand Trunk, that was the defendant's misfortune. When the defendant opened the door to the Grand Trunk transaction and adopted the Grand Trunk inspection as its own, it could not shut the door against evidence of specifications under which that inspection was made. In admitting those specifications it inevitably disclosed the existence of a contract between the defendant and the Grand Trunk which the defendant was trying to fill by purchases from the plaintiff under different specifications. While information to the jury of the existence of the contract between the defendant and the Grand Trunk containing more rigid specifications than those in the contract between the defendant and the plaintiff doubtless produced an atmosphere hurtful to the defendant, yet the defendant itself brought the atmosphere into the case by producing De Cew as its witness, and it risked the injury in order to get the benefit of his testimony. Of this we think the defendant should not complain, especially in view of the caution which the court gave the jury to disregard as immaterial the existence of the contract between the Grand Trunk and the defendant, and to use the evidence respecting the specifications of that contract only to ascertain whether the inspection by the defendant's witness was based upon those specifications or upon the specifications embraced in the contract between the parties.

[3] We shall treat the 7th, 8th, 9th and 16th assignments of error as raising sufficiently another question that calls for a brief examination. In the plaintiff's statement of claim its case is put altogether on the express contract, and is not rested in part on a quantum meruit. If the statement had contained such a count, the American Company's brief concedes that the value of the accepted ties that were under grade would have been a proper subject of inquiry (page 42):

"The issue raised at the trial by the pleadings was performance of the contract by the plaintiff. True, the defendant having unloaded the ties before inspection thereby accepted them, and, had the plaintiff in its replication seen fit to admit that some of the ties were under grade and claimed for them on a quantum meruit, there would then have been two issues of fact to try, namely, how many ties were up to grade, and the value of those under grade. But, the plaintiff having in its replication reiterated that the ties were up to grade, we submit that under the position taken by the plaintiff no evidence of the value of culled ties by it would be competent."

On the third day of the trial the district judge ruled that as a matter of strict pleading the statement should be amended, and granted the necessary permission. When the amendment was offered, however, the American Company pleaded surprise, and asked for a continuance. We infer that the court was disposed to grant the request; whereupon, evidently to prevent the expense and delay of another trial, the plaintiff withdrew the amendment, and the case proceeded, evidence of value being thereafter received. Now, it may be admitted that some con-

fusion and irregularity are apparent on this subject, but upon this record we are not inclined to reverse solely for that reason. We do not reverse except for harmful error, and in what took place below on this subject the American Company suffered no injury. No one can read the notes of trial without being satisfied that the dispute was fought out strenuously on the merits; the trial occupied five days, and the contest was severe as well as prolonged. We can discover no harm done the American Company by this branch of the inquiry, and we would not be justified in sending the case back merely to have the statement amended and the same evidence heard before a second jury. Both parties called witnesses upon this subject of value, and we find no complaint that the American Company was prevented from offering even cumulative evidence that would be available on another trial. In a word, this whole matter has apparently been tried out once on the merits, and, whatever the state of the pleadings may be, we are not inclined to disturb the result. After one fair hearing of a dispute, litigation should ordinarily come to an end.

The judgment below is affirmed.

McCOACH, Internal Revenue Collector, v. CONTINENTAL PASSENGER RY. CO. OF PHILADELPHIA.

(Circuit Court of Appeals, Third Circuit. May 19, 1916.)

Nos. 2097-2101.

1. INTERNAL REVENUE ⊂⊃9—EXCISE TAX ON CORPORATIONS—"DOING BUSINESS."

An operating agreement by which a street railroad company surrenders its own and leased lines to the possession of another company for operation for a term of 999 years, in consideration of annual rentals and the payment of interest on its indebtedness and that of its lessors, does not differ in legal effect from a lease, and the lessor is not subject to the excise tax imposed by the Corporation Tax Law (Act Aug. 5, 1909, c. 6, § 38, 36 Stat. 112 [Comp. St. 1913, § 6300]), as "doing business" through the operating company as its agent.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 13-28; Dec. Dig. ⊂⊃9.

For other definitions, see Words and Phrases, First and Second Series, Doing Business.]

2. INTERNAL REVENUE ⊂⊃9—EXCISE TAX ON CORPORATIONS—DOING BUSINESS.

A corporation, which has ceased to pursue the occupation for which it was organized by reason of the leasing of its property, may continue to exist, and to receive and disburse rentals, and pay or renew its debts, or create new indebtedness, without being subject to the excise tax for "doing business" under such statute.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 13-28; Dec. Dig. ⊂⊃9.]

In Error to the District Court of the United States for the Eastern District of Pennsylvania; Oliver B. Dickinson, Judge.

Actions at law by the Continental Passenger Railway Company of Philadelphia, by the Union Passenger Railway Company, by the Philadelphia Traction Company, by the West Philadelphia Passenger Railway Company and by the Thirteenth and Fifteenth Streets Passenger Railway Company against William McCoach, Collector of Internal Revenue. Judgments for plaintiffs, and defendant brings error. Affirmed.

For opinion below, see 224 Fed. 800.

Francis Fisher Kane, U. S. Atty., and Edward S. Kremp, Asst. U. S. Atty., both of Philadelphia, Pa., for plaintiff in error.

Boyd Lee Spahr and Ellis Ames Ballard, both of Philadelphia, Pa., for defendants in error.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

WOOLLEY, Circuit Judge. These actions were brought to recover corporation taxes for the year 1909, illegally collected from the plaintiff corporations. They were tried together by the District Court on an agreed state of facts without the intervention of a jury. Secs. 649 and 700 Rev. Stat. (Comp. St. 1913, §§ 1587, 1668). The single question was whether certain acts of the corporations constitute "doing business" within the meaning of the Corporation Tax Law. Act Aug. 5, 1909, c. 6, 36 Stat. 112, § 38 (U. S. Comp. Stat. 1913, § 6300). The court found for the plaintiffs and entered judgments for the amounts stipulated. 224 Fed. 800. The defendant tax collector sued out these writs, raising the same question for review.

The actions arose out of the relation of the plaintiff corporations to the complex street railway system of Philadelphia, and out of the conduct of those corporations in performing their obligations in that relation, a full recital of which is quite unnecessary to the present consideration. It will be sufficient only to outline the part of the system formed by these corporations, and to state with particularity only so much thereof as will disclose the legal aspects of the relation and develop the acts of the corporations which are specified to amount to "doing business" within the meaning of the law.

All the companies presently to be named were incorporated by special or under general acts of the Commonwealth of Pennsylvania.

The Continental Passenger Railway Company was incorporated in 1873 with full power to construct and operate a street railway in the City of Philadelphia.

On July 1, 1879, the Seventeenth and Nineteenth Streets Railway Company, having previously been incorporated with like power, leased to the Continental Company its entire property for a term of 99 years, in consideration of an annual rental and the payment of interest and principal of its bonded indebtedness.

On January 1, 1880, the Continental Company leased the railway property which it owned and the property which it acquired from the Seventeenth and Nineteenth Streets Company, to the Union Passenger Railway Company for a term of 99 years, in consideration of

an annual rental and the payment of all its obligation, including those assumed as well as those created.

At about this period there occurred a radical change in street railway motive power, and the cable made its advent. To operate street railways by this power, the Philadelphia Traction Company was incorporated in 1883. It was not authorized by its charter to hold property by lease. It was given authority, however, to operate street railways of other corporations by the power it provided, under agreements of operation, by which railway corporations turned over to it their railway properties and surrendered their operation as completely as by lease.

Having grown large by many leases similar to that of the Continental Company, the Union Passenger Company, on June 30, 1884, entered into an operating agreement with the Philadelphia Traction Company, by which it surrendered the possession and operation of its properties and the properties acquired from the Continental Company, for a term of 999 years, in consideration of annual rentals and the payment of interest on its own obligations and on the obligations of the Continental Company and the Seventeenth and Nineteenth Streets Company.

On November 28, 1888, while the operating agreement was still in force, the Philadelphia Traction Company surrendered its charter in accordance with the provisions of the Act of Assembly of Pennsylvania of March 22, 1887 (P. L. 8), receiving in return letters patent under that act. The Philadelphia Traction Company continued for a time to operate under the agreement between it and the Union Passenger Company the several properties thereby obtained.

At about this period electricity appeared as a motive power for street railways, and the Union Traction Company was incorporated as a traction motor company, with authority not only to electrically operate but to lease the properties of railway corporations.

On October 1, 1895, the Philadelphia Traction Company leased all its properties, including those acquired by the recited transactions, to the Union Traction Company for a period of 999 years, on the usual consideration of fixed rentals and the assumption of the direct and indirect obligations of the underlying corporations.

The Union Traction Company operated these properties until July 1, 1902, when it leased them, together with many others, to the Philadelphia Rapid Transit Company, for a period of 999 years, under the usual covenants as to annual rentals and the assumption of obligations of the underlying corporations in the line of succession.

It is not disputed that as these leases and operating agreements were from time to time entered into, one corporation surrendered and the succeeding corporation assumed the entire operation and control of the properties demised or transferred, and it is conceded, that during the year 1909 when the taxes in question were collected, the properties were wholly operated by the Philadelphia Rapid Transit Company, and the plaintiff underlying corporations had no relation of management or control to them whatsoever.

During the year 1909, while the Philadelphia Rapid Transit Company was so operating the properties and was producing from them

the revenues with which to pay the rentals and interest obligations under the successive leases and operating agreements, the underlying corporations or some of them performed all or a number of the acts which the defendant tax collector charges amount to "doing business" within the meaning of the law. These may be defined to be (a) operating property by an agent, evidenced by the operating agreement between the Union Passenger Company and the Philadelphia Traction Company; (b) the reduction of corporation bonded indebtedness by means of a sinking fund; (c) renewal of corporation bonded indebtedness by appropriate corporate action; and (d) making payment of rentals and interest by one underlying corporation to and upon the obligations of a corporation underlying it.

[1] These acts may therefore be divided into four classes. The first is a legal deduction rather than an act, which is, in effect, that when the Union Passenger Company entered into an operating agreement with the Philadelphia Traction Company for the operation of its property and the properties of its underlying corporations, it constituted the Philadelphia Traction Company its operating agent, and through that agency, the Union Passenger Company itself continued to engage in and carry on the business for which it was incorporated, for the privilege of doing which it was taxable under the law. We are not impressed by this contention. We discern no difference between an operating agreement of this kind and the customary lease by which one railway corporation takes over and operates the property of another, when considered with regard to carrying on business with that property. By such an agreement, one corporation surrenders and the other assumes and exercises control over the property and its operation, as fully and as completely as though the transfer had been effected by the recognized method of a lease. We are therefore of opinion that during the tax year none of the plaintiff corporations was engaged in the business of operating its property through an operating agent, and was not, even thus indirectly, "doing business" within the meaning of the law.

[2] In reducing their indebtedness by means of a sinking fund and in renewing their bonded indebtedness by extending the terms thereof, the corporations, though performing corporate acts in the exercise of corporate powers, were not pursuing the body and the substance of the business for which they were organized, for which alone the tax is exacted. Traction Companies v. Collectors, infra. The courts have repeatedly held, that in creating a new debt by an issue of stock or bonds to meet a situation contemplated by a lease, and in providing an issue of bonds to refund a maturing obligation, a lessor corporation is not doing business within the meaning of the act. Public Service Ry. Co. v. Herold, 229 Fed. 902, — C. C. A. —; Public Service Railway Co. v. Moffet, Id.; Traction Companies v. Collectors (C. C. A. 6th) 223 Fed. 984, 139 C. C. A. 360; Anderson v. Morris and Essex R. R. Co. (C. C. A. 1st) 216 Fed. 83, 132 C. C. A. 327, cited with approval in N. Y. C. & H. R. R. Co. v. Gill (C. C. A. 2d) 219 Fed. 184, 134 C. C. A. 558, and Lewellyn v. Pittsburgh B. & L. E. R. Co. (C. C. A. 3d) 222 Fed. 177, 137 C. C. A. 617. It would

add nothing to this decision to repeat the discussion upon this subject appearing in these cases. It is sufficient to say, that the cases before us are within the reason of the cases cited, and that we are of opinion, in taking corporate steps to retire or renew their bonded obligations, the plaintiff corporations were not doing business within the meaning of the act.

While it is conceded that none of the plaintiff corporations was physically operating the railway embraced in any contract or lease, it is maintained that certain of them received money either directly or indirectly from the operating corporation and disbursed it to their several underlying corporations in discharge of their assumed obligations, and in so doing they were carrying on business within the meaning of the act.

In disbursing money received from the operating corporation, an underlying corporation did nothing more than pay its debts. These debts were incurred prior to the tax year and did not grow out of acts of the corporations in connection with the operation of properties, either owned or leased. The payment of a debt disassociated with the operation of property is not doing business within the meaning of the law, McCoach v. Minehill R. R. Co., supra; and the fact that a debt is assumed rather than created by the one paying it, does not change the character of the act of payment. A corporation, which has ceased to do business by ceasing to pursue the occupation for which it was organized, may continue to exist and to receive rentals for the use of its property and to pay its debts without being taxed for that privilege. In its property it may have absolute or a qualified ownership, or against it there may be incumbrances created either by it or by a predecessor, with a corresponding liability on its part to discharge the same. The disbursement of money in discharge of a corporation's obligations to others is in the sense of doing business no different from the receipt of money in discharge of an obligation to it, and the payment of a debt assumed is not distinguishable in the sense of doing business from the payment of a debt created, or a debt imposed, as by a tax. McCoach v. Minehill R. R. Co., supra. We are of opinion that the application of money received from the operating corporation to the debts assumed first by one corporation and then by another in the train of leases, does not amount to doing business within the meaning of the Corporation Tax Law.

The judgments below are affirmed.

QUINETTE v. PULLMAN CO. et al.

(Circuit Court of Appeals, Eighth Circuit. May 2, 1916.)

No. 4235.

1. COURTS ⇐366(13)—FEDERAL COURTS—STATE DECISIONS—PRECEDENTS.

A decision by the Supreme Court of Oklahoma construing Comp. Laws Okl. 1909, § 5553, declaring that if, when a cause of action accrues against a person, he be out of the state or has absconded or concealed himself, the period limited for the commencement of the action shall not

⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

begin to run until he comes into the state, or while he is so absconded and concealed, and if after the cause of action accrues he shall depart from the state, or abscond or conceal himself, such time shall not be computed as any part of the period within which the action must be brought, to the effect that neither a natural person nor corporation that absents himself or itself from the state, though he or it maintains during his absence a residence in the state and persons therein on whom service of process which will sustain a personal judgment may be made, can take advantage of the statute of limitations, is binding on the federal courts, and limitations do not run in favor of a foreign corporation not a resident of the state, though it maintained a process agent therein.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 983; Dec. Dig. ⟸366(13).]

2. Removal of Causes ⟸3—Right of Removal—State Laws.

A state Constitution and laws, denying a foreign corporation doing business in the state the right to remove causes against it to the federal court under penalty of being denied the benefit of limitation statutes, are invalid.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 4, 5; Dec. Dig. ⟸3.]

3. Courts ⟸366(13)—Federal Courts—State Decisions—Precedents.

Where a decision of the state court denying a foreign corporation the benefit of limitation acts was valid, as it applied the same principles to residents and individuals, it must be followed by the federal courts, though the decision was also based on the proposition that a foreign corporation could not have the benefit of limitation acts unless it became a resident of the state and renounced its right of removal of causes, and such construction would invalidate the acts.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 983; Dec. Dig. ⟸366(13).]

In Error to the District Court of the United States for the Western District of Oklahoma.

On motion for rehearing. Motion denied, and former opinion affirmed.

For former opinion, see 229 Fed. 333, —— C. C. A. ——.

Charles Mitschrich, of Lawton, Okl., for plaintiff in error.

W. F. Evans, of St. Louis, Mo., and R. A. Kleinschmidt and E. H. Foster, both of Oklahoma City, Okl., for defendant in error St. Louis & S. F. R. Co.

Before SANBORN, ADAMS, and SMITH, Circuit Judges.

SANBORN, Circuit Judge. [1] So far as the writer alone is concerned, the reasons for the opinion that the motion for rehearing should be denied in this case are that this court is required to follow the construction of the statute of limitations of Oklahoma adopted by the highest judicial tribunal of that state, that the Supreme Court of Oklahoma in Hale v. St. Louis & San Francisco R. R. Co., 39 Okl. 192, 134 Pac. 949, 950, 953, L. R. A. 1915C, 544, Ann. Cas. 1915D, 907, in the opinion of the writer, decided that the true construction of the exception to subdivision 3, § 5550, Compiled Laws of Oklahoma 1909, found in section 5553 of those laws, to the effect that if, when a cause of action accrues against a person, he be out of the state the period limited for the commencement of the action shall not begin to run until he

comes into the state, is that neither a natural person nor a corporation that absents himself or itself from the state, although he maintains during his absence a residence in the state and persons therein on whom service of process against him may be made, or a corporation maintains at all times in accordance with the requirements of the Oklahoma statutes an agent on whom service of process against it which will sustain a personal judgment may be made, can take advantage of the statute of limitations in question. This conclusion seems to the writer unavoidable from the fact that the opinion in Hale's Case is based on Kansas decisions construing the same statute subsequently adopted in Oklahoma, Lane v. National Bank of the Metropolis, 6 Kan. 74, in which it was held that the personal absence of the debtor, a natural person, from the state, even if he retained his residence in the state at which process against him might be served, was sufficient to take his case out of the statute, and Williams v. Metropolitan Street Ry. Co., 68 Kan. 17, 74 Pac. 600, 64 L. R. A. 794, 104 Am. St. Rep. 377, 1 Ann. Cas. 6, Ætna Life Ins. Co. v. Koons, 26 Kan. 215, and other cases wherein it was held that foreign corporations, although they continuously maintained officers and agents in the state on whom process could be served that would sustain personal judgments against them, could not avail themselves of the Kansas statute of limitations, and on the fact that after a review of the authorities, in summing up this branch of the case, the Supreme Court of Oklahoma said:

"The question then arises: For whose benefit was the statute of limitations put in force? Evidently for those residing within the state, *for even citizens of the state cannot avail themselves of the benefit of such statutes during their absence from the state.*"

Counsel argue that this decision is mere dictum, and should be disregarded by this court, because in the Hale Case the railroad company had not complied with the Constitution and statutes of Oklahoma (section 260, Williams' Ann. Stat.; sections 5605, 5606, Comp. Stat. of Oklahoma 1909), requiring it to designate agents residing in the state on whom service of process against it might be made, and to file certificates of such appointments in specified public offices, while in the case in hand the defendant pleaded and the demurrer admitted that it had appointed and certified such agents and had complied with all the valid and constitutional laws of Oklahoma. That contention, however, is not persuasive and seems to the writer untenable. In the Hale Case the railroad company had officers and agents in Oklahoma, though not designated and certified under the sections of the statute just quoted, on whom service of process could be made during all the time after the cause of action arose. The Supreme Court of Oklahoma, in determining whether or not the foreign corporation upon whom service could have been made within the state at any time could avail itself of the statute of limitations, first exhaustively considered and decided the broad and fundamental proposition that no person, whether a natural person or a corporation, that had been absent from the state since the accrual of the cause of action, could avail himself or itself of the statute of limitations, notwithstanding the fact that at all times during his or its absence service of process which would have sus-

tained a personal judgment against him or it could have been made in the state, could invoke the statute of limitations of that state. Having decided that proposition, it descended to the particular case and held that, because the railroad company in the Hale Case was such a corporation, it was governed by that rule. The corporation in the case in hand, although at all times since the accrual of this cause of action process that would sustain a personal judgment against it might have been served upon its agent designated and certified to receive such service as required by the statutes of Oklahoma, falls equally under the basic proposition the Supreme Court of Oklahoma decided. And inasmuch as that court had the constitutional and judicial power to decide that proposition, and it is the duty of this court to follow and apply it in cases arising under the Oklahoma statute (Bauserman v. Blunt, 147 U. S. 647, 656, 13 Sup. Ct. 466, 37 L. Ed. 316), and for that reason, and for that reason alone, in the opinion of the writer, the defendant corporation cannot avail itself of the Oklahoma statute of limitations, and its motion for a rehearing of this case must be denied.

[2, 3] The fact is not overlooked that counsel for the corporation contend that the decision of the Supreme Court of Oklahoma in the Hale Case is not founded, as the writer believes it to be, upon the broad fundamental proposition which has been discussed and stated, and which may be termed the first proposition decided by the Oklahoma court; but they insist that it is based on the proposition which may be termed its second proposition, that the Constitution and statutes of Oklahoma required this foreign corporation, as a condition of availing itself of the statute of limitations of that state, to renounce its right under the Constitution and laws of the United States to bring in, or remove to, any of the national courts any suit for or against it arising in Oklahoma, to become a resident of that state and to submit all its controversies to the courts of that state exclusively. There is language in the opinion in the Hale Case that lends much support to the contention that this second proposition was decided. If that were the decision of that court, and if its construction and application of the Constitution and statutes of Oklahoma to the Hale Case rested upon that proposition, it would, in the opinion of the writer, be violative of the Constitution and laws of the United States, and it would be the duty of this court to disregard the decision and the opinion, and to consider and decide the true construction and application of the Oklahoma statute of limitations as a new question. Harrison v. St. Louis & San Francisco R. R. Co., 232 U. S. 318, 34 Sup. Ct. 333, 58 L. Ed. 621, L. R. A. 1915F, 1187.

It is, however, unnecessary to determine whether or not this second proposition was decided in the Hale Case, because if it were then the decision and opinion rested upon the first proposition and the second proposition, and granting that the second proposition is untenable, and violative of the supreme law of the land, the Oklahoma court's decision of the first proposition is still conclusive of its result, and of the duty of this court to follow the construction given to its statutes by that proposition, and it is on that ground alone that the writer is of the opinion that the motion for rehearing must be denied.

WETZEL v. UNITED STATES.*

(Circuit Court of Appeals, Ninth Circuit. July 3, 1916.)

No. 2696.

1. INDICTMENT AND INFORMATION ⟸132(4), 137(6)—MOTION TO QUASH—DISCRETION OF COURT.

A motion to quash an indictment on the ground that the three counts charged the same offense is properly denied, for such a motion is not favored, and is addressed to the discretion of the court, while a motion to elect is the proper remedy.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 439–443, 445, 486; Dec. Dig. ⟸132(4), 137(6).]

2. POST OFFICE ⟸48(2)—OFFENSE—INDICTMENT—SUFFICIENCY.

An indictment under Criminal Code (Act March 4, 1909, c. 321) § 211, 35 Stat. 1129 (Comp. St. 1913, § 10381), making it an offense to mail any writing giving information as to where, how, from whom, or by what means articles for producing an abortion may be procured, alleging that defendant mailed a letter and notice, consisting of the printed figures 938 and 100 pasted on the back of a political circular, whereby notice was given that articles and things designed and adapted for producing an abortion might be procured at 938 Fillmore street at a cost of $100, is sufficient to charge an offense.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. § 70; Dec. Dig. ⟸48(2).]

3. CRIMINAL LAW ⟸1167(2)—APPEAL—HARMLESS ERROR.

Where accused's motion to require the government to elect on which count of the indictment charging violations of the postal laws (Criminal Code, § 211) was denied, but the judgment of sentence did not purport to be a sentence on two counts, and the sentence imposed did not exceed that which was permissible on conviction of a single offense, the denial of the motion cannot be complained of, there having been but a single criminal act, for, where conviction is had on more than one count, the sentence, if it does not exceed that which might be imposed on conviction under any single count, is good if any count be sufficient.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3103; Dec. Dig. ⟸1167(2).]

In Error to the District Court of the United States for the First Division of the Northern District of California; M. T. Dooling, Judge.

J. F. Wetzel was convicted of violating the postal laws, and he brings error. Affirmed.

The plaintiff in error was indicted under three counts for violation of section 211, United States Criminal Code. The first count charged in substance that on August 13, 1912, at San Francisco, he did willfully, unlawfully, knowingly, and feloniously deposit and cause to be deposited in the post office establishment of the United States a certain letter and notice inclosed in a sealed envelope, on which the postage had been prepaid, addressed to Claude L. Coon, Box 741, Kingman, Ariz., which said written letter and notice consisted of the figures "938" and "100" pasted on the back of a printed circular containing certain printed matter which was a notice of the time and place of certain political speeches to be made in San Francisco and was set forth; that the figures pasted on the back of said circular gave information that divers articles and things designed and intended for producing abortion might be obtained at 938 Fillmore street in the city and county of San Francisco at a cost of $100. The second count differed from the first in charging that

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

*Rehearing denied October 9, 1916.

the figures on the mailed notice gave the information that an act and operation for procuring and producing abortion would be done and performed at No. 938 Fillmore street at a cost of $100. The third count differed from the others in charging that the notice gave information that an abortion would be produced by him, the said defendant, at No. 938 Fillmore street, for the sum of $100.

There was a motion to quash the indictment on the ground that it charged the defendant three times with the same offense, and there was a demurrer to the indictment on the ground that in neither count were facts stated sufficient to constitute an offense against the laws of the United States, and on the ground that the indictment is ambiguous, in that it cannot be ascertained therefrom how and in what manner the figures referred to gave the information prohibited by section 211 of the Criminal Code, and further that the indictment is uncertain and unintelligible, and the figures so referred to therein are without unlawful meaning. The motions to quash and the demurrers were overruled, as was also the motion of the plaintiff in error to require the United States to elect upon which count the plaintiff in error was to be tried.

It was shown on the trial: That the plaintiff in error had published in the newspapers an advertisement reading: "Old reliable specialists for women." "Accommodations, nurse, adoption, etc. 938 Fillmore Street." That on August 10, 1912, a letter was mailed at Kingman, Ariz., addressed to "Doctor, 938 Fillmore Street, San Francisco, California," in which the writer referred to the advertisement and asked for information as to what the doctor's fee would be for performing an abortion upon a young woman and inquiring when do "you want her to come." That in answer to that letter the plaintiff in error mailed to the writer thereof the printed circular, on the back of which were pasted the figures "938" and "100."

The jury found the plaintiff in error "guilty on the first count of the indictment, and guilty on the second and third counts of the indictment." There was a motion for a new trial, which was granted as to the first count, but denied as to the second and third counts. Thereafter judgment was rendered on the verdict as to the second and third counts.

Catlin, Catlin & Friedman, of San Francisco, Cal. (Augustine C. Keane, of San Francisco, Cal., of counsel), for plaintiff in error.

John W. Preston, U. S. Atty., and M. A. Thomas, Asst. U. S. Atty., both of San Francisco, Cal.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). [1] It is assigned as error that the court overruled the defendant's motion to quash the indictment, which was interposed on the ground that the indictment charged one offense in three counts. That defect, if it existed, was no ground for quashing all three counts. A motion to quash is not favored by the courts. It is ordinarily addressed to the discretion of the court. Durland v. United States, 161 U. S. 306, 16 Sup. Ct. 508, 40 L. Ed. 709; Hillman v. United States, 192 Fed. 264, 112 C. C. A. 522. And the objection that all the counts are for the same offense should be made by motion to require the prosecution to elect, and not by a motion to quash the indictment. United States v. Harmon (D. C.) 38 Fed. 827.

[2] It is urged that the indictment is defective, in that it does not set forth the facts upon which the government relied to show that the printed circular mailed by the defendant contained information forbidden by the statute. But the indictment in the first count states that

the figures so pasted on the back of the circular "then and there gave information that divers articles and things designed, adapted, and intended for producing abortion might be obtained at 938 Fillmore street," and there is a corresponding allegation in the other counts. The indictment substantially conforms to that which was approved in United States v. Grimm (D. C.) 50 Fed. 528, and Grimm v. United States, 156 U. S. 604, 15 Sup. Ct. 470, 39 L. Ed. 550, cited by the defendant as examples of proper pleading.

[3] It is contended that the court erred in not requiring the government to elect on which of the three counts the defendant should be tried. The first count charged that the letter sent by the defendant gave information where divers articles and information designed and intended for producing abortion might be obtained, the second charged that it gave information where an operation for abortion could be performed, and the third that it gave information as to who would perform the operation. The verdict on the first count has been set aside, and the court has ordered a new trial thereon. We do not find it necessary to inquire whether the defendant could have been compelled to go to trial on an indictment which, by the means alleged, charged him in one count with giving information as to the place where an abortion might be performed, and in another with giving information as to the person by whom it might be performed.

We are inclined to the view that such pleading was permissible. But, however that may be, we think that in this case the defendant has suffered no prejudice by the ruling of the trial court. Obviously the offense of which he was charged, and for which he was convicted, and upon which he was sentenced, was the single act of sending by mail the figures "938" and "100" in answer to a letter of inquiry as to a proposed abortion. The judgment of the court was:

"That, whereas, said J. F. Wetzel having been duly convicted in this court of the crime of violation of section 211 Criminal Code of the United States, it is therefore ordered and adjudged that said J. F. Wetzel be imprisoned for the term of six months in the Alameda county jail, Alameda county, California."

This is not a sentence upon two counts, but it is in form a sentence upon a conviction of a single offense. The sentence which was imposed does not exceed that which is permissible upon a single offense. Where a verdict of guilty is rendered upon more than one count, and the sentence does not exceed that which might properly be imposed upon conviction under any single count, the sentence is good if either count is found sufficient. Claassen v. United States, 142 U. S. 140, 12 Sup. Ct. 169, 35 L. Ed. 966; Evans v. United States, 153 U. S. 608, 14 Sup. Ct. 939, 38 L. Ed. 839; Kalen v. United States, 196 Fed. 888, 116 C. C. A. 450; Norton v. United States, 205 Fed. 593, 123 C. C. A. 609; Tubbs v. United States, 105 Fed. 59, 44 C. C. A. 357.

We find no error. The judgment is affirmed.

THE ELI B. CONINE.

(Circuit Court of Appeals, Second Circuit. April 11, 1916.)

No. 227.

TOWAGE ⇐11(5)—LOSS OF TOW—LIABILITY OF TUG.

A tug, which with three helpers undertook to take a tow of 19 loaded coal barges from North River around in East River during a south wind which at times exceeded 60 miles an hour, *held* negligent, and liable for the loss of a barge, which was swamped while rounding the Battery. The barge *held* not in fault for not having her hatch covers in place, which was not customary nor usually required while navigating harbor waters.

[Ed. Note.—For other cases, see Towage, Cent. Dig. § 17; Dec. Dig. ⇐11(5).]

Appeal from the District Court of the United States for the Southern District of New York.

Suit in admiralty by Ferdinand Gildersleeve and Olive Gildersleeve & Sons, Incorporated, owners of the barge Lillian, against the steam tug Eli B. Conine; the Cornell Steamboat Company, claimant. Decree for libelants, and claimant appeals. Affirmed.

January 3, 1913, was contemporaneously noted by the district forecaster in New York City as "one of the notable windy days of record." The hourly movement rose from 31 miles between 6 and 7 a. m. to 62 miles between 12 noon and 1 p. m., with a maximum of 66 miles. Between 2 and 3 p. m. the movement was 75 miles, with one 5-minute squall at the rate of 86 miles. At approximately 10 a. m. the tug Conine left Edgewater, N. J., with a tow of coalboats bound for the East River. The fleet was added to from time to time by helper tugs, and the helpers then assisted in towing. By noon, the tow consisted of 19 boats in 5 tiers, hauled by 4 tugs, and was off Cortlandt street, Manhattan. The tide during this passage had been ebb and the wind southward—probably shifting at times both to the eastward and westward of south. It required an hour to pull the tow from near Cortlandt street to the vicinity of Pier 1, North River.

Libelant's boat Lillian was the starboard hawser boat of this tow; she was an open coal barge, with a full, but not unusual, cargo aboard; she had hatch covers, but they were not in use; the strongbacks, by which alone the covers could have been made secure, were below decks, underneath the coal, and could not be gotten at. While the tow had been proceeding in a general southerly direction and head to the wind, no damage was received by any boat. At or near Pier 1 the tide changed, and the tugs turned eastward to round the Battery on the flood. As soon as the heading of the tow changed, the starboard side thereof was exposed to the full sweep of the waves, and when not far from the Aquarium, or Castle Garden, the Lillian swamped. At or about the same time the smallest tug of the four towing vessels was obliged to cut her lines and seek shelter in a slip, because her freeboard was not sufficient for the weather; but she was further distressed by the wash from the other tugs. The owner of the Lillian brought this libel to recover for the losses thus received.

J. Parker Kirlin, of New York City (H. H. Flemming, of Kingston, N. Y., and Wm. H. McGrann and Robert S. Erskine, both of New York City, of counsel), for appellant.

Park & Mattison, of New York City (Samuel Park, of New York City, of counsel), for appellees.

Before WARD and ROGERS, Circuit Judges, and HOUGH, District Judge.

HOUGH, District Judge (after stating the facts as above). Caution in tempestuous weather is of course obligatory, even in narrow and sheltered waters; and danger arises for harbor craft, when stronger or better built vessels would run no risk. Care is largely measured by what is to be taken care of. The navigators of these towing tugs knew, or were bound to know, that they had in charge, not one, but several, boats of little freeboard, filled with coal, and easily swamped, if exposed to the full force of waves, moderate when measured by what is to be expected in open waters.

It was known, also, that a long-continued southerly wind must rouse a considerable sea at the Battery, because there is open water from there to the Narrows, and it was obvious that in turning eastward out of the North River the starboard side of the tow would be exposed to the full sweep of a sea that a most unusual wind had been arousing for hours. These dangers were not thought sufficient to prevent or delay the trip, but that proceeding ahead was an error of judgment the event both as to boat and tug soon showed.

"Lack of care under the circumstances," which is negligence, is rarely willful or reckless; it is usually error of judgment. But the converse is not true—that every error of judgment is negligence. The error must be measured by the standards of conduct and business knowledge furnished by the evidence and by experience of which even courts can take cognizance without direct testimony. If the error, viewed from that standpoint, is such as would not have been committed by a reasonable man, reasonably skilled in his occupation, it is negligence. When thus tested, the presumably deliberate act of the Conine's navigators must be pronounced negligent, because it exposed the Lillian (and other boats) to dangers they were ill-fitted to endure, and of which no harbor captain could be ignorant. Indeed, the evidence leaves us in no doubt that the perils encountered were known to all, and justly feared by some, of the licensed men in charge of the towing craft.

Defense rests principally upon the argument that it was not negligent to start upon the voyage (which is admitted), that no occasion for alarm arose until Pier 1 was reached, and that it was then impossible to do anything but go ahead, risk the dangers of rounding the Battery, and seek shelter in the narrow waters of the East River. To this we cannot agree. How hard it was to drag the tow against the wind and waves is shown by the time required to get from Cortlandt street to Pier 1. The tide aided little against such a storm. It was not only possible, but quite feasible, to stay in the North River, and this should have been done. All that was required was cessation of effort to get ahead, and the tow would have remained substantially as it had been for hours. The only obligation to proceed resulted, not from the weather, but from an imperative desire to deliver the coal at its East River destination, which is no excuse for errors of navigation.

It is urged as a contributing cause of disaster, and a fault on the part of the Lillian, that she had no covering hatches in place. Her condition was well known to the tug masters, and it is rarely necessary to put on hatches while working in the upper harbor of New York. Boats of the class in question usually omit them on harbor trips. The Lillian was entitled to expect exposure to no unnecessary danger; she was subjected to such danger, and that constitutes the primary fault in this case. As it was no fault on the Lillian's part to start without covers in place, and it was a fault in the tugs to take her around the Battery in such a storm, we cannot consider it negligent to omit a possible precaution against a danger not reasonably to be anticipated, and produced by the error of claimant's employés. We say possible precaution, because it is doubted whether the covers under circumstances shown would have changed the event.

The decree is affirmed, with interest and costs.

MILWEE et al. v. WADDLETON.

(Circuit Court of Appeals, Ninth Circuit. July 3, 1916.)

No. 2649.

1. ADVERSE POSSESSION ⊂=51—TITLE—CLAIM IN GOOD FAITH.

Under Comp. Laws Alaska 1913, § 1874, which does not require claim in good faith for 10 years' adverse, open, and notorious possession to ripen into title, plaintiff, who held for that time, though judgment was recovered against him by defendant, acquired an adverse title, regardless of whether his claim was in good faith.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 238, 239; Dec. Dig. ⊂=51.]

2. PRINCIPAL AND AGENT ⊂=28—POWER OF ATTORNEY—AUTHORITY.

Where one entitled to share in an estate executed a power of attorney to enable his counsel to close up the estate, the attorney cannot, over 20 years after the power was given, convey lands belonging to the estate which the beneficiary had seen, declared to be worthless, and had abandoned, particularly where the beneficiary had not been heard of in the meantime.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 50; Dec. Dig. ⊂=28.]

In Error to the District Court of the United States for the First Division of the District of Alaska; Robert W. Jennings, Judge.

Ejectment by William N. C. Waddleton against S. H. Milwee and another. There was a judgment for plaintiff, and defendants bring error. Affirmed.

J. H. Cobb, of Juneau, Alaska, for plaintiffs in error.

Winn & Burton, of Juneau, Alaska, for defendant in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge. The defendant in error, who was the plaintiff in the court below, in the spring of 1896 entered into posses-

sion of a lot in the town of Juneau, and remained continuously in possession, claiming to own the lot, from that time until June 12, 1914, when he was ousted by the defendants. The lot was a part of the patented town site of Juneau. The town-site trustee on November 10, 1898, conveyed the lot to the "Pullen heirs"—James H. Pullen, Mary H. Wilson and Thomas R. Wilson. The conveyance was made after a contest between the said grantees and the plaintiff. From the decision on that contest the plaintiff appealed. In 1902 the decision was affirmed by the Commissioner of the General Land Office. Notwithstanding the decision, the plaintiff remained in the undisturbed possession of the premises, claiming to own the same, and paying the taxes thereon, until his eviction in 1914, whereupon he brought ejectment against the defendants. On the trial of the cause the court instructed the jury to return a verdict in favor of the plaintiff for a two-thirds interest in the lot; Pullen having conveyed to the defendants only a one-third interest in the same. As to the remaining one-third interest the court submitted to the jury the question of the right and title of the respective parties thereto, and the jury returned a verdict for the plaintiff as to that interest also.

[1] The defendants assign error to the refusal of the court to instruct the jury to return a verdict in their favor and to the peremptory instruction to return a verdict for the plaintiff for an undivided two-thirds interest in the lot. We find no merit in either of these assignments. The plaintiff claimed the title and paid the taxes, under an open, notorious, continuous, hostile, and adverse possession under a claim of ownership for more than 10 years. The defendants say that the plaintiff, after a judgment against him, could not claim title in good faith, and they cite Jasperson v. Scharnikow, 150 Fed. 571, 80 C. C. A. 373, 15 L. R. A. (N. S.) 1178, and Center v. Cady, 184 Fed. 605, 106 C. C. A. 609. Those decisions were based upon a statute of the state of Washington (Ballinger's Ann. Codes & St. § 5503), which provided that one should be held to be adjudged the lawful owner of property if he were in actual, open, and notorious possession of the same under a claim and color of title "made in good faith," and who should during said time pay all taxes legally assessed on such lands.

There is no provision in the statute of Alaska that the claim of title shall be made in good faith. It is sufficient if for the specified period the possession is maintained and ownership asserted in accordance with the provisions of the statute. We think, however, that it might properly be held that the plaintiff's claim of title in this case was made in good faith. Notwithstanding the adverse decision against him, he remained in the undisturbed possession and claimed the property. He claimed it, he said, "because I thought I had a better right, the Pullen heirs had not been heard from, and I didn't think they could get it." And he testified that no claim whatever had been made by any of the Pullen heirs to the land in controversy, and that it formed no part of the inventory of the Pullen estate, and had never been occupied by any of the Pullen heirs. Mr. Heid, who was attorney for J. H. Pullen, testified that when Pullen saw the lot he abandoned it and gave it up in disgust.

[2] Again, we are of the opinion that the defendants proved no title in themselves. Their claim of title depended wholly upon a conveyance, executed by John J. Heid under a power of attorney from James H. Pullen, which had been made and executed 26 years before the conveyance. The power of attorney gave general authority to take charge of all the property of Pullen, real and personal, in the town of Juneau, with authority to lease, bargain, and sell the same upon such terms and under such covenants as Heid might see fit. It was evidently executed for the purpose of enabling the grantee therein to take possession of and settle up the interest of the grantor in the estate of which he was one of the heirs. Pullen shortly afterward came to Juneau, and according to Heid's testimony he never returned. From that time on Heid never again saw or heard from him. Heid testified that Pullen, when he saw the property, was greatly disappointed in it, "and, when shown this particular lot, abandoned it and gave it up in disgust, and I have never received a letter or any word from him since that time."

A power of attorney executed under the circumstances detailed should be held insufficient to authorize the execution of a conveyance 26 years after its date. It is the settled rule that the duration of a power depends upon the intention of the grantor, as shown by its terms, by the purposes he had in view, and by the surrounding circumstances. 31 Cyc. 1051. It would seem that the purpose of this power of attorney had been fulfilled and its life ended when the grantor thereof visited Juneau, examined the property, and abandoned it as valueless. It would be going far to hold that, in the absence of knowledge of Pullen's whereabouts, or knowledge whether he was alive or dead, and in the absence of communication from him to his agent for a period of more than 20 years, the conveyance to the defendants was the act and deed of Pullen. In Marquam v. Ray, 65 Or. 41, 131 Pac. 523, the Supreme Court of Oregon said:

"Where the time within which the power is to be exercised is not fixed in the instrument, it must be exercised within a reasonable time"—citing Clark and Skyles on Agency, p. 542.

The judgment is affirmed.

UNITED STATES FIDELITY & GUARANTY CO. v. EICHEL et al.

(Circuit Court of Appeals, Third Circuit. October Term, 1916.)

No. 1850.

On petition for further order. Petition denied.

For former opinion, see 219 Fed. 803, 135 C. C. A. 473.

PER CURIAM. After we decided this controversy in February of last year (219 Fed. 803, 135 C. C. A. 473), an appeal was taken to the Supreme Court, but this was dismissed for want of jurisdiction in the following November. 239 U. S. 629, 36 Sup. Ct. 165, 60 L. Ed. ——. The mandates from both courts were promptly sent down, and since

December, 1915, the District Court has once more had possession of the suit. The pending petition asks for an order—

"* * * that the District Court shall rehear this case, and in such rehearing permit the parties to introduce any evidence pertinent to the issues made by the pleadings so that additional evidence may be taken on any of said issues, and the District Court proceed to rehear the case on the evidence already taken and in, and on any additional evidence that may be offered."

We have considered the petition, and the appellant's reply thereto, and are of opinion that (if we assume our power now to make the order requested) no sufficient reason is disclosed for directing the court below to rehear the case. What was said in 219 Fed. 803, 135 C. C. A. 473, states the subjects that were committed to that court for further action, and we see no need to add anything now. This prolonged litigation should come to an end as soon as the other business of the District Court may reasonably permit.

The petition is refused.

NG JUNG v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. May 24, 1916.)

No. 289.

ALIENS ⊂=31—CHINESE PERSONS—DEPORTATION.

The United States is not estopped from deporting a Chinese person, not entitled to remain in the country, by reason of the acts of a special immigration agent.

[Ed. Note.—For other cases, see Aliens, Dec. Dig. ⊂=31.]

Appeal from the District Court of the United States for the Southern District of New York.

Proceeding for deportation of Ng Jung. From an order of the District Court affirming an order of deportation, defendant appeals. Affirmed.

R. M. Moore, of New York City, for appellant.

F. M. Roosa, Asst. U. S. Atty., of New York City.

Before COXE and WARD, Circuit Judges, and CHATFIELD, District Judge.

PER CURIAM. The question here is one of fact. There was testimony for and against the proposition that the defendant was born in the United States. The commissioner and Judge Lacombe, who reviewed the order of deportation, concurred in finding that the appellant was a laborer unlawfully in the United States.

We think the testimony warranted this conclusion, and that nothing in the record would justify a finding that both the commissioner and the judge were wrong. The United States is not estopped from deporting the appellant because of any act or omission of the special agent, Dannenberg.

The order of deportation is affirmed.

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

TOCH et al. v. ZIBELL DAMP RESISTING PAINT CO.

(Circuit Court of Appeals, Second Circuit. May 9, 1916.)

No. 25.

1. PATENTS ⟸37—ANTICIPATION—ACCIDENTAL PRIOR USE.
Patentable novelty is not negatived by a prior accidental production of the same thing, when the operator does not recognize the means by which the accidental result is accomplished, and no knowledge of them, or of the method of their employment, is derived from the prior use by any one.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 41-44; Dec. Dig. ⟸37.]

2. PATENTS ⟸52—ANTICIPATION—PRIOR USE.
To invalidate a patent by prior use, it is not necessary that the one who previously made use of the same process to accomplish the same result understood the scientific principle.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 70; Dec. Dig. ⟸52.]

3. PATENTS ⟸328—PRIOR PUBLIC USE.
The Toch patent, No. 813,841, for method of treating cement and cement construction, *held* void for anticipation, on evidence establishing beyond a reasonable doubt that the article made by defendant and alleged to infringe was publicly known and publicly used by defendant for the same purpose as at present more than two years before application for the patent.

Appeal from the District Court of the United States for the Southern District of New York.

On petition for rehearing. Denied.

For former opinion, see 231 Fed. 711, — C. C. A. —.

Kenyon & Kenyon, of New York City (Walter C. Noyes and William Houston Kenyon, both of New York City, of counsel), for appellants.

Merwin & Swenarton, of New York City (W. H. Swenarton, of New York City, of counsel), for appellee.

Before WARD and ROGERS, Circuit Judges, and MAYER, District Judge.

ROGERS, Circuit Judge. This court on February 21, 1916, filed an opinion in which it held that the plaintiffs were not entitled to recover from the defendant for an alleged infringement of letters patent No. 813,841 granted to them by the United States. The court reached its conclusion that the patent in suit was invalid because convinced of the public use of the thing alleged to infringe; such use having occurred more than two years prior to the application for the patent. The petition for the rehearing states that there is an important and well-established exception to the rule that a public use that occurred more than two years prior to application makes a patent void. That exception is that use without knowledge does not make a patent void. The counsel for the petitioners allege that, while the defense of prior use was sufficiently and properly pleaded, nevertheless on the original

argument of the case in this court they did not advert to this defense, but confined their attention to other defenses which the court below had based its decision upon, without reference to the particular defense upon which this court decided the case on the appeal. We granted, therefore, a rehearing, that the matter might be more fully presented in oral argument; but in doing so we do not wish to be understood as encouraging piecemeal prosecution of appeals, or that attorneys can ignore in argument a serious defense, and when they discover that the court has decided the case on a defense they saw fit to ignore upon the argument, expect the court will grant another hearing to correct their own mistaken judgment. In this case counsel for defendant in their original brief submitted to this court considered this defense of so much importance that upwards of 20 pages, in a brief of 87 pages were devoted to the prior public use. Moreover, counsel are mistaken in saying in the brief submitted upon the rehearing that they did not advert to this particular defense in their oral argument and so have been taken by surprise. A copy of the notes used by counsel in that oral argument and which counsel fully read and filed with the court at its close, reads as follows:

"That the patent is invalidated by certain alleged Zibell prior uses—but the evidence is inadequate and insufficient to the point of absurdity. The alleged prior use on the Blair squash court at Peapack, N. J., occurred after the Toch invention was made. Considered as a bar, because it occurred more than two years prior to the application, it fails: (1) Because there is no clear or sufficient evidence as to the nature or ingredients of the so-called 'Protectorine' and green paint that were then applied to the squash court walls; and (2) because it affirmatively appears that those walls had been previously so treated as to destroy the free lime therein, and so in any event the Toch operation could not possibly have proceeded or the Toch result have obtained."

We, however, concluded to grant a rehearing and to re-examine the testimony and the law relating to the prior public use and knowledge thereof. The reargument and the re-examination of the testimony and the law have not convinced the court that any error was committed in the conclusion originally reached.

The plaintiffs assert that their patent is infringed by the Protectorine which the defendant makes and sells. But the evidence satisfies us that Protectorine as now sold differs not at all from the article sold by defendant two years and more prior to the application for the patent in suit. And the law is so well settled that no reference to authorities is necessary for the proposition that that which infringes if later anticipates if earlier.

We are also satisfied that more than two years prior to the application for the patent in suit the defendant's mixtures were made public use of in the Blair squash court at Peapack, New Jersey. They were used on the Portland cement walls of that court.

[1] But counsel urge upon us that if such prior use occurred the conjunction of circumstances which brought about the embodying and realizing of the Toch process and product in the Zibell process and product was fortuitous, accidental, unintended, and not understood by anybody at the time. If that be true then the prior use is not such an anticipation as invalidates the Toch patent. For the doctrine is

well settled in the law of patents that novelty is not negatived by a prior accidental production of the same thing when the operator does not recognize the means by which the accidental result is accomplished, and no knowledge of them, or of the method of their employment, is derived from the prior use by any one. See Wickelman v. A. B. Dick Co., 88 Fed. 264, 31 C. C. A. 530 (1898), and the cases there cited.

However the evidence in this case satisfies us that the use of the Zibell product on the walls of the squash court is not to be regarded as in any sense accidental, or incidental, or unintentional within the meaning of Wickelman v. A. B. Dick Co., supra, or of such cases as Tilghman v. Proctor, 102 U. S. 707, 26 L. Ed. 279 (1880). Zibell made his product and sold it, and the public bought it and used it, to do the very things it was intended to do, and in doing it Toch says it infringes his composition.

The testimony shows that the walls of the squash court were constructed of heavy rubble masonry, faced with Dexter Portland cement concrete and Dexter Portland cement plaster; that the court was located below the general level of the cellar of Mr. Blair's country house, which was situated on the apex of the mountain at Peapack, N. J.; that various attempts had been made to paint these walls, and that all of them proved unsatisfactory, as it had been found impossible to make any of the paint which they could get hold of stick on the walls; that in the spring of 1903 the civil engineer in charge of all of Mr. Blair's construction work noticed in the Engineering News an advertisement of Zibell's product which in effect stated that the Zibell Damp Resisting Paint Company could furnish paints in various colors which would be guaranteed to resist dampness when applied to walls; that thereupon he obtained several gallons of a material known as Protectorine and applied the same to the wall with results which were entirely satisfactory, the original paint being still on the walls at the time of the trial of this case. After the completion of the work several cans were left unused. This testimony comes from a totally disinterested witness, who never talked with Zibell except over a telephone, and who had never met him. That the witness is trustworthy is shown by the fact that this use of Zibell's Protectorine was made in September, 1903, under the witness' direction, and that in 1915, when the testimony was given, he was still and had been continually in the employ of Mr. Blair, and had, under his supervision as superintendent of construction, expended on the Blair property over half a million dollars. The witness was asked:

"Was the material applied by the Zibell Damp Resisting Paint Company for treating this cement squash court apparently an unusual material and was it satisfactory for the purpose?"

This question was answered as follows:

"It was very unusual, and most satisfactory. By unusual, I mean that it accomplished certain work that ordinary paint could not. For instance, we had experimented on the squash court walls with a great many kinds of paint, ordinary and extraordinary and this paint was the first that we had obtained that would even stay. The walls, you must bear in mind, were subject to a great deal of dampness, and without knowing the chemical parts of

the Zibell paint I should imagine that there must have been some part that acted as an absorbent. This in itself would indicate a very different material from ordinary paint."

He was then asked:

"How did you happen to use Protectorine as the first coat?"

And he answered:

"Mr. Zibell recommended it after having been told the condition of the walls, and in fact I think that there were printed directions governing its application."

In view of this testimony it is quite impossible to maintain that the use of the Zibell Protectorine in 1903 was accidental, unintended, and not understood by anybody at the time.

The counsel for the plaintiff Toch seek to overcome the effect of this testimony by calling attention to the fact that before the Protectorine was applied to the walls of the squash court they had been previously painted. They would have us believe that the paint previously applied destroyed all the free lime in the surface of the walls, and so changed the condition of the walls that they were no longer Portland cement construction. The argument proves too much, for if it proves anything it is that Protectorine does not infringe the Toch invention, as it does not affect Portland cement construction until that construction has been changed by the application of some other product by changing its nature so as to destroy the free lime inherent therein. We are not, however, impressed by the testimony that the nature of the walls had been so changed by the previous paint which had been applied that their nature had been, as Portland Cement construction, destroyed. There is testimony in the record that a specimen of this wall was subjected to analysis by the defendant's expert, and that the specimen analyzed corresponded to an ideal Portland cement mixture, and that, where the alumina in an ideal Portland cement mixture ran 9.6 and the lime ran 62.2, the lime in the specimen ran 66.6 and the alumina 9.48. The testimony also showed that the specimen analyzed was not a portion distant from the surface, but the portion next to the surface, which would have been penetrated by the paint. The plaintiff's expert, on the other hand, made no analysis of cement taken from these walls. Moreover, the testimony of complainants' own witnesses shows that no substantial neutralization of the free lime could have occurred in the cement surface of the court. The complainants' expert testified that, if free lime had been eliminated from the surface temporarily by the oil, the fact that the walls were still wet and water was running through them would have resulted in more free lime percolating from the rear of the structure up to the surface. He also admitted that turpentine did not mix with water, but in fact repelled it. It is difficult, therefore, for us to see how the treatment given to the walls prior to the application of Zibell's Protectorine could have penetrated them at all. Prior to the application of the Protectorine to these walls the paints previously applied had been thoroughly scraped off, the walls then washed with turpentine, afterwards washed with washing soda and then washed again with water.

[2] In Andrews v. Cross (C. C.) 8 Fed. 269 (1881), Mr. Justice Blatchford, then Circuit Judge, said:

"It may be that the inventor did not know what the scientific principle was, or that, knowing it, he omitted, from accident or design, to set it forth. That does not vitiate the patent."

A long line of authorities shows that such is a well-established principle in the law. And if it is not necessary in order to sustain a patent that the inventor should understand the scientific principle which underlies his invention, it is also not necessary in order to invalidate the patent to show that one who made use of the same process to accomplish the same result prior to the patent understood the scientific principle. The Bell telephone transmits speech by transmitting it by means of electricity. But precisely how electricity operates under Bell's process, or what form it takes, neither Bell nor any one else knows. But that fact did not affect his right to obtain his patent. Telephone Cases, 126 U. S. 1, 8 Sup. Ct. 778, 31 L. Ed. 863 (1887). The scientific principle is no part of the process for which a patent is granted and does not need to be set forth. Emerson v. Nimocks, 99 Fed. 737, 40 C. C. A. 87 (1900); Eames v. Andrews, 122 U. S. 40, 7 Sup. Ct. 1073, 30 L. Ed. 1064 (1886).

Toch may understand better than Zibell the scientific principle involved in the process. He states in his specification:

"The acid filler above described reacts with the calcium compounds in the outer portion of the cement construction to form a hard resinate or other organic calcium salt, which serves as an efficient protective layer and which is reinforced by the second or exterior coating."

[3] And there is much in the brief submitted by his counsel on the chemical effect of the Toch mixture on a Portland cement construction. But chemical reactions as such are not patentable as a process and the references thereto do not aid us in the decision of the real question involved. That question is whether the Zibell Protectorine, which plaintiff says infringes his patent, was made and publicly used as now constructed more than two years prior to the application for the plaintiff's patent. If it was so used, and we are satisfied it was, then the remaining question is whether it was publicly known as well as used. And we think the proofs sufficiently show that it was so publicly known as well as used.

It may be that Zibell did not fully understand the scientific principle. But it is not necessary that either Zibell or the parties applying his Protectorine in 1903 should have known that an acid resin would react upon the free lime in the Portland cement and form calcium resinate. It is sufficient that it was known to Zibell what his Protectorine consisted of, and that the public knew of the result that would be accomplished by the application of the compound to Portland cement walls. We do not think it material that Zibell did not state in his advertisements or otherwise just what constituted the ingredients of his Protectorine, for it was open to any chemist to ascertain that for himself by making a chemical analysis.

It is clear to us that if Zibell, more than two years after the use of

it on the squash court, had applied for a patent on his Protectorine, claiming the process of applying the same material as previously used to a Portland cement wall, he could not have succeeded, or, if he did, could not have sustained the validity of his patent in the courts. We do not think that the fact that Zibell did not tell the public how to make Protectorine, as he would have had to do if he had applied for a patent, but kept its composition secret, precludes him now from defending a suit for the infringement of a patent, taken out subsequently for a like process accomplishing a like result.

In Walker on Patents, § 94, the law is stated as follows:

"To constitute public use, it is not necessary that more than one specimen of the thing invented should have been publicly used, nor that more than one person should have known of that use. Egbert v. Lippman, 104 U. S. 336, 26 L. Ed. 755 (1881). Nor is it necessary to public use that the article used could have been seen by the public eye if the ordinary use of such articles is veiled from view. Egbert v. Lippman, supra; International Tooth Crown Co. v. Gaylord, 140 U. S. 68, 11 Sup. Ct. 716, 35 L. Ed. 347 (1891); Walker on Patents, page 85."

We think the prior public use of Zibell's Protectorine thus shown to have been made cannot by any reasonable interpretation of the evidence be otherwise construed than as completely invalidating the patent in suit. The prior public use with knowledge is established beyond a reasonable doubt.

The prior decision of this court is correct, and is reaffirmed.

NATIONAL BINDING MACH. CO. v. LARKIN CO.

(Circuit Court of Appeals, Second Circuit. April 25, 1916.)

No. 247.

PATENTS ⇐328—INVENTION—BINDING MACHINE.

The Brownson patent, No. 913,614, for a strip-serving apparatus for moistening and delivering gummed tape for binding packages, while covering an improvement on prior devices, does not disclose the exercise of more than mechanical skill, and is void for lack of invention.

Appeal from the District Court of the United States for the Western District of New York.

Suit in equity by the National Binding Machine Company against the Larkin Company. Decree for defendant, and complainant appeals. Affirmed.

The plaintiff is a corporation existing under the laws of the state of Maine and has its principal place of business in New York City. The defendant is a corporation existing under the laws of the state of West Virginia and having its established place of business in the city of Buffalo, in the state of New York. On April 25, 1907, Earl L. Brownson, of Allston, Mass., filed an application in the United States Patent Office for a patent for an improvement in strip-serving apparatus. Thereafter Brownson assigned his interest therein to the plaintiff, and a patent was issued, No. 913,614, on February 23, 1909. This suit is brought under the patent laws for an infringement of that patent. The court below has entered a decree adjudging the three claims in suit, claims 6, 7, and 8, invalid for lack of invention, and has dismissed

the bill. The defendant is a user of the tape-moistening machines which are alleged to infringe the patent in suit.

The defense is controlled by and conducted at the expense of the Lang & Gros Manufacturing Company, Incorporated, which manufactured and sold these machines to the Larkin Company.

Emery, Booth, Janney & Varney, of New York City (Frederick L. Emery and Lucius E. Varney, both of New York City, of counsel), for appellant.

Harry L. Duncan, of New York City, for appellee.

Before COXE and ROGERS, Circuit Judges, and AUGUSTUS N. HAND, District Judge.

ROGERS, Circuit Judge (after stating the facts as above). This suit is brought for an alleged infringement of tape-moistening machines, sometimes called binding machines, and sometimes gummed tape machines. The plaintiff claims to have been a pioneer in building up during the past several years a new industry in the use of gummed tape as a substitute for string, cord, sealing wax, glue, and the like for sealing packages in the retail, wholesale, and manufactured trades; and at the present time shipments of small merchandise, whether by freight or express, are almost wholly in fiber cartons, sealed with these strips of gummed paper.

We are informed that the earlier art was restricted to the sealing of small packages, such as those sold over the counters of retail stores; and for such packages a small strip of one inch or an inch and a quarter tape was used. A very slight contact with the moistener was all that was needed in order to moisten sufficiently the thin and narrow film of glue which these tapes carried. While the tapes were narrow, light, and flexible, and while the packages to be sealed were small and light, it was not a matter of consequence if the operators, in drawing out the tape, failed to keep it perfectly true and in uniform contact with the moistener. So long as that condition continued uniform, thorough moistening does not seem to have been a vital or an essential factor. But it was not long before the advantages incident to the use of this method of sealing packages over other methods suggested the application of it to the sealing of larger and heavier packages in the wholesale and jobbing houses. This use, however, made it necessary to employ wider and heavier paper strips, more heavily gummed, and therefore more difficult to handle, moisten, and apply.

Economy in the use of these gummed paper strips as a substitute for other means of sealing depended upon the ability to apply rapidly and conveniently the tape to the package. It also depended upon obtaining a thorough, uniform, and effective moistening of the tapes. The necessity of using wider tapes made necessary heavier paper and heavier glue. The matter of the proper presentation of the end of the tape for seizure by the operator, preliminary to drawing out and moistening the tape and applying the same to the package, was also important.

The appellant's counsel inform us that the difficulty was to combine, in one and the same machine, two such opposite and apparently conflicting ideas as fixed mechanical control of the tape during such portion of its length as is necessary to insure proper and reliably uniform moistening, while at the same time leaving its end presented for convenient seizure, to be drawn from the machine in any necessary direction, at any desired speed, and with a large measure of abandon or carelessness, without danger of impairing the moistener or of breaking the strip. To this end they declare that there are four absolute requisites for the moistening and for the leading end of the tape:

"First, there must be fixed or unvariable mechanical control of the tape to maintain it at all times in its true service path, and such mechanical control must be organized to produce during the draft an effective pressure for moistening; second, the tape end must be freely accessible for immediate seizure by the operator; third, the tape end must not touch any part of the machine, either while at rest or while being drawn out, since, being wet, it would either stick to the machine, or its gummed surface would be rubbed off; fourth, the tape end must be of sufficient length for ready seizure, yet must not be so long that, having become dried, as where permitted to stand for several minutes in disuse, it cannot be remoistened before the strip is again drawn out for use."

And they tell us that the patent in suit solved for the first time the organization of a machine wherein these several last-named requisites were realized.

The claims in suit are 6, 7, and 8. Claim 6 reads as follows:

"A strip-serving device comprising, in combination a support for the paper strip, a strip moistener in juxtaposition thereto, a strip presser above and opposed to said moistener for holding said strip without deflection, in the true service path, thereby to eliminate waste or loss of movement and strip when serving the latter, and a fixed strip-severing device to act upon the strip and offset from the service path of the strip, thereby to require deflection of the strip for severing."

Claim 7 reads as follows:

"A strip-serving device comprising, in combination, a paper strip support, a strip moistener in juxtaposition thereto, means above said moistener to press said strip into effective contact with said moistener, thereby to eliminate waste or loss of movement and strip when serving the latter and a fixed strip-severing device to act upon the strip and offset from the service path of the strip, thereby to require deflection of the strip for severing."

Claim 8 reads as follows:

"A strip-serving device comprising, in combination, a paper strip support, a strip moistener in juxtaposition thereto, a presser above said moistener to maintain said strip during serving in effective contact with said moistener, thereby to eliminate waste or loss of movement and strip when serving the latter, and a fixed strip-severing device constructed and arranged relative to the service path of the strip to compel upward deflection of the strip for severing."

The defenses are anticipation, want of novelty, prior use, and noninfringement. The answer sets up some 21 prior patents to show that the patentee, Brownson, was not the first, original, and sole in-

ventor of any material or substantial part of the thing patented. We only find it necessary to refer to one or two of the prior patents.

Prior to the issuance of the patent in suit a patent had been granted by the United States Patent Office to one Piper, being patent No. 700,816. The device in that patent consists of a holder for a roll of gummed paper tape in combination with a roller for moistening the paper and a knife for cutting it off after it has been pulled out to the desired length. The combination is completed by a mechanism for removing the paper from the top of the roller, so that it will not stick to it. This it accomplished by having the paper before it reached the roller pass over a swinging guide which holds the free end away from the roller. The idea of this patent is that of a continuous roll of paper or tape, which was wet by being passed over a wet roller, and which was cut in various lengths as needed by a knife adjacent to the roller. The tape was then used for binding packages. The patent was the basis for a new method of making up parcels and it developed a new industry. The validity of the patent was sustained in National Binding Machine Co. v. James D. McLaurin Co. (C. C.) 186 Fed. 992 (1911), and in National Binding Machine Co. v. Eisler (D. C.) 197 Fed. 175 (1912).

On April 19, 1904, the United States Patent Office issued a patent, No. 757,565, to George Norwood, of Winthrop, Mass., assignor by mesne assignments to himself and John S. Richardson. The patent was for an improvement in strip-delivering apparatus. This patent now belongs to the complainant, and was granted about five years prior to the patent in suit. The Norwood patent, as the District Judge has pointed out, is an improvement on the Piper patent, and introduced as an additional element in the combination a strip lifter or guide, made of coiled wire or tubing, which served to guide the tape as it was pulled from the roller, and to raise it to keep the end from sticking to the moistener when the apparatus was not in use. In his specification Norwood stated that the invention had for its object "the production of an improved apparatus by which to deliver a gummed strip in any desired length to be used for wrapping bundles, the strip being used by merchants instead of string or india rubber bands."

The complainant now claims that the Norwood machine was not entirely satisfactory. His objection to it is that when the moistener in the machine was new it gave out a good deal of water, but after use it became water-logged and permeated with gum, and it did not give thereafter as much moisture as was desired, so that, when a tape apparently moistened at the time was applied to a corrugated fiber case, it would, as soon as it became dry, peel or lift. This difficulty arose from the fact that the moistener of the machine was stationary. Then an attempt to use a revolving moistener on the machine was made, and this was found less satisfactory than the stationary one, as it supplied too much water; the tape being saturated with the water, so that the tape, when pulled down over the box, would come right up again. Then a rotary or duplex moistener was tried. It was called duplex, because it would rotate and could be also made stationary by

lifting out of the sockets and putting it down in front of the water pan. The testimony shows that this duplex moistener worked better than the former ones, but that the machine still did not work satisfactorily. It also shows that in using the machine, unless an operator was very particular to pull the tape out slowly and straight and without twisting the hand, a piece of tape could not properly be moistened.

It is claimed that the Brownson machine of the patent in suit is not a rearrangement of an old machine, to make it work better, but a new machine, which works differently. It is also claimed that Brownson, by introducing presser means above and just forward of the median line of the moistener, so as to cause the tape to lead down from the highest point of the moistener, succeeded in producing a combination of elements whereby the moistening position of the tape was always maintained rigidly, and the short free end of tape which extended beyond the moistening area was projected into space by being held between said presser device and the moistener. Brownson's idea, it is said, differed from Norwood's in maintaining rigidity of confinement of strip over the entire area of contact. Brownson, it is also said, obtained by means of this rigidity and confinement of strip over the entire area of contact a thorough, uniform, and effective moistening grip, and by means of the short flexible end he secured accessibility, freedom from fouling, and opportunity of remoistening the end of strip, if it became dry. It is also claimed that Brownson's presser device, by being located above and just forward of the median line of the moistener, so that the tape would lead slightly downward therefrom, would perform three functions, namely: It would act with the moistener during draft to produce a uniform, constant and effective moistening contact; it would act with the knife after severance to cause the tape to spring away therefrom; and then it would act with the moistener again to maintain the end of the strip projecting freely into space from fouling, and ready for immediate seizure and remoistening, if desired.

Now it may be conceded that the Brownson machine is an improvement upon the Norwood machine. The Norwood machine, while working satisfactorily with a 35-pound tape, did not work satisfactorily with a 60-pound tape, and packages so sealed became unsealed. And it may be conceded, too, that patentable novelty is sometimes found in discovering what is the difficulty with an existing structure and what change in its elements will correct the difficulty. Miehle Printing Press Co. v. Whitlock Co., 223 Fed. 647, 650, 139 C. C. A. 201 (1915). But the question now is whether Brownson, seeing what was wrong with the Norwood machine, and in devising the means he did for the better moistening of the strip and for freeing the strip end after it was moistened and leaving it protruding for seizure, is entitled to say that what he did amounted to invention. In Dunbar v. Meyers, 94 U. S. 187, 197, 24 L. Ed. 34 (1876), the court said:

"Invention or discovery is the requirement which constitutes the foundation of the right to obtain a patent; and it was decided by this court, more than a quarter of a century ago, that unless more ingenuity and skill were required in making or applying the said improvement than are possessed by

an ordinary mechanic acquainted with the business, there is an absence of that degree of skill and ingenuity which constitute the essential elements of every invention. Hotchkiss v. Greenwood, 11 How. 267 [13 L. Ed. 683]."

We do not see that what Brownson did involves that degree of skill and ingenuity which constitutes invention and entitled him to a monopoly. The record shows that machines having the same object in view as that of the complainant were well known long prior to the date of the Brownson patent. Many of them performed all the functions of the Brownson patent in suit, not perhaps with the same certainty and precision, but effectively and satisfactorily. After the Piper and Norwood patents, nothing but mechanical skill was required to produce the changes and improvements which the popularity of the machines demanded. The prior patents, and there are many of them, all accomplished the desired result of sticking the strip to the desired surface, and the art shows a continuous evolution towards improvement, as new situations arose and new use for the tape developed. To make these improvements, after the broad principle had been shown Brownson by the prior patentees, required only the attention of an intelligent mechanic, who knew how to adapt the machine to the new uses.

Decree affirmed.

PALMER et al. v. JOSEPH.

(Circuit Court of Appeals, Second Circuit. May 24, 1916.)

No. 271.

PATENTS ⇐328—INVENTION—BOLT ANCHOR.

The Newton patent, No. 725,279, for a bolt anchor designed to anchor threaded bolts or screws, when inserted in cement or similar material, *held* void for lack of patentable invention, in view of the prior art.

Appeal from the District Court of the United States for the Southern District of New York.

Suit in equity by Frederick C. Palmer, the Clements Company, and the Star Expansion Bolt Company against Carl Joseph. Decree for defendant, and complainants appeal. Affirmed.

E. W. Marshall, of New York City, for appellants.

Richard Eyre, of New York City, for appellee.

Before COXE, Circuit Judge, and HOUGH and MAYER, District Judge.

HOUGH, District Judge. The subject-matter of this patent is a "bolt anchor," a device intended for giving fixity and security to screws and threaded bolts, when inserted in material which does not readily or permanently "bite" upon the screw thread. It is primarily intended, under modern conditions, for use in connection with the insertion of bolts and screws into cement. The art is an old one, and we perceive

⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

no difference requiring discussion between the problem of securing screws (or similar contrivances) in cement or concrete, and doing the same thing in soft wood or any other material or substance which does not firmly and permanently contact with the ordinary helical thread of one of the most familiar appliances of the building trade.

The first claim is typical, and is as follows:

"1. A bolt anchor consisting of a plurality of sections each composed of spirally corrugated metal and the walls of which are of uniform thickness throughout and forming, when assembled, a spirally corrugated tube."

When this claim is compared with the specifications, and the scope and nature of the invention there discovered, the device is seen to consist of a plurality of sections (obviously intended to be stamped out of sheet metal) two of which incase the screw or bolt and are intended to be wedged or driven into the surrounding material by the act of driving in the screw. Exactly as described, we are satisfied that the patentee's plan was inoperative, a belief confirmed by the admitted fact that such exact thing has never passed into commercial use. This action is upon a "paper patent" of the plainest kind.

The prior art is crowded; but one reference seems to us sufficient. The patent to Held (No. 606,925) specifically covers:

"An internally screw-threaded longitudinally divided bushing adapted to be seated in a suitable opening and to receive the screw and to be expanded thereby."

A more accurate description of what this patentee sought to accomplish cannot be given. In our opinion the Held patent completely anticipated what this patentee shows and claims, with the possible exception of one portion of the fourth claim, wherein the corrugated tube (which is the bolt anchor or bushing) is stated to be provided "with a smooth noncorrugated portion at its outer end."

In this case that "smooth noncorrugated portion" is called the "open mouth," and much has been made of it. In considering the results of common observation, as well as the diagrams and specifications of prior patents, one of the rarest of screw-threaded implements is an article having the helical thread continued to the screw or bolt head. There is almost always a smooth unthreaded portion at the top of a screw, and the so-called "open mouth" is no more, and was not intended to be anything more, than a convenient receptacle for that portion of a familiar and ancient device.

In our judgment no patentable invention is shown, and for this reason the decree is affirmed, with costs.

ROBINS CONVEYING BELT CO. et al. v. LINK BELT CO.

(Circuit Court of Appeals, Second Circuit. April 11, 1916.)

No. 211.

1. PATENTS ⟸328—VALIDITY AND INFRINGEMENT—BELT CONVEYER.
The Robins patent, No. 571,604, for belt conveyer mechanism, claim 5, *held* not infringed.

2. PATENTS ⟸328—VALIDITY AND INFRINGEMENT—BELT CONVEYER.
The Robins patent, No. 919,638, for idler pulleys for belt conveyers, claims 3 and 4, *held* void for lack of invention, and claims 1, 2, and 5, narrowly construed, as required by the prior art, *held* not infringed.

Appeal from the District Court of the United States for the Southern District of New York.

Suit in equity by the Robins Conveying Belt Company and Thomas Robins, Jr., against the Link Belt Company. From the decree, complainants appeal. Affirmed.

Plaintiffs' bill charged infringement of claims 5 and 6 of Robins patent, No. 571,604 (which patent expired shortly after the filing of the bill), and also of claims 1, 2, 3, 4, and 5 of Robins patent, No. 919,638. The decree appealed from (by plaintiffs only) adjudged that, as to patent 571,604, claim 5 was valid and not infringed, and claim 6 valid and infringed, and as to patent 919,638 that claims 1, 2, and 5 were valid, but not infringed, and claims 3 and 4 were invalid for lack of invention.

E. Bright Wilson, of New York City (John R. Nolan, of New York City, of counsel), for appellants.

Howson & Howson, of New York City (Parker & Carter and Francis W. Parker, all of Chicago, Ill., of counsel), for appellee.

Before WARD and ROGERS, Circuit Judges, and HOUGH, District Judge.

HOUGH, District Judge. [1] As the defendant has not appealed, it is not deemed necessary to consider any matters, except those necessarily raised by plaintiffs' assignments.

Both the patents in suit relate to certain details of belt conveyer devices. Apparatus of this kind transports upon an endless belt (sometimes of great length) material such as coal or ore that may be thrown upon it at any convenient point. Such belts may be flat or curved, according to the configuration of the carrying or idler pulleys upon which they run.

Claim 5 of 571,604 [1] shows a particular arrangement of the idlers so disposed in relation to each other as to enable certain oiling de-

[1] This claim is as follows: "The supporting pulleys *L*, *K*, *L*, the hollow bearings *F* therefor, and the horizontal and turn-up hollow shafts secured in the said bearings, and the oil devices mounted on the ends of the turn-up shafts, substantially as set forth."

vices to be applied in the manner specifically shown by one of the patent drawings. As to this claim it is sufficient to say that it is by its terms confined to the especial apparatus displayed, and is not infringed by anything that defendant has made or used.

[2] No. 919,638 relates to an arrangement of old and well-known idler pulleys such as to raise the edges of the belt so as to produce a troughlike form of carrier. Conveyers of this form were by no means unknown in the prior art, and it is not contended that the patent is a pioneer.

Claims 3 and 4 of this patent [2] cover a combination of which one essential element is means for safely adjusting each main bracket upon a common support for both brackets. The prior patent to Lynch, 625,342, shows a single solid bracket adjustable in exactly the same manner as is applied by Robins to his separate brackets. We agree with the court below in thinking that such application of means of adjustment to two brackets, when it was well known in respect of one, is "pushing mere novelty into the place of invention." Both these claims were properly held void for lack of invention.

Claims 1, 2, and 5 [3] describe a machine in which the auxiliary or side brackets are secured to and adjustable with one of the main brackets. The object of such adjustability is to make the auxiliary bracket an extension of the main one, to the end that when the main bracket is adjusted, or rectified, when necessary, the auxiliary or side bracket must go with it and be governed by the adjustment of its parent. An examination of the file wrapper shows that this characteristic of Robins' invention was by the Patent Office considered essential to the grant prayed for. It is certain that the prior patents of Plummer, No. 728,005, Phillips, No. 706,848, and Blake, British (1904) 26,036, rendered this position on the part of the examiner correct. The defendant's apparatus shows no auxiliary or side brackets in the sense that that phrase was used by Robins and allowed by the Patent Office. Therefore there is no infringement.

The decree below is affirmed, with costs.

[2] Claim 3 is as follows: "An idler pulley structure for belt conveyers, having two main or inner brackets and a pulley supported between them, means for adjusting each one of the said main or inner brackets upon a common support for the two, and two auxiliary or side brackets each of which is secured to and is adjustable with one of the main or inner brackets, and pulleys supported between the main or inner brackets and the auxiliary or side brackets."

[3] Claim 1 is as follows: "An idler pulley structure for belt conveyers having two inner brackets, a pulley supported between them, auxiliary or side brackets each forming an extension of and removably mounted or secured to one of said inner brackets, pulleys supported between the inner and the auxiliary or side brackets, and means for securing the said brackets to a suitable support therefor, and inclined shafts mounted in and extending outward from the auxiliary or side brackets with pulleys mounted thereon."

SAFETY CAR HEATING & LIGHTING CO. v. UNITED STATES LIGHT & HEAT CORP.

(District Court, W. D. New York. February 15, 1916.)

PATENTS ⊜301(1)—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION.

Motion for a preliminary injunction to restrain infringement of the Creveling patent, No. 747,686, for a car-lighting system, denied on the ground that the showing made leaves the question of infringement in such doubt that it should only be determined on a full hearing.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 489, 493; Dec. Dig. ⊜301(1).]

In Equity. Suit by the Safety Car Heating & Lighting Company against the United States Light & Heat Corporation. On motion for preliminary injunction. Denied.

Duell, Warfield & Duell, of New York City, for plaintiff.
Jones, Addington, Ames & Seibold, of Chicago, Ill., for defendant.

HAZEL, District Judge. Motion for preliminary injunction in an action for infringement of the Creveling patent No. 747,686, for a car-lighting system—one employing an axle-driven dynamo in connection with a storage battery, and electrical regulation in supplying current to the lamps. The said patent was involved in an earlier litigation between the complainant and the United States Light & Heating Company, defendant's predecessor, and was held valid and infringed by the adaptation of the so-called stop charge and taper charge apparatus. 222 Fed. 310, affirmed 223 Fed. 1023, 138 C. C. A. 651. In view of the novelty of the invention and its mode of operation, the claims involved in the earlier litigation, which included claims 3, 4, and 8 herein relied upon, were accorded a liberal construction, and were not limited to the specific means described for operating the invention.

At the accounting proceeding, which followed, it appeared that the defendant's predecessor had modified its car-lighting systems and added to them an ampere hour meter, the invention of Wm. L. Bliss, assignor of defendant. Complainant, claiming that such modifications and changes were colorable and evasive of the adjudicated stop charge and taper charge systems, moved to enlarge the accounting to include them; but upon objection by defendant the court held that the better practice required filing an original bill alleging infringements. This suit was thereupon instituted, and motion made to enjoin the manufacture and sale of the so-called first and second ampere hour systems marketed by defendant's predecessor and third ampere hour system manufactured by the defendant.

The claims in issue broadly include means for maintaining the output of the dynamo practically constant throughout changes in speed; (3) electro-magnetic means for determining the output to be maintained; (4) means for holding current output practically constant; and (8) a regulating device for regulating the output of the dynamo, and sup-

plemental means for controlling the regulating device to determine the output. The specification and claims cover (a) a system of control and regulation for maintaining constant dynamo output, regardless of the lamp load and variations in train speed until the storage battery becomes charged; and (b) automatic means which then come into play to reduce the output and prevent the battery from being overcharged. The specific means for accomplishing the result need not be here stated, as they are set forth in the reported opinion in the prior litigation. It should, however, be understood that the patentee adapted a regulating coil in series with the main lead to regulate and control the current passing to the battery and lamps.

In the prior litigation we were concerned with apparatus wherein the dynamo output was held constant until the protecting means required a lower standard or rate of output, namely, when the storage battery became fully charged. Defendant has included in its combination a regulating coil, positioning it, however, in the battery circuit, and not, as in complainant's patent, in series with the main circuit. By reason of such arrangement of the regulating coil, according to defendant, a constant battery charging current is obtained with lamp load changes in the dynamo output only, as distinguished from a constant dynamo output, regardless of any variations in train speed or lamp load. Defendant also urges that the battery voltage in its apparatus does not govern or control the current reduction, but that it depends on the quantity of current supplied to the battery, and contends that the operation of its apparatus is widely disparate from complainant's.

It may be true, as testified by Hammer, that the regulator coil of defendant's apparatus operated to maintain a constant current supply to the battery throughout changes in train speed, owing to the disconnection of the wire conductor leading to the main switch *16* and its connection with the lower side of the current coil; but at least five witnesses for defendant have testified that this did not produce or maintain a constant current supply to the battery through variations of lamp load, and have denied that the telegraphic relay interposed in one system was capable of easily producing constant dynamo output, or that the quantity was diminished by the adjustment of a screw when the voltage rose, and the battery thus protected.

It is true that the indicated differences of construction are not of material importance if they relate simply to details of operation, as the patent in suit was accorded a broad construction in the prior litigation, owing to the original adaptation by Creveling of what was believed to be a new and novel principle of operation in car lighting; but the scope of the claims does not control this application, unless the defendant's apparatus is operated upon the Creveling principle. The opposing affidavits require something more than a mere ascertainment of whether by its modification the defendant is endeavoring to evade infringement by a colorable device. The stop charge and taper charge systems have been abandoned; and defendant claims to have embodied in its present structure only the essential elements of two prior McElroy patents, Nos. 720,609 and 893,533, respectively, to which was add-

ed the ampere hour invention for battery protection, and that in such prior patents the means for regulation consisted essentially of a voltage or potential regulation, not of a constant generator output regulation during speed variations.

The argument is that the complainant's and defendant's systems are operated upon entirely different principles, and are in fact opposites. Indeed, four witnesses for defendant, skilled and trained in the art, Bliss, Lunn, Turbayne, and Professor Kennelly (some of whom have been granted patents for car axle lighting systems), swear positively that there are essential differences in the principles and modes of operation of the systems under consideration, and the reasons for their conclusions are stated with considerable detail. Under the circumstances, then, and without regard to the prior adjudication, I have a serious doubt as to whether defendant's systems, as now arranged and operated, are infringements. I may state, however, that any doubt I entertain is based chiefly upon the showing that defendant's apparatus is adapted to the disclosures of the McElroy patents, with the addition of the Bliss ampere hour meter.

The contention of complainant has not been overlooked that defendant does not in fact manufacture its apparatus under the McElroy patents; that it has departed from the feature of constant voltage during battery charging, and instead utilizes constant current during battery charging; and that it has departed substantially from the second McElroy patent. But, in view of the conflict that has arisen between complainant's expert witness and the defendant's witnesses, I am constrained to ignore this assertion. Besides, the case is one involving a difficult and abstruse question, and before enjoining the structures, as requested, I think I should have the benefit of the examination and cross-examination of witnesses at final hearing, to the end that the testimony in its entirety may be considered and weighed.

The motion for a preliminary injunction is denied.

LOWENTHAL v. GEORGIA COAST & P. R. CO.

(District Court, S. D. Georgia. July 12, 1916.)

1. RAILROADS ⊜205—RECEIVERS—APPOINTMENT—GROUNDS FOR.
Where a railroad corporation is unable to pay its currently accruing interest, it is actually insolvent, and its property being insufficient security for the mortgage debt, it may be placed in the hands of a receiver.
[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 673–675; Dec. Dig. ⊜205.]

2. MORTGAGES ⊜407—FORECLOSURE—PROVISIONS RESTRICTING.
Provisions in a mortgage restricting foreclosure must be strictly construed.
[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1170, 1171; Dec. Dig. ⊜407.]

3. EQUITY ⊜363—PLEADING—MOTION TO DISMISS—EFFECT OF.
On motion to dismiss a bill, its averments must be treated as true, the same as in case of a demurrer.
[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 762–766, 768; Dec. Dig. ⊜363.]

4. RAILROADS ⊜180—FORECLOSURE OF MORTGAGES—ACTION BY TRUSTEE.
Though a mortgage given to secure an issue of bonds by a railroad company provided that it should not be foreclosed, save on request of one-third of the bondholders, nevertheless, where the company defaulted in payment of interest and the security was in danger, a bondholder may sue to foreclose the mortgage, the trustee refusing to take steps for the protection of the bondholders.
[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 605–609; Dec. Dig. ⊜180.]

5. RAILROADS ⊜180—FORECLOSURE OF MORTGAGES—CONDITIONS PRECEDENT.
A mortgage securing railroad bonds provided that bondholders before they could require the trustee to foreclose should offer to indemnify the trustee to its reasonable satisfaction. The railroad company defaulted in payment of interest, and a committee of the bondholders was formed, which committee had powers usurping the functions of a court of chancery in that it was authorized to dispose of the property of the corporation without liability save for bad faith, and to execute obligations which would constitute a prior lien thereon. The committee or any of its members also were authorized to buy in the property of the railroad company. *Held*, that where the trustee because of the existence of the committee refused to foreclose the mortgage, a suit for the appointment of a receiver to foreclose the mortgage by a bondholder not joining in the arrangement, cannot be dismissed because indemnity was not offered.
[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 605–609; Dec. Dig. ⊜180.]

6. RAILROADS ⊜180—MORTGAGES—FORECLOSURE.
A provision in a mortgage securing railroad bonds that a bondholder should not proceed to enforce his equitable right of foreclosure without giving indemnity to the reasonable satisfaction of the trustee is too vague to warrant dismissal of a foreclosure suit by a bondholder who offered no indemnity.
[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 605–609; Dec. Dig. ⊜180.]

7. RAILROADS ⊜180—FORECLOSURE OF MORTGAGES—CONDITIONS.
Where the trustee unconditionally refused to foreclose a mortgage, regardless of the giving of indemnity, a suit by the holder of bonds to secure which the mortgage was given, will not be dismissed because he had not

offered to furnish indemnity as required, for a person is not required to do a vain thing.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 605–609; Dec. Dig. ⟸180.]

8. RAILROADS ⟸186—FORECLOSURE OF MORTGAGES—NECESSARY PARTIES.

Judicial Code, § 50 (Act March 3, 1911, c. 231, 36 Stat. 1101 [Comp. St. 1913, § 1032]), provides that when there are several defendants and one or more of them are neither inhabitants nor found within the district in which suit is brought and do not voluntarily appear, the court may entertain jurisdiction and proceed to trial and adjudication of the suit between the parties who are properly before it, but the judgment or decree rendered shall not conclude or prejudice other parties not regularly served nor voluntarily appearing. Equity rule 39 (198 Fed. xxix, 115 C. C. A. xxix) provides that in all cases when it shall appear to the satisfaction of the court that persons that otherwise might be deemed proper parties cannot be made parties by reason of their being without the jurisdiction, or because their joinder would oust the jurisdiction, the court may, in its discretion, proceed without making such persons parties, but the decree shall not be binding on them. In a suit to foreclose a mortgage given by a railroad company to secure bonds, the complaining bondholder was without the state while the railroad company was a local corporation and its line was within the district. *Held*, that the trustee which was a foreign corporation was not an indispensable party, and as the security was imperiled and the appointment of a receiver was prayed, the case might be proceeded with, though the trustee was not joined.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 615, 616; Dec. Dig. ⟸186.]

9. COURTS ⟸328(1)—JURISDICTION—FEDERAL COURTS—AMOUNT IN CONTROVERSY.

Where a railroad company had for some time defaulted in the payment of interest on its bonds, a suit by a holder of bonds to the value of $6,000 to foreclose a mortgage given to secure the whole issue, which amounted to a very large sum, is one within the jurisdiction of the federal district court, though the amount of the unpaid interest installment on the bonds of complainant did not equal $3,000; the default in the payment of interest rendering the principal due.

[Ed Note.—For other cases, see Courts, Cent. Dig. § 890; Dec. Dig. ⟸328(1).]

In Equity. Bill by David Lowenthal against the Georgia Coast & Piedmont Railroad Company. On motion to dismiss bill. Motion denied.

C. Henry & R. S. Cohen, of Augusta, Ga., and Max Isaac, of Brunswick, Ga., for plaintiff.

Adams & Adams and Hitch & Denmark, all of Savannah, Ga., for defendant.

SPEER, District Judge. [1] The Georgia Coast & Piedmont Railroad Company is a corporation of this state. Its railway line extends from the port of Brunswick into the interior of the state. The mortgage was made to secure bonds in the amount of about $1,600,000, the proceeds of which were designed for the construction of the defendant's railway lines, depots, etc. About 100 miles of the road have been constructed, and are in actual operation. Lowenthal holds and owns bonds in the amount of $6,000. The interest thereon, maturing in

October of the last year, and in April of this, is in default. The plaintiff has made a demand in writing upon the trustee, the Columbia Trust Company, of New York, requiring it to take immediate action to foreclose the mortgage or deed of trust, to secure the bonds and the interest thereon. The default of the October interest has lasted for more than three months. The railway corporation is alleged to be insolvent, and the bill seeks the appointment of a receiver for the purpose of foreclosing the equity of the bondholders in the property.

"Where a railroad corporation is unable to pay its currently accruing interest, it is actually, as well as technically, insolvent, and its property inadequate security for its mortgage debt, and it may be put in the hands of a receiver." 94 Fed. 276, 36 C. C. A. 242, Central Trust Co. of New York v. Chattanooga R. & C. R. Co. et al. (Owen et al. v. Jones).

The trustee, notwithstanding this demand, has refused to take the action requested. This bill was presented to the court, Judge Speer presiding, when actually in session at Savannah, in the Eastern Division of the Southern District. Its consideration in limine was continued by the court until the next week when the court would be in session in Augusta. At that time, and on the day assigned, a rule nisi was ordered, directing the defendants to show cause at Macon in the Western Division of the district, why the relief sought should not be granted. This rule was duly served, and came on for hearing on the day when it had been assigned. The respondents filed no answer, but relied upon a motion to dismiss the bill. Since then, a highly important amendment was filed, and the defendant has also filed its answer to the rule to show cause. The motion to dismiss is based on the following grounds:

First. That one-third of the persons holding bonds outstanding, secured by the mortgage, had not called upon the trustee to take action to foreclose the same.

Second. That the bill does not show an offer on the part of the plaintiff to indemnify the trustee to its reasonable satisfaction, when the demand for foreclosure was made.

Third. That the trustee was not made a party defendant, although under the allegations of the bill, it is an indispensable party.

Fourth. That the requisite jurisdictional amount, exclusive of interest and costs, is not involved.

[2-4] In Toler v. East Tennessee, Virginia & Georgia Railway Company (C. C.) 67 Fed. 168, Judge Lurton, afterwards Associate Justice, rendering the opinion, declared that:

"If there is any proposition well settled in the courts of the United States, it is that limitations contained in a mortgage, restricting the right of foreclosure, must be strictly construed."

There may be some departure from this rule among the state courts, but in the national courts it is uniform.

The learned circuit judge makes this significant statement:

"If the provisions of the mortgage concerning foreclosure were subject to the construction that they are exclusive of all right to resort to a court of equity, then the mortgage, itself, would be invalid, as intended to oust the

jurisdiction of the courts, which, by a uniform current of authority, cannot be done."

See, also, Guarantee Trust & Safe Deposit Company v. Green Cove Springs & M. R. Company, 139 U. S. 143, 11 Sup. Ct. 514, 35 L. Ed. 116. In that case, and on its last page, Mr. Justice Brown for the court observes:

"We think that such limitations upon the power of the trustee to take legal proceedings to enforce payment of the amount secured, should be strictly construed." "In this case, the condition only relates to the taking possession of the property under the deed of trust, * * * and we think it should not be held to apply to foreclosure proceedings begun in a court of competent jurisdiction to obtain a judicial sale of the property."

Justice Brown, for the unanimous court, continues:

"It is true there is a subsequent provision in the deed of trust, to the effect that neither the whole nor any part of the premises mortgaged shall be sold, under proceedings either at law or equity, for the recovery of the principal or interest of the bonds, it being the intention and agreement of the parties that the mode of sale provided by the mortgage shall be exclusive of all others. This clause, however, is open to the objection by attempting to proceed against a remedy in the ordinary course of judicial proceedings, and oust the jurisdiction of the courts, which, as is settled by the uniform current of authority cannot be done."

The learned justice here cites many authorities.

In that case it appeared in the answer that the mortgage or deed of trust required that 60 per cent. in value of the outstanding bondholders should request the trustee in writing to initiate proceedings, and that no such request was alleged in the bill. The circuit court dismissed the bill, and its decree was, by the Supreme Court, reversed. The conditions in the case before the court are very similar.

In Farmers' Loan & Trust Company v. Northern Pacific Railroad (C. C.) 66 Fed. 174, the rule that, in general, courts can deal with bondholders only through their trustee, is declared to have its exceptions. It is merely a rule of convenience to facilitate the conduct of the suit. It proceeds upon the assumption that the cestui que trust can be fully and freely represented and protected in his rights by the trustee or his representative. A rule of convenience must, however, give way when rights are involved. If it appears that the trustee refuses or neglects to act, or stands in a hostile position, or has assumed a position prejudicial to the interest of the cestui que trust, the rule is put aside and the cestui que trust admitted to represent his right, because in such case the trustee has not or cannot fully and faithfully represent them. See, also, Jones on Corporate Bonds, 338.

The averments of the bill point out that the trustee has both refused and neglected to perform its duty, and such averments, for the purpose of this action to dismiss as in case of a demurrer, must be taken as true.

[5-7] The contention that the bill should be dismissed because it does not show an offer on the part of the plaintiff to indemnify the trustee to its reasonable satisfaction cannot be maintained. It is the prime duty of the trustee to preserve the life of the estate. This is

the security of the plaintiff's bonds. The averments in the bill that no interest has been paid, that the labor, and that its trestle across the Altamaha swamp is in such a precarious condition that the lives of its employés and the traveling public are daily endangered, and that it has utterly failed to provide for its installments of interest, are all to the effect that this primal duty has been ignored. Also for the purposes of this motion these averments must be taken as true.

In addition to this, the agreement between certain bondholders and certain persons who call themselves "The Committee," to an astonishing extent, usurps the power of a court of chancery, to protect and in proper case to administer the property pledged as security. It provides for a sale of the property at a price to be fixed by the committee. It provides that the committee, or any member, may buy it in, and obtain the absolute title. It authorizes the committee to place any liens upon the property, superior in priority to the claim of the bondholders, and to fix the degree of the priority of such liens inter sese, to issue receivers' certificates, to fix their own compensation and that of their counsel and employés, and pay it out of any cash or any values on hand, to penalize the bondholders who do not enter into the agreement, and to do many other things equally astonishing when considered in the light afforded by the principles of equity. In other words, it completely eliminates the powers which the court exercises in chancery under such conditions, conferring them upon what is termed "The Committee," which, itself, is relieved from all liability except for positive malfeasance. A copy of this agreement is attached to the amendment, and again, for the purposes of this motion, it must be considered as genuine.

The further contention that the bill should be dismissed because no indemnity has been offered the trustee to its reasonable satisfaction also cannot prevail. In the present status of the record the court cannot discover that the trustee has been endangered or made subject to loss because the bill has been filed. The court will not require the suitor apparently entitled to relief to do an idle thing. Besides, the stipulation, that the bondholder shall not proceed to enforce his equitable right without giving indemnity to the reasonable satisfaction of the trustee, is a stipulation too vague and indefinite to oblige the court to imperatively refuse the plaintiff the opportunity to be heard.

Besides, the trustee has refused the demand of the plaintiff that it proceed to foreclose, not because there was offer of indemnity, but because it did not mean to foreclose, and because it had assumed a duty conflicting with foreclosure. Cochran v. Pittsburg, S. & N. R. Co. et al., 150 Fed. 682, decision of Judge Hazel. The plaintiff, therefore, cannot be called upon to indemnify the trustee for an act which the latter had no intention to perform. Had the trustee proceeded to foreclose, pursuant to the demand of the plaintiff, he might with greater show of right have called for indemnity; but surely the plaintiff will not be required to indemnify it for what it declares it will not do. The case of Linder v. Hartwell (C. C.) 73 Fed. 320, also is authority to negative the contention that the bill cannot be maintained, unless two-thirds of the bondholders authorize a foreclosure. Since a large majority, as it appears from the pleadings, have deposited their bonds

with the trustee as depositary, this contention of superiority would wholly close the door of the court to the minority bondholders whatever their rights.

[8] The contention that the bill must be dismissed because the trustee is not made a party defendant is equally unfounded. The trustee is a corporation and a citizen of New York. It is not found in this district, and does not voluntarily appear. But the railway property is here, and to this the lien and mortgage securing plaintiff's bonds inheres. Here, also, is the defendant corporation a corporation of this state.

In such cases, the court may entertain jurisdiction and proceed to the trial and adjudication of the suit between the parties who are properly before it, but the judgment and decree rendered therein shall not conclude or prejudice other parties not legally served with process, nor voluntarily appearing to answer. A nonjoinder of parties who are not inhabitants of nor found in the district as aforesaid shall not constitute matter of abatement or objection to the suit. Judicial Code, § 50.

The rule in equity, No. 39 (198 Fed. xxix, 115 C. C. A. xxix) also negatives the contention. It provides that in all cases where it shall appear to the court that persons that might otherwise be deemed proper parties to the suit cannot be made parties by reason of their being without the jurisdiction of the court, or incapable otherwise of their being made parties, or because this joinder would oust the jurisdiction of the court as to parties before it. The court may in its discretion proceed in the cause, without making such persons parties, and in such cases the decree shall be without prejudice to the rights of the absent parties. Thus Congress has taken action to remove the obstacle in the way of the plaintiff and the court which this motion to dismiss seeks to introduce.

Obviously, to join the trustee as a party, as a citizen of another state, at this time, when it cannot be served, would be to hazard the jurisdiction of the court, to grant the preliminary relief now sought. While the trustee may be a proper party, and may be heard as to any right it may set up, it is clearly not an indispensable party to this application.

[9] Nor can the court assent to the proposition that there is here involved less than the amount necessary to give us jurisdiction. True, only four installments of interest are due, but the principal on which the interest was in default is also in grave hazard. The plaintiff owns bonds secured by the mortgage in the amount of $6,000. The mortgage itself is intended to secure a much greater amount. The railway property, which is pledged to secure the debt, is also involved. This question is determined adversely to the motion to dismiss in Edwards v. Bates County, 163 U. S. 269, 16 Sup. Ct. 967, 41 L. Ed. 155, opinion by Mr. Justice White. See, also, Barry v. Edmunds, 116 U. S. 560, 6 Sup. Ct. 501, 29 L. Ed. 729; Wilson v. Daniel, 3 Dall. 401–407, 1 L. Ed. 655; Smith v. Greenhow, 109 U. S. 669, 3 Sup. Ct. 421, 27 L. Ed. 1080.

The amount in the controversy here is not only the unpaid coupons of interest, but the amount of the plaintiff's bonds, the security of

which, if the averments of the bill are true, which is of large value, is in imminent hazard.

It follows that in view of the considerations here stated, the motion to dismiss the bill, on all grounds, must be overruled and denied. An order may be taken to that effect.

LOWENTHAL v. GEORGIA COAST & P. R. CO.

(District Court, S. D. Georgia. July 13, 1916.)

1. RAILROADS ⟸205—RECEIVERS—APPOINTMENT—RIGHT TO APPOINTMENT.
A railroad company which issued bonds for construction purposes defaulted in the payment of interest and its line was in such a precarious condition that it endangered the lives of passengers and trainmen. Taxes to a large sum were unpaid and there were claims for labor and materials. Thereupon a considerable number of the bondholders deposited their bonds with the trustee, giving control to a so-called committee which was authorized to issue obligations which should be prior liens, to dispose of the property and to buy it in, either for themselves or others. The committee, in fact, was given all the powers of a court of chancery, and no steps were taken for the protection of bondholders who would not join. *Held* that, in such case where the tax liens paid were preserved by the committee paying them, and the property was in a precarious condition, a receiver might be appointed at the suit of a minority bondholder who desired to foreclose the mortgage securing the bonds; the trustee refusing to act.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 673–675; Dec. Dig. ⟸205.]

2. RAILROADS ⟸186—FORECLOSURE OF MORTGAGES—INDISPENSABLE PARTIES.
In such case, where the committee and its depositary were citizens of other districts, and an attempt to join them would imperil the foreclosure suit and proceedings for a receiver, they were not parties indispensable to the appointment of a receiver.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 615, 616; Dec. Dig. ⟸186.]

In Equity. Bill by David Lowenthal against the Georgia Coast & Piedmont Railroad Company. On application for receiver. Receiver appointed.

C. Henry & R. S. Cohen, of Augusta, Ga., and Max Isaac, of Brunswick, Ga., for plaintiff.

Adams & Adams and Hitch & Denmark, all of Savannah, Ga., for defendant.

SPEER, District Judge. [1] The general nature of this case is, perhaps, sufficiently stated in the opinion on the demurrer rendered on yesterday and now of file. The hearing this morning is as to the necessity for a receiver. That the railroad of the defendant company is hopelessly insolvent is undisputed. When the bill was filed, it was indebted to the state and county for taxes in the sum of $5,000 unpaid taxes; for the unpaid wages of laborers and operatives in an amount approximately the same; upon the liens of materialmen and similar liens having priority in the amount of about $15,000. The grand jury of the county of McIntosh, in its general presentments, had recom-

mended that the county officers take energetic action to collect the taxes.

The bonds were issued to construct the railroad in 1912. In that and in each subsequent year the interest thereon was unpaid, and is now in default in the sum of $320,000. A portion of this interest was sought to be refunded by debentures, but the interest on the debentures was also unpaid. After this bill was filed and injunction granted, prohibiting such action, the defendant company obtained from certain bondholders who have entered into a scheme to which reference will be presently made, about the sum of $20,000, with which the taxes and other liens of high priority have been paid. This sum was obtained, however, by issuing additional debentures, which were taken over in New York, and, according to the statement of the comptroller general of the state, the liens thus taken up were deposited with the Railway Developing Company in New York City, and therefore are in full force and effect as prior obligations of the defendant company.

In addition to this, the railway property and particularly the trestle over the Altamaha swamp are shown to be in a condition gravely hazardous to the traveling public. Now one calamity might occur at this point, which, in the damages and loss of life resulting, might destroy or at least largely minimize the security upon which the plaintiff has the right to rely for the payment of his bonds. A far greater danger to that security, however, is to be found in the agreement between a majority of the bondholders of the defendant company or its solicitors and certain persons who term themselves "The Committee," which, if carried into effect, will not only obliterate the property itself, but confiscate the interest of the plaintiff and all others who do not enter into this cause. This provides that the Columbia Trust Company, which was the trustee named in the mortgage for all the bondholders, shall be the depositary under the agreement; that the committee, or the depositary at the request of the committee, may appoint agents to accept the deposit of the bonds, coupons, and funded interest notes, and assist in the performance of any other duty imposed upon the depositary, either by the agreement or by the committee. The securities thus deposited shall be held by the depositary subject to the order of the committee; that neither the depositary, nor the committee, nor its agents shall be held liable for any action taken on account of any mistake, loss, or liability, when such loss or liability of the depositary, or its agents, or the committee, or its agents, caused other than by bad faith, shall conclusively be deemed to be a part of the expenses of the committee; and these expenses, it is otherwise provided, shall be paid out of the proceeds of the road if the committee thinks proper.

The agreement constitutes the committee as trustee of an express trust, with legal title to all of the bonds, coupons, and funded interest notes which may be deposited. It is empowered to take all proceedings, legal or otherwise, as to it shall seem necessary or proper; that it may transfer the deposited securities to itself and its own members, or to any other person whom it may designate; that it may execute such papers and do such act as the committee shall consider judi-

cious or proper; that it may demand, collect, or receive the interest for all the deposited securities; that it may elect to have them declared due and payable; that it may withdraw or revoke any such election; that it may exercise control over any suit or proceedings instituted, in which the holders of any class of deposited securities are, or may be, interested, whether by foreclosure or otherwise; may consent to the appointment of receivers, for the removal or substitution of receivers; may consent or oppose the issuance of receivers' obligations, and may, if the committee deems it advisable, consent that the lien and security of all obligations or certificates be superior to the lien of the first mortgage, or to any securities held or pledged thereunder, upon or in respect of all or any property covered thereby or subject thereto, and in general may do whatever the committee in its discretion may deem judicious and expedient in order to carry out fully and effectively the purposes of this agreement.

The agreement further stipulates that the committee may at any time and from time to time, at public or private sale, purchase or cause to be purchased, or may contract to purchase, or may in any manner acquire or cause to be acquired, at such price or prices as the committee in the exercise of its discretion deems expedient, all or any of the property at any time subject to the first mortgage or the lien thereof, all obligations of the defendant company, all certificates of indebtedness issued by any receiver or receivers of the railroad company or of its property; but the committee shall not be bound to make any such purchase or contract to purchase.

It is further agreed that the committee at all times may exercise the rights of an absolute owner as to all the securities and property acquired by it, and may, in its uncontrolled discretion, sell or transfer the same upon such terms as it may deem proper.

It is further stipulated that the deposited securities and all the proceeds thereof shall be charged with the payment of the compensation of the committee and its expenses, the compensation and expenses of the depositary, and counsel fees and all the indebtedness, obligations, and liability of the committee. All the cash it may receive may be applied to such compensation, for expenses, or otherwise, as the committee may in its discretion determine to be necessary or advisable for the purposes of this agreement. Again, that it may borrow money at such terms and at such rates of interest as it may in its discretion determine, and pledge all the property and securities as securities therefor. Other than that, it shall have the power to fix and adjust the respective rights and interest of the bondholders, the relative rights, preferences, priorities, and distinctions to be accorded to each class of the bonds, to give effect to such determination, and to apportion thereto such amount as the committee may in its discretion determine to be just and equitable, and power to penalize the bondholders who do not enter into this agreement may be found in the following clause:

"The committee shall have full power and authority to fix and adjust respective rights and interests as between the holders of the bonds, and of such classes as may not have made the cash contribution provided for; to determine relative rights, preferences, priorities, and distinctions to be accorded to such holders; to give effect to such determination, and to apportion, as between the

holders of the deposited first mortgage bonds, of each class who have and who have not made said distribution, upon any distribution of securities, cash or other property, or under any plan of reorganization, as the committee may in its discretion determine to be just and equitable; and the committee may provide for the forfeiture of all the interest in or under this agreement, in or to the deposited securities or any proceeds thereof or substitutes therefor, by any depositor who shall not, within the period limited, comply with the terms imposed by the committee."

The committee may enter into a contract for the sale or exchange of the deposited securities at such price as they may think proper, if consented to in writing by depositors representing two-thirds of the amount deposited; that such contract shall be filed with the depositary, and shall become binding on all depositors, all of whom shall be conclusively and finally deemed, for all purposes, to have assented to said contract, whether they have received actual notice or not. The committee is given absolute discretion to prepare and adopt a plan for the reorganization of the railroad company, which may, in their judgment, provide for the sale or exchange, or resale of the same, at such price and under such conditions as they may deem proper. They may buy other railroads, which, in the opinion of the committee, may be advantageous. They may raise any sums in cash they may deem necessary for the purposes of reorganization, may constitute managers of the reorganization, and provide for their compensation and expenses. It is noteworthy that the members of the committee may act as such managers, and may make provision for the payment of the compensation and expenses of the committee. Whenever the committee shall have prepared or approved such a plan, it shall be filed with the depositary at its principal office in the city of New York, and a brief notice, the character of which is not indicated, or the length of time, shall be given of the fact. This shall be done by publication, and shall be conclusive on all.

Any depositor may withdraw from the agreement by the payment of an amount which the committee, in its discretion, may fix and apportion. The committee may, at any time, fill a vacancy in itself or may add an additional member or additional members, who shall have all the power and rights of the committee; but, if any committeeman should die or resign, the vacancy need not be filled. The committee may act for the majority of its members, either at a meeting or without a meeting. Any member may vote or act by proxy, which proxy may not be another member; and the vote or act of such proxy shall be as effective as the vote or act of the member appointing such proxy. The committee may limit or extend the time and fix the conditions under which deposits may be made under the agreement, and may impose penalties upon belated deposits; but, generally, and in special instances, may in its discretion accept such deposits after the time thus fixed has expired. The committee shall have the power to employ such depositary's counsel, attorneys, agents, or employés, which, in its judgment, shall be necessary or useful, and shall be entitled to a reasonable compensation for its services; but the committee is careful to state that it shall not be liable for any act or action of such

agent of employé, or any error of judgment or mistake of law, nor for anything other than its or his own willful malfeasance.

The depositary, in all things, shall be subject to the direction of and responsible to the committee alone. No member of the committee shall be liable for the act or acts of any other member or for anything but his own willful malfeasance. It is especially provided that any member of the committee or any firm or corporation of which he is a member may become interested in any or all of the property subject to this agreement, and in any plan of reorganization. Any of them may be an officer, director, or stockholder for the depositary; and its officers, directors, or agents may likewise become interested and may buy or sell certificates of deposit and undeposited first mortgage bonds, etc., on the same footing as any other depositor; and the committee is given imperative and absolute power to construe the agreement, and its construction made in good faith shall be final, conclusive, and binding upon all depositors.

The committee may make such modifications in the agreement as in its judgment may be expedient, and such judgment as to such expediency or efficiency shall be final. It may amend the agreement and may confer upon the committee additional rights and power, although such rights and power are not contemplated by the agreement. After such increase of power, any depositor may withdraw from the agreement provided he pays such an amount as the committee may in its discretion fix. For such increase of power not originally provided for, there shall be publication for the period of 15 days, and, if the depositors do not withdraw in that period, they shall be conclusively presumed to have assented to such increase of power, whether they have received actual notice or not, and shall be irrevocably bound and concluded by the sale.

The committee in its discretion at any time may ask to cancel the whole agreement and terminate the same, in which event the depositors shall be entitled to the return of their securities if, under the gigantic powers otherwise provided, the committee has not already parted with them; but they shall not have this privilege unless they pay their proportionate share to be fixed in the discretion of the committee, of a sum necessary for its compensation and expenses which they may have incurred under the provisions of the now abortive and abandoned scheme. The receipt of a depositor under such circumstances, or what the committee may apportion him, and the surrender of his certificate and deposit, shall estop him from making any objection to the correctness of the accounts of the committee, and shall constitute a release and discharge of the committee, from any and all accountabilities and liabilities whatsoever to such depositor or depositors. It expressly stipulates also that, in the enumeration of the special rights or powers in the committee, shall be construed to limit any of the general provisions of the agreement. "The Commercial and Financial Chronicle," published in the borough of Manhattan, and any other magazine, periodical, or newspaper published in the city of New York, or elsewhere, that the committee may determine upon, may be the offi-

cial "organ" of the committee for the publication of any notice made necessary by the agreement. Any notice so published shall be considered as though personally served, and such publications shall be the only notice required to be given under this agreement or under any of its provisions.

The committee stipulates that it is not under any obligations, legal or equitable, expressed or implied, to any bondholder who shall not deposit his bonds hereunder, or to any other person whatsoever, other than the depositor.

The plaintiff, the holder of $6,000 worth of bonds, the price of which were used for the construction of the railway property, which constitutes the sole value in the nature of his security which this agreement enables the committee and its coadjutors to administer and appropriate, was in no sense a party to the agreement. He knocks at the door of this court and asks protection against this most astonishing arrangement for the dissipation of his rights, and the defeat of his remedies. The agreement is one which enables a few persons of financial acumen and means to draw to their management and, if necessary, to themselves, all the values which have been invested in this project, and all the chances of its prosperity. It empowers agents who are authorized to sell the property to buy it for themselves, or either of themselves, at public or private sale. It usurps all the powers of those courts, the agents of that established justice which the Constitution provides. There have been many such schemes in the past. The learned solicitors of the respondent declare that they are of everyday occurrence. If this be true, so much the worse for investors and for American constitutional justice. They have never had and will not have any encouragement from this court.

The plaintiff's interests are, in the minds of the defendant company, and its solicitors, ludicrously small. They are, however, entitled to protection here. The property itself which may become invaluable to the state and to one of its best seaports is here. Upon that property the plaintiff, as bondholder, has an equitable lien. The depositary and the committee are not citizens of Georgia, and are not before the court; but their scheme, as set forth in the agreement, is undisputed, and it is made plain that a majority of the bondholders have assented to it. It therefore threatens the value and effectiveness of the plaintiff's lien.

[2] The presence of the committee and the depositary as parties at this preliminary stage, while proper enough if they choose to appear, is not indispensable to the jurisdiction of the court to grant the extraordinary remedy sought. They may appear if they think proper, or, before final judgment, they may be made parties by the usual procedure in such cases. In our judgment, we should protect, if we can, the right of this plaintiff to enforce his mortgage lien upon this property, and the property itself. Under the circumstances, this can be done by the equitable levy resulting through the appointment of a receiver or receivers.

A decree may be taken accordingly.

In re ARONSON.

(District Court, N. D. Alabama, S. D. July 26, 1916.)

No. 14,565.

1. BANKRUPTCY ⊂=399(3)—EXEMPTIONS—CONCEALED GOODS.
A referee may charge a bankrupt's exemptions with the amount of the value of goods in the possession of the bankrupt on the eve of bankruptcy, which he failed to surrender to his trustee; there being no reasonable explanation of the failure.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 657, 669; Dec. Dig. ⊂=399(3).]

2. BANKRUPTCY ⊂=228—APPEAL—REFEREE'S FINDINGS.
A finding of the referee on conflicting evidence will be given weight, as he has seen and heard the witnesses.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 387; Dec. Dig. ⊂=228.]

3. BANKRUPTCY ⊂=399(3)—EXEMPTIONS—RIGHT TO.
In determining whether a bankrupt's claimed exemptions shall be charged with goods concealed from the trustee, the measure of proof applicable is that obtaining in civil cases, and not that necessary in cases of contempt for disobedience of an order to surrender.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 657, 669; Dec. Dig. ⊂=399(3).]

In Bankruptcy. In the matter of the bankruptcy of O. J. Aronson. On review of order of referee charging claimed exemptions of bankrupt with goods concealed from trustee in equal or greater amount than his exemptions. Review denied.

Deedmeyer & Birch and J. I. Abercrombie, all of Birmingham, Ala., for bankrupt.

Max J. Winkler, of Birmingham, Ala., for trustee.

GRUBB, District Judge. The referee allowed the bankrupt his exemptions only out of personal property, which the referee determined from the evidence was in the possession of the bankrupt at the time of the filing of the petition, and which he had failed to surrender to the trustee.

[1] The correctness of the referee's order depends upon whether the record shows that the bankrupt was in possession of goods to the amount of $1,000 or more, upon the eve of bankruptcy, which he failed to surrender to his trustee. The right of the referee to charge his exemptions with the amount of the value of such goods, in the absence of a reasonable explanation of the failure, is settled in this district. Cowan v. Burchfield (D. C.) 180 Fed. 614, 25 Am. Bankr. Rep. 293; In re Denson (D. C.) 195 Fed. 857, 28 Am. Bankr. Rep. 162.

[2, 3] In this case the possession of additional goods of a value equal to the bankrupt's exemptions is predicated on the bankrupt's own evidence as to the value of his stock on May 1, 1915, the increase from purchases thereafter, and the amount of his sales from that date up to the bankruptcy, and upon the amount of the receiver's inventory.

The bankrupt kept no books, and the trustee was therefore limited to the evidence of the bankrupt. The estimate was not based upon a general shortage of assets over disbursements, but upon a claimed failure to account for the disposition of tangible goods, shown by the bankrupt's own evidence to have been in his possession at some time between May 1st and the filing of the petition, but not shown by the receiver's inventory. The bankrupt's own evidence shows that he was unable to show the disposition of goods, valued at from $1,200 to $2,200, except by a burglary, which he testified occurred in May, 1915. The shortage is shown both by the discrepancy between goods on hand and received after that period, less sales (as testified to by the bankrupt), and the amount inventoried by the receiver, and also by the bankrupt's evidence that his store was robbed, and that goods of the value of $2,000 were removed from it, during the month of May, 1915.

The case is therefore to be determined by the reasonableness of the bankrupt's explanation of the loss by burglary and by the correctness of his estimate of the amount of goods lost. If his explanation is reasonable, as to the fact and value of such loss, the shortage is satisfactorily explained, and no deduction from his exemptions should be made because of it. If the bankrupt's story of the burglary is unreasonable in its entirety, or his estimate of the amount of his loss too uncertain to be held to properly account for the ascertained shortage in goods at the time of bankruptcy, then there is a failure to properly explain, shown by the record, since the burglary is the only explanation offered by the bankrupt to explain the admitted discrepancy.

The referee found that the burglary did not satisfactorily account for the shortage, either in fact or amount. There is certainly enough doubt in the evidence contained in the record, as to the good faith of the alleged loss by the burglary, and as to the amount of goods lost, if in fact the bankrupt's store was burglarized, to give the presumption to be indulged in favor of the referee's finding, he having seen and heard the witnesses, its legitimate weight, as against the contention of the bankrupt to the contrary. The measure of proof applicable is that which obtains in civil cases, and not that necessary in cases of contempt for disobedience of an order to surrender. Shea v. Lewis, 206 Fed. 877, 124 C. C. A. 537, 30 Am. Bankr. Rep. 447; In re Coppleman, 30 Am. Bankr. Rep. 414; Good v. Kane, 211 Fed. 956, 128 C. C. A. 454, 32 Am. Bankr. Rep. 19.

The petition of the bankrupt to review the referee's order is denied, at his costs.

END OF CASES IN VOL. 233